

**DAMAGE CLAIMS AND PASSING-ON DEFENCE: A GLOBAL COMPARATIVE OVERVIEW
OF LEGAL PROVISIONS AND KEY METHODOLOGIES
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Abstract

As several orders of the Competition Commission of India are nearing closure by the verdicts of the National Company Law Appellate Tribunal and/or the Supreme Court, proving an alleged contravention of the provision(s) of the Competition Act, 2002 and imposing large penalties¹ may no longer be the final stage of adjudication. Therefore, it is likely that the damages claims from affected parties may come to the fore.

Compensation in the form of private damages claims is a common practice in mature jurisdictions such as in the European Union and the United States. Much debate has taken place across different jurisdictions about the passing-on defence and quantification of the pass-on.

In India, clarity is needed on various aspects of damages claims including methods of estimating overcharge, eligibility of both direct and indirect consumers to claim compensation, right to full compensation and duration within which claims can be filed. Given the evolving Indian jurisprudence, this is an opportune time for stakeholders to gain an understanding of this aspect of competition law enforcement.

Introduction

Private enforcement of antitrust damages claims gaining acceptability across the globe

Damages claim actions, as a part of private enforcement of antitrust laws, is a common practice in developed competition jurisdictions such as in the European Union ('EU') and the United States ('US'). Recent developments show that the quantification of damages claims and vitality of the passing-on defence have been the focus of several discussions across various jurisdictions. For example, on 9 October 2018, the High Court of England and Wales ordered ABB, a Swiss engineering company, to pay BritNed Developments approximately €13 million for damages suffered as a result of a cartel in the power cable sector.²

As legal jurisprudence is developing in newer jurisdictions, mature jurisdictions also continue to further refine their existing provisions. In July 2018, the European Commission ('EC') invited comments from

¹The CCI has imposed penalties worth INR 13,087 crores in over 100 cases in the last seven years since the Act came into force. CCI Annual Report 2016-17 https://www.cci.gov.in/sites/default/files/annual%20reports/CCI_AR-2016-17_English.pdf

²*BritNed Developments and ABB*. Claim No. HC-2015-000268. <https://www.judiciary.uk/wp-content/uploads/2018/10/britned-v-abb-judgement.pdf>

stakeholders on the draft guidelines to help national courts estimate the economic harm caused by cartels. These guidelines also highlight the legal provisions relating to passing-on of overcharge and the right to full compensation. Besides the EC and the US, damages claims in competition cases are prevalent in other countries such as Canada, Australia, China, Japan and India.

Progression to damages claims imminent in India’s competition law jurisprudence

A new era in the evolution of Indian competition law jurisprudence is imminent as the orders of the Competition Commission of India (“CCI”) are nearing closure by the verdicts of the National Company Law Appellate Tribunal (“NCLAT”) (earlier COMPAT) and/or the Supreme Court (“SC”). Proving an alleged conduct to be in the contravention of the provision(s) of the Competition Act, 2002 (“the Act”) and meting out large penalties³ to the infringers may no longer be the final stage of adjudication. As several appealed cases near closure, it is likely that the compensation (damage) claims from affected parties/consumers may come to the fore.

While there exists legal provisions for damages claims in India, the same has not gained prominence. Competition law in India, through Section 53-N of the Act, permits filing of damages claims before the NCLAT or the SC, by consumers who have been affected by a proven violation of the Act. Further, through Sections 42-A and 53 Q(2) of the Act, compensation may also be claimed in instances of damage ensuing from the violation of orders of the CCI or the NCLAT. The Act also allows for the possibility of filing class action suits – a claim filed jointly by many consumers in case of similar damage.

Objective and structure of the paper

As the jurisprudence develops in India, this is an opportune time for the stakeholders to gain an understanding of this aspect of competition law enforcement particularly dealing with legal provisions, data requirements and the methodologies for damages estimation. With a view to provide clarity on some of these aspects, the paper is organised as follows:

- First, we briefly outline consumers who may qualify as affected parties and shed light on the theory of harm;
- Second, we present the legal position on damages claims and pass-on defence from different jurisdictions; and,

³The CCI has imposed penalties worth INR 13,087 crores in over 100 cases in the last seven years since the Act came into force. CCI Annual Report 2016-17 https://www.cci.gov.in/sites/default/files/annual%20reports/CCI_AR-2016-17_English.pdf

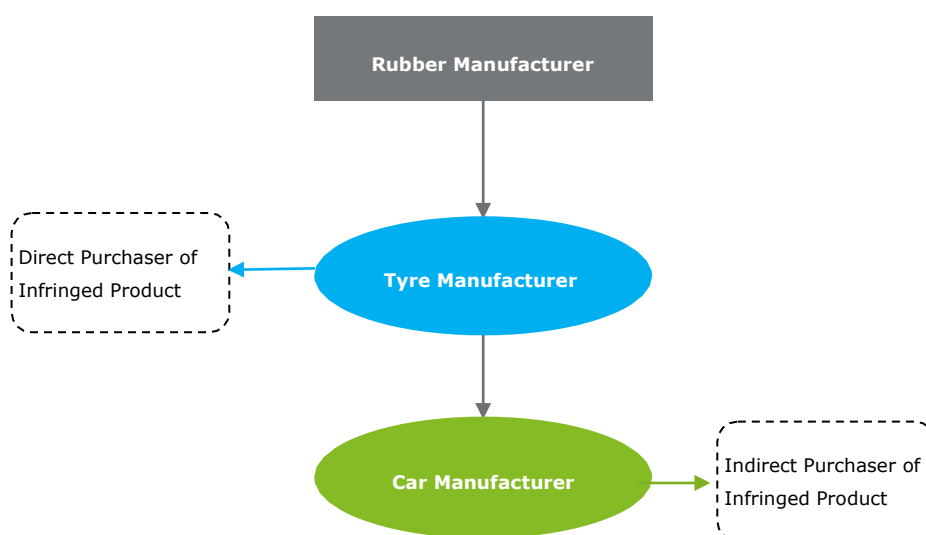
- Third, we discuss the different damages assessment methodologies that are available along with their benefits and shortcomings.

Affected parties and theory of harm

Direct and Indirect Purchasers

Infringement of competition law either by way of joint (collusive) or unilateral conduct (abuse of dominant position) has the potential of harming stakeholders. These stakeholders could involve both direct and indirect purchasers (consumers) in the relevant goods and/or services consumption value chain. In Figure 1 below, we present an illustration in the context of tyres market and anti-competitive cartel conduct by rubber manufacturers. Rubber serves as an essential input for tyre manufacturers. Therefore, purchase of rubber at cartelised prices by a tyre manufacturer would make it the direct purchaser of the infringed product. The purchase of tyres by a car manufacturer from the affected tyre manufacturers would make it an indirect purchaser of the infringed good. It is important to note that there may be multiple categories of indirect purchasers depending upon the levels involved before the end product reaches the final consumer. The ultimate end consumer of the finished product also qualifies as an indirect purchaser.

Figure 1: Direct and indirect purchasers



While the EC allows both direct and indirect purchasers to claim damage compensation, the US federal legislations permit only direct purchasers to claim damages, with the exception of some state specific laws that permit both⁴.

⁴ OECD Report on International Experiences with Class Actions and Private Enforcement. [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3\(2017\)33&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2017)33&docLanguage=En)

Theory of Harm

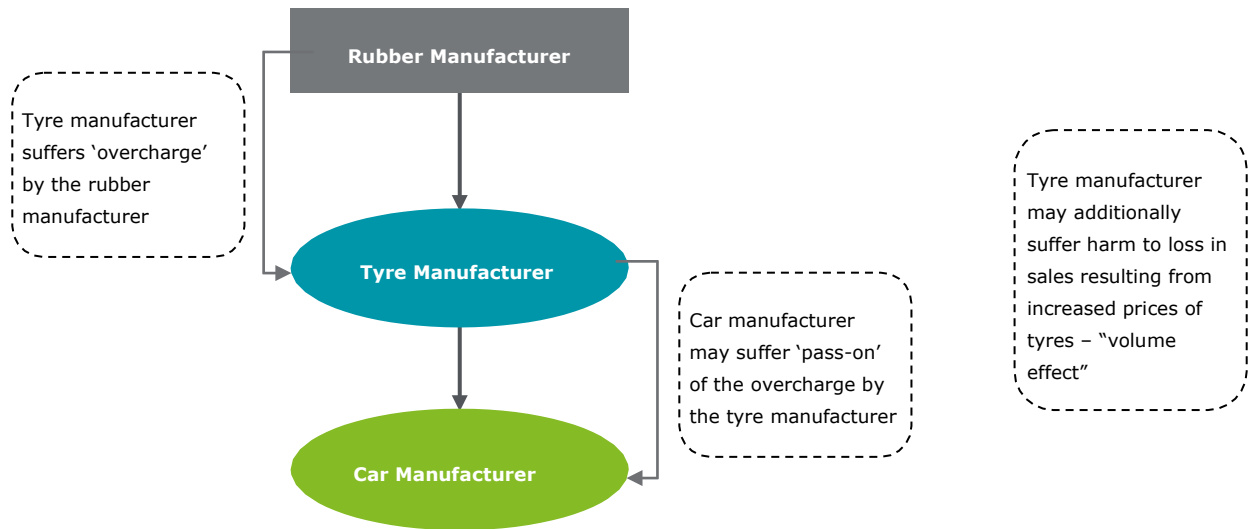
In the context of the above example, the harm resulting from increased/cartelised prices by the rubber manufacturers may potentially be claimed as damages by both direct and indirect purchasers. When a purchaser brings up a damages claim arising from an infringement, three crucial elements contribute to the extent of the harm-suffered, i.e., the overcharge, the pass-on and the volume effect.

- The first part starts from the *overcharge* itself, i.e., the increase in the costs of the goods that the purchaser may have suffered while purchasing the good. The EC draft guidelines describe overcharge as “*The price difference between the price actually paid and the price that would otherwise have prevailed in the absence of the infringement of EU competition*”⁵;
- The direct/indirect purchaser(s) may respond to this overcharge by increasing their prices further downstream, thereby offsetting the adverse impact of higher prices, in part or in entirety. This phenomenon is known as the *passing-on* effect; and,
- The passing-on of the overcharge in the form of increased prices by the intermediate purchaser may lead to loss in sales volume and consequently profit margins associated with those sales. This is known as the *volume effect*, which is directly linked to the pass-on effect and contributes to the overall harm suffered.

In Figure 2 below, we present an illustration of overcharge and pass-on in the context of tyres market and anti-competitive cartel conduct by rubber manufacturers:

⁵ EC Draft Guidelines to help national courts estimate the share of price increases caused by a cartel that are passed on to indirect purchasers and final consumers, July 2018
http://ec.europa.eu/competition/consultations/2018_cartel_overcharges/20181807_en.pdf

Figure 2: Overcharge and pass-on of overcharge



According to the EC Damages Directive enacted in November 2014 ('EC Damages Directive')⁶, purchasers have the right to full compensation, i.e., compensation for both the price and volume effect. Competition laws of Germany, France and Ireland, in line with the EU rules, permit damages claims from direct and indirect purchasers. However, there are subtle differences in the adjudication process, for example, in the allocation of burden of proof. In the section that follows, we outline in detail the approach followed by different jurisdictions with respect to this aspect.

⁶ EC Damages Directive enacted in November 2014, <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=EN>

Global overview of legal provisions

Regulations prevailing in select jurisdictions

Compensation in the form of private damages claims is a fairly common practice in mature competition jurisdictions such as in the EU and US. The assessment of damages claims including those involving pass-on is increasingly garnering attention across various jurisdictions. Much debate has taken place across different jurisdictions about the vitality of passing-on defence and the quantification of the pass-on. There are subtle differences across jurisdictions in terms of permissibility, limitation period, passing-on defence, burden of proof, and compensation mechanism among other factors. In this section, we provide a comparative overview of some of these characteristics for select jurisdictions – EU, US, France, Canada, Australia and China.

European Union

The antitrust laws for the EU are based on the provisions of Articles 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”). The EC Damages Directive⁷ that provides clarity on the legal provisions and procedures regarding claiming of damages caused by antitrust violations. In July 2018, the EC sought public comments on draft guidelines to help national courts estimate the share of price increases caused by a cartel that are passed on to indirect purchasers and final consumers.⁸ Produced below are the highlights of the legal provisions:

- **Permissibility of damages claims:** As per the Article 3 of the EC Damages Directive, any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and obtain full compensation for that harm.⁹
- **Forms of compensation:** The claimant is entitled to claim full compensation that includes actual loss, loss of profit and payment of interest. The actual loss refers to the loss suffered by the claimant due to increased prices (in comparison to competitive scenario) viz. overcharge harm. The loss in profit refers to the loss in profit resulting from reduced sales due to higher prices. Full compensation would place the person who has suffered as a result of the infringement in the same position in which that person would have been had the infringement not taken place. To ensure that full compensation does not lead to over compensation, the EC Damages Directive prescribes that the Member States of the EC must lay down

⁷ DIRECTIVE 2014/104/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL 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. <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0104&from=EN>

⁸ EC Draft Guidelines

⁹ EC Damages Directive

suitable procedural rules such that compensation for actual loss at any level of the supply chain does not exceed the overcharge harm suffered at that level.

- **Purchasers who can claim:** Both direct and indirect purchases can claim damages in the EU. Further, the indirect purchasers are also entitled to claim full compensation, i.e., compensation for actual loss, loss of profit and payment of interest.
- **Limitation period**¹⁰: The Damages Directive mentions that the limitation period to bring in damages claims should be 'at least five years'. The Directive states that the limitation period should not begin to run before the infringement has ceased and the claimant knows or can reasonably be expected to know the identity of the infringer and that the infringement has caused him harm. The limitation period may also be suspended or interrupted when investigation or proceedings of the competition authority is underway. It is up to the Member states to lay down specific rules applicable to limitation periods.¹¹
- **Permissibility of passing-on defence:** Article 13 of the Damages Directive provides that the defendant in an action for damages can invoke pass-on defence on the basis that the claimant passed on the whole or part of the alleged overcharge resulting from the infringement.
- **Burden of proof:** In instances of pass-of defence, the burden of proving that the overcharge was passed on shall be on the defendant, who may reasonably require disclosure from the claimant or from third parties. Article 17 of the EC Damages Directive notes that the Member States shall empower national courts to estimate the amount of harm if it is established that a claimant suffered harm and that it is practically impossible or excessively difficult to precisely quantify the harm on the basis of the available evidence.
- **Collective proceedings:** Injunctive and compensatory collective redress mechanisms are permitted under the EC Recommendation on Common Principles issued on 11 June 2013 (EC Recommendation, 2013).¹² The EC has recommended to all Member States to introduce collective redress mechanisms to facilitate the enforcement of the rights that all EU citizens have under EU law, including the right to compensation for antitrust harm.

United States of America

The antitrust laws in the US are based on three separate legislations that have been amended from time to time: the Sherman Antitrust Act of 1890 ('Sherman Act'), the Clayton Antitrust Act of 1914 ('Clayton Act') and the Federal Trade Commission Act of 1914 ('FTC Act'). Apart from these, the decisions of the Supreme

¹⁰ Limitation period refers to the time period within which damages claims in relation to a certain infringement may be brought.

¹¹ EC Damages Directive

¹² Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, 11 June 2013 <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32013H0396&from=EN>

Court in specific antitrust cases are commonly accepted as precedents and serve as guidance for the interpretation of some of the legal provisions of the extant legislations. Produced below are the highlights of the legal provisions/case precedents:

- **Permissibility of damages claims:** Section 4 of the Clayton Act authorises private plaintiffs to seek damages for violations of antitrust laws. Section 16 of the Clayton Act permits plaintiffs to seek injunctive relief to stop or prevent the illegal conduct.¹³
- **Forms of compensation:** Section 4 of the Clayton Act provides that prevailing US antitrust plaintiffs can recover three times their total compensatory, or actual, damages, known as ‘treble damages,’ as well as costs incurred and reasonable attorneys’ fees.¹⁴ In contrast to the provisions of the EC, damages claims in the US are concerned with actual loss only, i.e. undoing the transfer of welfare from buyers to sellers that results from an artificial price elevation in an antitrust law violation (Crémieux, 2016).¹⁵
- **Purchasers who can claim:** Direct purchasers and rivals are allowed to bring private actions for antitrust violations under federal law. Indirect purchasers have the standing to seek injunctive relief but cannot bring private antitrust suits for damages. This holds true even if the entire amount of the overcharge is passed on by the direct purchaser to the indirect purchaser. However, as of 2016, more than 25 states have enacted the ‘Illinois Brick repealer’ statutes that allows indirect purchasers to claim damages under state laws (Mobley, 2016).¹⁶
- **Limitation period:** Under section 4(b) of the Clayton Act, a plaintiff has four years from the time of injury to bring a civil antitrust suit (Mobley, 2016).¹⁷
- **Permissibility of passing-on defence:** Although not specifically laid out under the Sherman Act or the Clayton Act, guidance on the admissibility of the passing-on defence and indirect purchasers bringing damages claims is found in select landmark decisions of the Supreme Court - *Hanover Shoe* (Hanover Shoe Inc. v United Shoe Machinery Corp, 1968) and *Illinois Brick* (Illinois Brick Co. v Illinois, 1977). These decisions have the effect of rejecting the defence of passing-on and barring indirect purchaser claims under federal antitrust law. As per Strand (2010), defendants are not allowed to invoke the

¹³Mobley, S. (2016). *Getting the Deal Through, Private Antitrust Litigation 2016*. London: Law Business Research. para 3

¹⁴Ibid. para. 27

¹⁵Crémieux, P. (2016). *Antitrust Private Damages Actions in the United States, Canada and the European Union*. Competition Policy International

¹⁶Mobley, S. (2016). *Getting the Deal Through, Private Antitrust Litigation 2016*. London: Law Business Research. para. 2

¹⁷Ibid. para. 17

defence of passing-on against the claims of direct purchasers,¹⁸ and indirect purchasers cannot claim damages on the basis that an overcharge has been passed on to them.¹⁹

- **Burden of proof:** The burden of proof is borne by the claimant and is of the nature of preponderance of evidence.^{20,21}
- **Collective proceedings:** Collective proceedings are available for civil antitrust claims, and are known as ‘class action’ litigation in the United States.²²

France

French antitrust laws prohibiting anti-competitive practices are set forth under Article L.420-1 et seq. of the French Commercial Code (‘FCC’). Particularly, anti-competitive agreements fall under L.420-1 of the French Commercial Code (the equivalent of article 101 of TFEU) and abuse of dominance under L.420-2 of the Commercial code (the equivalent of article 102 TFEU).²³ Produced below are the highlights of the legal provisions:

- **Permissibility of damages claims:** Damages claims for competition infringements can be brought before a civil or commercial court based on Article 1382 of the French Civil Code in conjunction with relevant antitrust provisions.²⁴
- **Forms of compensation:** Damages awarded by French courts typically compensate the entire damage suffered by the victim including interest. Compensation usually covers the overcharge suffered, loss of profit and the loss of chance.²⁵ Additionally, non-pecuniary damages may also be granted by French courts. We understand that many cases actually result in out-of-court settlements.²⁶

¹⁸ An exception to this is the cost-plus arrangement. In *Hanover Shoe* (1968), the Supreme Court stated, “*there might be situations-for instance, when an overcharged buyer has a pre-existing 'cost-plus' contract, thus making it easy to prove that he has not been damaged-where the considerations requiring that the passing-on defense not be permitted in this case would not be present*”. (Anderson, 1980)

¹⁹ Strand, M. (2010). *The Defence of Passing On: Loss, Gain and the Award of Damages in Private Enforcement of Competition Law*. Uppsala: Uppsala Faculty of Law. p. 9

²⁰ In a civil case, preponderance of evidence, also known as balance of probabilities, is a standard of proof in which one party’s case needs to be proved more probable than that of the other party. This is in contrast to that in criminal trials in which the crime needs to be proved beyond reasonable doubt.

²¹ *Competition Litigation in the United States*, Global Compliance News. <https://globalcompliancencnews.com/antitrust-and-competition/competition-litigation/competition-litigation-in-the-united-states/>

²² Ibid. para. 19

²³ Competition Litigation 2019, France

<https://iclg.com/practice-areas/competition-litigation-laws-and-regulations/france>

²⁴ Condomines, A. (2016) *Private antitrust litigation in France: overview*. Practical Law. <https://uk.practicallaw.thomsonreuters.com/4-632-1738?transitionType=Default&contextData=sc.Default>

²⁵ French courts award damages for loss of chance and loss of earnings if appropriate. Compensation for loss of chance is calculated by reference to the probability of the missed opportunity occurring (and so will never be 100%). Competition Litigation in France, Global Compliance News. <https://globalcompliancencnews.com/antitrust-and-competition/competition-litigation-in-france/>

²⁶ Competition Litigation 2019, France, section 3.2

<https://iclg.com/practice-areas/competition-litigation-laws-and-regulations/france>

- **Purchasers who can claim:** Both direct and indirect purchasers may bring damages claims provided they satisfy the general conditions that are required to be satisfied to bring a civil claim which include interest in the case, standing and urgency or imminent damage for interim measures.²⁷
- **Limitation period:** According to order no. 2017-303 dated 09 March 2017²⁸, the limitation period is for five years. The period runs from the day when the claimant is aware or should have been aware of a) the conduct in question; b) the fact that it constitutes an anticompetitive practice; c) the damage he suffers; and d) the identity of the author of the practice (infringer).
- **Permissibility of passing-on defence:** Passing-on defence is available under Article L 481-4 of the FCC which provides for a rebuttable presumption of passing-on.
- **Burden of proof²⁹:** As a principle, the burden of proof rests on the one who alleges a fact/infringement. According to Order no. 2017-303 dated 09 March 2017³⁰, direct or indirect purchasers that claim to have suffered an overcharge as a result of the anticompetitive conduct have to bear the burden of proof.
- **Collective proceedings:** Provisions for an opt-in regime of collective claims or class actions have been introduced in France following the Hamon Law of 17 March 2014.³¹

Australia

The antitrust legislation in Australia consists of the Competition and Consumer Act 2010 (“CCA”).³² Specifically, Part IV of the CCA proscribes anti-competitive conduct that distresses trade and commerce in Australia. The CCA along with the Federal Court of Australia Act 1976 (Cth) (“FCA”) provides the framework for private antitrust litigation in Australia. Produced below are the highlights of the legal provisions:

- **Permissibility of damages claims:** Under Section 82 of the CCA, actions for damages claims may be brought by any person who has suffered a damage due to an infringement of the competition provisions of the CCA.

²⁷ Buhart, J. (2015) *Private Antitrust Litigation 2015, France*. Getting the Deal Through, Law Business Research. https://www.mwe.com/~media/files/thought-leadership/publications/2014/10/getting-the-deal-through-private-antitrust-litig_/files/unnamed-item/fileattachment/gtdt-private-antitrust-litigation.pdf

²⁸ Competition Litigation 2019, France, section 6.1

<https://iclg.com/practice-areas/competition-litigation-laws-and-regulations/france>

²⁹ Ibid. section 4.2

³⁰ Ibid. section 5.2

³¹ Ibid. section 1.5

³² The Competition and Consumer Act 2010, Australia <https://www.legislation.gov.au/Details/C2011C00003>

- **Forms of compensation:** Compensation only to the extent of actual loss may be sought by the claimant.³³
- **Purchasers who can claim:** The CCA allows any person or a corporation to bring a damages claim. The CCA does not explicitly elaborate on the standing of direct and indirect purchasers for bringing damages claims.
- **Limitation period:** A damages claim may be brought within six years from the day the competition infringement occurred.³⁴
- **Permissibility of passing-on defence:** The admissibility of the passing-on defence has not yet been determined by an Australian court.³⁵
- **Burden of proof:** While the burden of proof typically rests on the party bringing the claim, it may rest on the defendant in certain situations, for example if they choose to rely on a particular defence.³⁶
- **Collective proceedings:** Representative proceedings or class actions are permitted under the FCA when seven or more people have claims against the same person(s) arising out of the same / similar circumstance and giving rise to a substantial common issue of law or fact.³⁷

Canada

The Competition Act, 1985 is the primary competition law statute in Canada with prohibitions classified into criminal and civil.³⁸ Part VI of the Competition Act of Canada provides for criminal prohibitions that include conspiracy, bid-rigging and misleading representation among others. Part VIII contains civil prohibitions such as refusal to deal, price maintenance, abuse of dominance and tied selling. Produced below are the highlights of the legal provisions

- **Permissibility of damages claims:** Persons who have suffered damages due to violations of the criminal prohibitions of the Competition Act of Canada are allowed to bring damages claims under Section 36. At present, private litigation with respect to damages claims for civil prohibitions is not allowed. An exception to this is when the damages claim relates to the breach of an order under the Competition Act of Canada (Akman, 2017).³⁹

³³ Bridges, T. (2018) *The Private Competition Enforcement Review - Edition 11, Australia*. The Law Reviews. <https://thelawreviews.co.uk/edition/the-private-competition-enforcement-review-edition-11/1166412/australia>

³⁴ Section 82(2) of the CCA

³⁵ Henry, T. (2017) *The International Comparative Legal Guide to: Competition Litigation 2017, Australia*. Global Legal Group. para. 5.2

³⁶ Ibid. para. 4.2

³⁷ Bridges, T. (2018) *The Private Competition Enforcement Review - Edition 11, Australia*. The Law Reviews. part vii

³⁸ The Competition Act, 1985. Canada. <https://laws-lois.justice.gc.ca/PDF/C-34.pdf>

³⁹ Akman, D. (2017) *Private Competition Laws Action: Practical Law Canada Practice Note*. Bordin Ladner Geravis. <http://blg.com/en/News-And-Publications/Documents/Private-Competition-Law-Actions - 2017.pdf>

- **Forms of compensation:** Compensation to the extent of damage sustained due to an infringement of the Competition Act of Canada, legal costs and investigation costs may be claimed in a damages action.⁴⁰
- **Purchasers who can claim:** Both direct and indirect purchasers have the standing to file a damages action in Canada. The standing of indirect purchasers was clarified in the decisions of the trilogy of cases heard by the Supreme Court of Canada in 2013.⁴¹
- **Limitation period:** Damages claims must be brought within two years from the date on which the infringement occurred or the date on which criminal proceedings were disposed of, whichever is earlier.
- **Permissibility of passing-on defence:** The Supreme Court of Canada through various decisions has rejected the passing-on defence.⁴²
- **Burden of proof:** The claimant bears the burden of proof in damages claims brought under Section 36. The burden is in the nature of a civil burden in which the claims need to be proved on a balance of probabilities^{43,44}
- **Collective proceedings:** There exists a process whereby class actions may be brought by any person who has a cause of action, i.e., he/she has suffered loss as a result of the violation of the criminal prohibitions of the Competition Act of Canada.

China

In China, monopolistic activities and conduct are regulated on the basis of the Anti-Monopoly Law ('AML') that came into force in August 2008.⁴⁵ Produced below are the highlights of the legal provisions:

- **Permissibility of damages claim:** Article 50 of the AML provides that “*Where any loss was caused by a business operator's monopolistic conducts to other entities and individuals, the business operator shall assume the civil liabilities*” and thus forms the basis for damages claims to be brought forward.⁴⁶

⁴⁰ *Competition Litigation in Canada*, Global Compliance News. <https://globalcompliancencnews.com/antitrust-and-competition/competition-litigation-in-canada/>

⁴¹ Young, J. (2013) *Supreme Court of Canada trilogy holds that indirect purchasers may advance class action for recovery of unlawful price-fixing*. Class Action Bulletin, McMillan. <https://mcmillan.ca/Supreme-Court-of-Canada-trilogy-holds-that-indirect-purchasers-may-advance-class-action-for-recovery-of-unlawful-price-fixing>

⁴² On 31 October 2013, the Supreme Court of Canada rejected the passing-on defence in its entirety in its trilogy of decisions in (1) *Pro-Sys Consultants Ltd v Microsoft Corporation*, 2013 SCC 57; (2) *Sun-Rype Products Ltd v Archer Daniels Midland Co.*, 2013 SCC 58; and (3) *Infineon Technologies AG v Option consommateurs*, 2013 SCC 59

⁴³ In a civil case, balance of probabilities, also known as preponderance of evidence, is a standard of proof in which one party's case needs to be proved more probable than that of the other party. This is in contrast to that in criminal trials in which the crime needs to be proved beyond reasonable doubt.

⁴⁴ *Competition Litigation in Canada*, Global Compliance News. <https://globalcompliancencnews.com/antitrust-and-competition/competition-litigation-in-canada/>

⁴⁵ Anti-monopoly Law of the People's Republic of China https://www.icao.int/sustainability/Compendium/Documents/China/Anti-monopoly-Law_China.pdf

⁴⁶ Ibid.

- **Forms of compensation:** Compensation may be sought on the claimant's actual loss and loss of profit if the claimant can prove that the conduct in violation of the AML has caused a loss of profit.⁴⁷
- **Purchasers who can claim:** Article 1 of the AML Judicial Interpretation⁴⁸, any natural person, legal person or organization that has suffered losses resulting from monopoly conduct may file a civil lawsuit before the suitable court. Therefore, both direct and indirect purchasers may bring damages claims.⁴⁹
- **Limitation period:** The General Provisions of the Civil Law of the People's Republic of China⁵⁰ which came into force on 1 October 2017 extended the limitation period from two years to three years from the date when the claimant or injured party should have known about the infringement.⁵¹
- **Permissibility of passing-on defence:** Given that both direct and indirect purchasers can bring damages claims, passing-on defence is theoretically available. However, there are neither legal precedents nor clear provisions that outline acceptability.
- **Burden of proof:** The burden of proof is in general borne by the claimant. There are exceptions to this, for example, the burden of proof shifts to the defendant in case the claimant has proved the existence of a horizontal agreement that has caused the damage.⁵²
- **Collective proceedings:** Although there is no explicit provision for 'class actions' in the AML, the Civil Procedure Law of China permits a joint action mechanism whereby claimants can jointly file a case if they have a common object of action.⁵³

Comparative overview of regulations

It is apparent from the above that damages claims are permitted in all jurisdictions that have been covered in this paper; however, there are differences in terms of forms of compensation available, purchasers who have the standing to claim damages, limitation periods, permissibility of passing-on defence, burden of proof and provisions of collective actions. In Table 1 below, we summarize the key aspects of the legal provisions across these select jurisdictions:

⁴⁷ Qi, F. (2018) *Private antitrust litigation in China: overview*. Practical Law. [https://uk.practicallaw.thomsonreuters.com/5-631-1871?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/5-631-1871?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1)

⁴⁸ In 2012, the Supreme People's Court in China new judicial interpretation of the Anti-Monopoly Act. <http://www.chinaiplawyer.com/full-text-judicial-interpretation-anti-monopoly-law-china-supreme-court/>

⁴⁹ Ning, S. et al. (2018) *The Private Competition Enforcement Review - Edition 11, China*. The Law Reviews

⁵⁰ General Rules of the Civil Law of the People's Republic of China. (2017) <https://www.dimt.it/images/pdf/GeneralRules.pdf>

⁵¹ Qi, F. (2018) *Private antitrust litigation in China: overview*. Practical Law. [https://uk.practicallaw.thomsonreuters.com/5-631-1871?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/5-631-1871?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1)

⁵² Competition Litigation in China. Global Compliance News. <https://globalcompliancencnews.com/antitrust-and-competition/competition-litigation-in-china/>

⁵³ Ning, S. et al. (2018) *The Private Competition Enforcement Review - Edition 11, China*. The Law Reviews

Table 1: Summary of legal provisions in major jurisdictions

Jurisdictions	Permissibility of damages claims	Forms of compensation	Purchasers who can claim	Limitation period	Permissibility of passing-on defence	Burden of proof	Collective actions
European Union	Allowed	Full compensation – actual, profits and interest	Direct and indirect purchasers	Five years	Allowed	Claimant. In cases of passing-on defence, the burden of proof rests on the defendant	Allowed
United States	Allowed	Treble damages, other costs and attorney fees	Direct purchasers. However, over 25 states allow indirect purchasers as well	Four years	Not allowed under federal law. However, over 25 states allow the passing-on defence to be invoked	Claimant	Allowed
France	Allowed	Compensation for actual loss, loss of profit and loss of chance	Direct and indirect purchasers	Five years	Allowed	Claimant	Allowed

Australia	Allowed	Compensation for actual loss	Not clear	Six years	Not clear	Claimant	Allowed
Canada	Allowed	Compensation for actual loss, legal costs and investigation costs	Direct and indirect purchasers	Two years	Not allowed	Claimant	Allowed
China	Allowed	Compensation for actual loss and loss of profit (if causation is proved)	Direct and indirect purchasers	Three years	Theoretically allowed. However, there are no legal precedents	Claimant. In some specific cases, the burden of proof rests on the defendant	Allowed

Damages assessment methodologies

Overview of methodologies available for damages estimation

The quantification of damages claims under competition law of various jurisdictions can be predominantly complex depending upon the economic nature of the illegitimacy of the act and the difficulty of rebuilding the claimant situation of what it would have been absent the infringement ('the counterfactual' or 'but-for' scenario). A range of methods and models, from simple to more complex, is available in theory and can be used for estimating the harm arising from antitrust infringements. These methods have found mention in both economic literature⁵⁴ and guidance/discussion notes published by antitrust agencies⁵⁵. In this section, we provide an overview of such methods basis our review of economic literature and case precedents.⁵⁶ It is important to note that none of these methods may necessarily qualify as superior to one another; instead, one may view them as complementary depending on the facts of the case and information availability. Additionally, one can undertake a comparison of damages estimates obtained through the different methods.

Before-and-After method

Description

Before and after method is a time series based approach under which prices during the infringement period are compared with the prices that prevailed before and after the infringement periods. The assumption of this approach is that the prices prevailing in the determined time horizons can be used as a reasonable approximation for the counterfactual price that would have prevailed in the absence of the infringement. Varied time horizons can be considered for this approach. Time horizons recommended by Doose (2013)⁵⁷ are presented in Table 2 below:

Table 2: Temporal horizons that can be considered under the before and after method

Time Horizon	Description
Before and During	The approach compares the prices of the relevant product before the beginning of the infringement period with prices that were set

⁵⁴ Clark et al. (2004), *Study on the conditions of claims for damages in case of infringement of EC competition rules*; Analysis of Economic Models For The Calculation of Damages

⁵⁵ Roundtable Discussion on Private remedies: *Passing on Defense; Indirect Purchaser Standing; Definition Of Damages*; European Commission (2006); DAF/COMP/WP3/WD(2006)9

⁵⁶ The methods presented in this paper are primarily based on the work carried out by Clark et al.(2004)

⁵⁷ Anna Maria Doose (2013), *Methods for Calculating Cartel Damages: A Survey*; Ilmenau Economics Discussion Papers, Vol. 18, No. 83, p. 11,

	during the infringement period
During and after	This approach refers to the timeframe relevant for benchmarking as during and after the infringement period
Before, During, and After	This approach compares the prices of the relevant product before, during, and after the infringement period

Techniques

The estimation techniques as recommended by Kominos et al. (2009)⁵⁸ for this approach include the comparison of averages, interpolation, and time series analysis. While the comparison of averages observes the average price in an unaffected comparator group as an estimate for the counterfactual price, interpolation is a simple technique based on the comparison of averages wherein prices from both before and after the infringement periods are used to estimate the counterfactual price. Interpolation entails joining the price points before and after the infringement period to indicate what the prices would have been in the intervening period. Time-series analysis serves as an alternative source of comparing data over time. It typically compares data of companies (or markets) involved in the infringement in a particular period with data of the same companies (or markets) in a period without the infringement. The primary caution to be exercised while using this technique is that the degree of response of other explanatory factors should be taken into account in order to ensure that the difference between the periods is not biased by any external factors. One needs to be mindful of the fact that prices charged in the infringement period are generally higher on average than they otherwise would be in the non-infringement period. Further, in an infringement period like cartel, different customers may well experience discriminatory prices due to factors such as bargaining power, old customer base, etc. Therefore, the calculation of damages needs to consider a breakdown of the customer base between specific groups. This is because there is a danger that by considering only the average level of prices, there could be chances of getting erroneous conclusions/results.

Shortcomings

While the approach is simplistic and transparent in nature, Clark et al. (2004)⁵⁹ has set out a few limitations:

- Firstly, the approach does not allow for the assessment of whether the prices prevailing in the selected benchmark period may not be a correct representative of a competitive market. In another words, the

⁵⁸ Kominos, O. a.-j., Beckert, D. W., Damme, P. E., Dewatripont, P. M., Franks, P. J., Kate, D. A., & Legros, P. P. (2009). *Quantifying antitrust damages Towards non-binding guidance for courts*. Oxera.

⁵⁹ Clark et al. (2004), *Study on the conditions of claims for damages in case of infringement of EC competition rules; Analysis of Economic Models For The Calculation of Damages*

prices prevailing in the considered benchmark period may either be under or over represented due to factors such as seasonal effects, exit and entry of rival firm in the industry, capacity constraints, etc. and thereby may lead to misleading results;

- Secondly, this approach assumes that the prices prevailing during the infringement period should mimic the prices prevailing during the benchmark period without allowing for consideration of any price influencing factors that may have changed between the two periods.

Case example

This approach has found application by experts. For example, in German car glass case^{60 61}(2015), the experts had carried out an analysis of the price developments before, during and after the cartel period. The experts sought to establish a link between the price of cartelized product and non-cartelized product by observing the price patterns. However, considering the limitations of the approach, the court did not approve the approach as the analysis failed to suitably illustrate any direct causal link between the pricing of the two products due to lack of control factors other than the ones stemming from the infringement.

Yardstick approach

Description

Under this method, prices from the market in which the antitrust violation is found to have occurred are compared with prices in similar market(s) which are unaffected by the infringement. The comparison could be of identical product markets in other geographic areas or different product markets in the same geographic areas or different product markets in different geographic areas. Typically, this approach is used where the product market is the same but is geographically localized i.e. where local conditions determine prices and where it may be the case that certain local areas are affected by cartel activities and others are not. In another words, the yardstick approach aims to create a hypothetical “but-for” scenario in which one assumes that the infringer would have obtained profits consistent with other firms in the same industry. One of the primary requirements of this approach is that the benchmark market should ideally have similar competitive characteristics as that of the infringement market. These characteristics could include factors such as demand and supply trends, cost structures, etc. This similarity allows for the differences in prices

⁶⁰ European Commission *Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser* dated 2018: Box 5, p.26. Case reference details: Regional Court Düsseldorf, decision of 19 November 2015, Case no 14d O 4/14 (German Car Glass).

⁶¹ The claimant was an indirect purchaser from the members of a car glass cartel. The members of the cartel infringed Article 101 TFEU and were fined by the European Commission in 2008.

between the two markets to be attributed largely to the effects of the infringement as opposed to other market conditions.

Techniques

The techniques recommended for this approach include comparison of averages⁶² and cross-sectional analysis. Under cross-section comparisons, counterfactual price is estimated from the data in the comparator-based market with no infringement. Unlike comparisons over time, cross-sectional comparisons are unaffected by uncertainty about when an infringement started or ended.

Shortcomings

Although the technique is simplistic in nature and reliable in markets that are localized and demonstrate similar demand and supply characteristics, results can be misleading if the factors other than the presence or absence of the antitrust activity influence the prices between the areas. Therefore, in practice, it might be difficult to find a yardstick benchmark that is adequate in terms of comparability and not affected by the anti-competitive conduct in any form.⁶³

Case example

A case example that illustrates the application of this method is the case of *Greenhaw v. Lubbock County Beverage Ass'n*(1983)⁶⁴. This case involved a price fixing infringement among liquor retailers in Lubbock County, Texas. In estimating damages, the claimant's expert compared prices in Lubbock County during the infringement period with those that prevailed in Dallas, which was presumably competitive. The expert first established a ratio that reflected cost differentials between the two markets. From the calculation of the ratio of cost differentials, the expert derived as what were described as "should have been" prices for the defendants' products during the infringement years. From the assessment of these prices, the expert was then able to estimate that the cartel overcharged consumers by about 7.74%. The analysis revealed that the percentage of overcharge multiplied by the defendants' sales during the infringement period equalled the aggregate monopoly overcharge.

⁶² Please refer the explanation to this technique under techniques section of the "Before-and-After method"

⁶³ Anna Maria Doose (2013), *Methods for Calculating Cartel Damages: A Survey*; Ilmenau Economics Discussion Papers, Vol. 18, No. 83, p. 15

⁶⁴ *Greenhaw v. Lubbock County Beverage Ass'n*, 721 F.2d 1019 (United States Court of Appeals, Fifth Circuit December 27, 1983).

Cost-based approach

Description

This method entails estimating the counterfactual price by using a measure of per unit production costs, and adding up a mark-up for per unit profit that is considered reasonable for the non-infringement scenario. The information on the average unit cost of production is obtained from the infringer. According to the Practical Guide issued by the European Commission (2013)⁶⁵, one way to estimate the reasonable profit margin is to consider the nature of competition and the characteristics of the product(s) market in the absence of the infringement and derive a likely profit margin from the understanding of the industrial organisation models. The resulting estimate of the per unit non-infringement price is compared to the per unit price actually charged by the infringer to obtain an estimate of the overcharge. This method serves as a good substitute to estimate a counterfactual when dealing with companies for which there is a constant relationship between price and cost.

Techniques

The techniques used in this approach uses the financial information on comparator firms and industries to estimate a counterfactual. These include evaluating the profitability of the defendants and comparing this against a benchmark, event studies of how stock markets react to information, and bottom-up costing of products.

Shortcomings

While the approach sounds rational in theory, the calculation of counterfactual price using bottom-up analysis poses a few challenges:

- Firstly, one of the fundamental drawbacks of this method is that the approach is based on the assumption that the price-cost margin and competitive cost would remain constant for the entire infringement period. Therefore, the calculation of an appropriate profit margin to add to the average unit cost of production becomes difficult; and,
- Secondly, obtaining robust estimates of cost data may be challenging in situations wherein only the accounting data of the firm is available due to non-disclosure of confidential information by the defendants'. Therefore, adjustments may be deemed necessary given that the notion of costs in accounting terms differs from the notion of costs in economic terms.

⁶⁵ *Quantifying harm in actions for damages based on Breaches Of Article 101 or 102 of The Treaty on the functioning of The European Union*; Commission Staff Working Document (2013);para 109,p.36

Case-example

Notwithstanding the challenges, this approach has appealed to Courts/Antitrust agencies. Interestingly, in the Paper Wholesale Cartel (2007)⁶⁶ case, the Higher Regional Court had recommended the modified yarstick approach i.e. comparing the cartel price with the price charged by parties which were attempting to undercut the cartel price to the German Federal Court of Justice (Federal court). The Higher regional court had done the calculation of additional earnings for a regional cartel of German paper wholesalers. The Federal Court, however disagreed with the method and found this approach to have a set of limitations. They found that such undercut prices could not serve as a reference price for computation of overcharge as it was still dependent on the cartel price. They further considered that the prevailing price after the price cuts was likely to be much higher than the competitive price, and therefore may result in underestimation of the overcharge. Thus, the Federal Court was of the view that the counterfactual price for estimating the overcharge should be established by way of an overall economic analysis. The judgment recommended a bottom-up cost-based approach where an average profit margin is added to costs and adjustments are made for buyer power and market structure.

Difference-in-difference approach

Description

This approach uses data that is both over time and across markets. It is based on the comparison of overtime changes in price paid by consumers in the infringement market with overtime changes in the prices in non-affected market. The computation of damages estimation under this approach is presented in Table 3 below:

Table 3: Damages estimation under difference-in-difference approach

Market	Competitive period	Non-competitive period	Damages estimation
Infringement	A	C	(C-A)-(D-B)
Non-infringement	B	D	

⁶⁶Paper Wholesale Cartel ;Case no. KRB 12/07; German Federal Court of Justice; Dated June 19, 2007

The damages estimated under this approach takes into account two effects across the considered period: (i) the change in the price in the infringement market (C-A) and, (ii) the change in the price in the non-infringement market (D-B). The second factor captures the change that would have resulted in the price even absent the infringement. Combining the two effects allows for examination of any changes in demand and supply. This is an improvement over conventional methods like before and after, and yardstick. Further, this method can avoid the shortcomings of cross-sectional and time-series approaches by combining comparisons over time and across unaffected markets.

Techniques

The techniques recommended for this approach include comparison of averages and panel data regression. Panel data models are a more sophisticated version of the comparison of averages technique wherein prices are estimated using regression techniques.

Shortcomings

One of the key challenges as outlined in the paper by Hüscherlath et al. (2012)⁶⁷ lies in the identification of a suitable comparator market, i.e., a market with similar demand, cost, and market structures. Ideally, these markets should not be exhibiting any anticompetitive behaviour that might bias the modelling results. However, as market characteristics for particular products are often similar in various countries, it is difficult to isolate a well-suited comparator market for an application of this approach.

Comparison of the different damages estimation methodologies

As apparent from the discussion above, there are different methods available that can be used for damages estimation. In Table 4⁶⁸ below, we provide a brief comparative summary on the basis of description, but-for price and techniques:

Table 4: Methods for estimating the counterfactual

Method	Description	But-for price	Techniques
Before and	The counterfactual price is	Prices before the	<ul style="list-style-type: none"> • Comparison of averages

⁶⁷ Hüscherlath, K., Müller, K., & Veith, T. (2012); *Concrete Shoes for Competition The Effect of the German Cement Cartel on Market Price*; ZEW : Centre for European Economic Research.

⁶⁸Table 3 is borrowed from a white paper published by Oxera titled *Damage actions: the European Commission White Paper*; 2018

After	estimated by the situation before and/or after the infringement period	infringement for the relevant time period	<ul style="list-style-type: none"> • Interpolation⁶⁹ • Time-series analysis
Yardstick	The counterfactual price is estimated by the performance of a similar but unaffected group in the market	Prices elsewhere from a similar market	<ul style="list-style-type: none"> • Comparison of averages • Cross-sectional analysis
Cost-based	The counterfactual price is estimated by using the data on the defendants' cost of production and adding a margin to obtain a price that can be considered reasonable under competitive conditions	Cost plus margin	<ul style="list-style-type: none"> • Profitability • Valuation • Event studies • Bottom-up costing
Difference-in-Difference	Combination of before and after and yardstick approach. The performance of control group before and during the infringement is compared with the performance of the affected group in the same time-period	Changes in the prices in the non-infringement market	<ul style="list-style-type: none"> • Comparison of averages (arithmetic difference-in-differences) • Panel data regression

The applicability/suitability of the methodologies is case specific. The before-and-after and yardstick methods can be used as reliable methods for simple cross checks; however, one has to be mindful of the fact that these are simple techniques that may be prone to error if the selected benchmark period or market is not representative of the infringement period or market. The difference-in-differences approach is a refined approach. It relies on pure cross section and time series methods and thereby exploits both time and firm-specific variations. This is beneficial as it supports in the estimation of the effect of the infringement and can account for key factors that affect prices in the two markets. The cost-based approach on the other hand may be less helpful in the context of a cartel infringement in which it is not clear that a competitive benchmark price is appropriate for the non-infringement market. Further, there are significant difficulties in estimating the appropriate 'but for' profits taking into account the business cycle and the need to allow appropriate adjustments for factors such as innovation, risk-taking, superior efficiency, etc. between price and cost.

⁶⁹ *Interpolation* is a statistical method by which related known values are used to estimate an unknown price

Conclusion

The existence of legal provisions and guidelines regarding damages claims in antitrust cases across jurisdictions indicate the acceptability of such claims by the relevant competition/legal authorities. India being a relatively new antitrust jurisdiction has the advantage of adopting the best practices from across the globe while detailing its regulations/guidelines on damages claims.

Notably, damages claims arising from antitrust violations are permissible in all the considered jurisdictions. While in the case of developed jurisdictions, there is clarity available in the form of both guidelines and legal case precedents in addition to legislations, the newer jurisdictions are yet to find application of these provisions to provide clarity on certain aspects. Compensation for actual loss is available across all jurisdictions with some jurisdictions also allowing for loss in profits and attorney costs. The US stands out for being the only jurisdiction where punitive damages in the form of treble damages are available. Both direct and indirect purchasers have a standing to claim damages across jurisdictions with the exception of US and Australia. While some select states in the US allow indirect purchasers to bring damages claims, in the case of Australia there is no clarity by way of either legislations or case precedents. The passing-on defence is allowed in five out of the eight jurisdictions considered. The limitation period for bringing damages claim actions is at least two years across jurisdictions. The burden of proof typically rests with the claimant; however, it shifts to the defendant in case of invoking of pass-on defence (or certain other conditions being met) in some jurisdictions. With respect to class actions, the EU, US and Canada explicitly allow while other jurisdictions offer alternative forms such as opt-in actions or representative proceedings.

With respect to damages estimation methodologies, in theory, there is no reason for preferring one type of approach to another. The choice of approach largely depends on the details of the specific case, in particular, the accessibility and quality of data, and the required levels of evidence and burden of proof in the relevant legal framework. In addition, it also depends on the stage of a case. For example, at the start, a claimant normally has access to its own internal data and to public data, but not to confidential data from the defendants. Due to the limited availability of the data, some techniques can be used with that data while others cannot be used. However, as the case proceeds, more information may become available through disclosure, and thereby allow for application of more complex approaches. Overall, there must be a balance between determining the real damages value to the closest extent possible, and finding an approach that is suitable, easy to apply and is in alignment with the considered jurisdiction.