



THE STRATEGIC **VIEW**

Expert perspectives on international law

Competition Litigation 2016

Legal analysis, forecasts and opinion by
leading legal experts in key jurisdictions

THE STRATEGIC VIEW

Competition Litigation 2016

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- 3  **PREFACE**
Euan Burrows Ashurst LLP
- 5  **THE EU DAMAGES DIRECTIVE AND ACCESS TO EVIDENCE FOR ANTITRUST DAMAGES ACTIONS**
Geert Goeteyn & Collette Rawnsley Shearman & Sterling
- 11  **PUTTING FLESH ON THE DAMAGES DIRECTIVE – SOME RECENT DEVELOPMENTS IN THE UK**
Sarah Smith & Sam Szlezinger DLA Piper
- 17  **QUANTIFICATION OF DAMAGES IN COMPETITION LITIGATION**
Bruno Augustin Haberman Ilett LLP & **Rob van der Laan** OmniCLES
- 22  **AUSTRALIA**
Georgina Foster & Leanne Rich Baker & McKenzie
- 28  **BRAZIL**
Cristianne S. Zazur & Ana Carolina C. Zoricic Pinheiro Neto Advogados
- 32  **CANADA**
Randall J. Hofley & Rob Kwinter Blake, Cassels & Graydon LLP
- 37  **CHINA**
Ding Liang DeHeng Law Offices
- 43  **CYPRUS**
Marios Eliades & Alexandra Kokkinou Tassos Papadopoulos & Associates LLC
- 47  **DENMARK**
Olaf Koktvedgaard & Søren Zinck Bruun & Hjejle
- 52  **ENGLAND & WALES**
Euan Burrows, Max Strasberg & Alina Fazal Ashurst LLP
- 58  **FINLAND**
Lotta Pohjanpalo Waselius & Wist
- 62  **FRANCE**
Edouard Sarrazin & Marie Hindré DLA Piper
- 67  **GERMANY**
Dr. Michael Holzhäuser & Dr. Jan Dreyer DLA Piper
- 72  **GREECE**
Emmanuel Mastromanolis & Ilias Koimtzoglou Zepos & Yannopoulos
- 77  **HUNGARY**
Anikó Keller Szecskay Attorneys at Law
- 81  **IRELAND**
Marco Hickey LK Shields Solicitors
- 86  **NETHERLANDS**
Léon Korsten & Sophie Gilliam DLA Piper Nederland N.V.
- 92  **PORTUGAL**
Gonçalo Machado Borges & Pedro Gouveia e Melo
Morais Leitão, Galvão Teles, Soares da Silva & Associados
- 98  **RUSSIA**
Artur Rokhlin & Victor Fadeev INFRALEX
- 102  **SPAIN**
Eurne Navarro Varona & Ana Raquel Lapresta Bienz Uría Menéndez
- 107  **USA**
Jonathan Jacobson & Thu Hoang Wilson Sonsini Goodrich & Rosati

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CYPRUS

Marios Eliades and Alexandra Kokkinou outline various concerns that should be addressed to improve the efficacy of private enforcement of competition law in Cyprus, making it a more favourable jurisdiction for claimants to lodge claims

1. Are there any particular sectors in your jurisdiction which tend to be a focus for competition damages actions? Why do you think this is the case?

No particular sector in the Cypriot jurisdiction has yet to become a focus for competition damages actions. To date, there has been no reported case of a damages action having been decided by a Cyprus court. However, as there is no public record in place so as to investigate whether any pending damages action case exists, it cannot be stated with complete certainty that pending cases of damages actions do not exist for which a judicial decision has yet to be issued. It is important to note that, in practice up to now, parties either come to a settlement before a decision is issued by the Commission for the Protection of Competition in Cyprus (hereinafter the "CPC") or, alternatively, if the parties prefer to obtain a decision by the CPC,

once the CPC finds that a party has infringed the provisions of the relevant law, it issues a decision whereby, amongst others, it imposes a fine on the said party. The said party then has the right to file an appeal of the decision before the Supreme Court within 75 days following the date the decision was issued by the CPC.

2. Who do damages claims tend to be brought by in your jurisdiction? (e.g. direct purchasers, indirect purchasers, end consumers?) If claims are not currently being brought by indirect purchasers and/or end consumers, why do you think this is?

As mentioned above, to date, there is no publicly available record of actions filed for competition damages.

If there are any actions pending, it is certain that they are very few in number. This might

- either be because parties usually settle prior to the issue of a decision by the CPC, or because of the time-consuming process and specific disincentives related to the judicial process, such as the costs arising out of such a process, the prospect that it might take years for the court to issue a final decision, and the fact that no legal aid exists to assist plaintiffs in civil cases. Considered together, these factors do not act as encouraging factors for plaintiffs to file a competition damages action.

3. What approach are the courts taking to claims that originate from investigations or infringements arising out of the jurisdiction?

There has been no report of a claim having originated from infringements or investigations out of the Cypriot jurisdiction which has been filed and decided by a Cyprus court.

4. Do claimants favour your jurisdiction when they have a choice as to where to lodge a claim? Why?

The Cypriot jurisdiction is not generally favoured by claimants in terms of lodging a claim, one of the reasons being that the size of the market is small. Moreover, the lack of judicial precedent evidently does not provide a solid source of information as to the approach likely to be adopted by courts.

5. In practice, are the courts generous to claimants when awarding disclosure, including pre-action disclosure?

In terms of disclosure before courts, this primarily takes place through the process of "Discovery and Inspection" of documents.

Specifically, in accordance with the Civil Procedure Rules, a party to a court proceeding may apply to the Court for an order requiring the other party, within a period of time from that date, to make discovery on oath of the documents which are or have been in their possession or power relating to the alleged matters referred to in the action, and to inspect the documents listed in the affidavit for discovery. Such a process is called "Discovery and Inspection", which is subject to claims for privilege and admissibility.

In accordance with the Civil Procedure Rules, the role of the Court in terms of disclosure is to hear applications by the parties for the purpose of the "Discovery and Inspection" of documents and to decide whether or not discovery is necessary at that stage of the cause or matter, or issue such an order, either generally or limited to certain classes of documents, at its sole discretion.

Other than disclosure before the courts, the Cypriot jurisdiction does not make any provision for pre-action disclosure.

At this point it should be noted that the scope and importance of disclosure is not only a judicial matter but a subject of focus by the CPC as well. In particular, it should be noted that in 2011 the Council of Ministers issued the "Immunity from and Reduction of Administrative Fines in Cases of Restrictive Collusions Infringing Section 3 of the Law and/or of Article 101 of the TFEU (Leniency Programme) Regulations". Said Leniency Programme provides the legal framework which defines the leniency or full exemption from administrative fines of an undertaking and/or associations of undertakings wishing to cooperate with the CPC in Cyprus to uncover illegal cartels which are prohibited under Section 3 of the Protection of Competition Law and Article 101 of the Treaty for the Functioning of the EU. Basically, said Leniency Programme provides for the necessary procedure, conditions and criteria which enable the CPC to grant an exemption or a reduction of the administrative fine imposed by the CPC to an undertaking/association of undertakings.

6. How do the dynamics of a settlement really work in your jurisdiction? Is there a mechanism by which a "global settlement" can be approved/enforced?

There is no official procedure for reaching a settlement. The CPC, however, before reaching an infringement decision, has the power to encourage the parties to reach a settlement in the form of one or more representations and undertakings from the parties themselves. The CPC usually issues an order to ensure that the parties will be bound by said order and that they shall fulfil the commitments that were imposed.

Specifically, under Article 24 of the Protection of Competition Laws of 2008 and 2014, the Commission may "force the undertakings or associations of undertakings concerned, to bring to an end within a fixed time-limit the infringement ascertained and avoid any repetition of it in the future; in case the infringement is brought to an end before the issuing of the decision of the CPC, the CPC may condemn the infringement by a declaratory decision".

Also, under Article 25 of the above-mentioned Law, in the case the CPC intends to issue a decision demanding that an infringement of the provisions in sections 3 and/or 6 of said Law and/or Articles 101 TFEU and/or 102 TFEU be brought to an end, and the undertakings/associations of undertakings concerned offer to undertake commitments to meet up with the Commission's concerns in its preliminary assessment, the Commission may by its decision make these commitments binding on the undertakings/associations of undertakings concerned. Said Commission's decision may be issued for a specified period and has to conclude that there are no longer grounds for further action.

“ If there are any actions pending, it is certain that they are very few in number. This might either be because parties usually settle prior to the issue of a decision by the CPC, or because of the time-consuming process and specific disincentives related to the judicial process ”

7. How long do damages actions take? What is the likely range of costs required to defend a claim?

In practice, the length of the proceedings for each damages action can vary depending on whether the action proceeds to a full hearing. If this is the case, it can take an average of three years until a judgment is issued; however, in certain districts, it might take a longer period of time to issue a decision because of the heavy case load. With regards to the likely range of costs for a trial, this depends on the nature of each case, as well as on the costs of the judicial process, which largely depend on the amount of the claim. Usually, these include the costs of the procedure, the cost of drawing up pleadings, the cost of the hearing and of appearances before and after the hearing, the costs of witnesses, etc. In civil cases, the court decides who should pay the costs of the proceedings at the end of the case after taking into account the specific features/circumstances of the case; however, in the vast majority of cases, the costs follow the outcome.

8. What funding options are available for (i) claimants and (ii) defendants, in your jurisdiction?

In 2002, the Legal Aid Law implemented Directive 2002/8/EC in Cyprus, whereby access to justice was improved with respect to cross-border disputes through the establishment of minimum common rules relating to legal aid for such disputes, and which conferred the right upon any individual to ask for legal aid from the State if that individual is financially unable to pay his/her legal costs in a judicial process.

Under the Legal Aid Law 2002, legal aid is provided in the following situations:

1. Criminal proceedings for crimes or offences for which the law provides for imprisonment exceeding one year.

2. Civil and criminal proceedings for specified violations of human rights.
3. Proceedings relating to Family and Matrimonial Law disputes.
4. Cross-border disputes.

Moreover, the Civil Procedure Rules provide that a Plaintiff as well as a Defendant (in cases of a counter-claim which is not merely in the nature of a set-off), which usually resides outside Cyprus or a Member State of the European Union, may be ordered to give security for costs, although they may be temporarily resident in Cyprus or in a European Union Member State.

In terms of actions brought by individuals residing outside Cyprus or the European Union, when the Plaintiff's claim is based on a judgment or order, or negotiable instrument, it is at the Court's discretion to ask the Plaintiff to give security for costs. Where the Court orders security for costs to be given, the proceedings in the action are brought to a halt until said security is offered. In the case the security is not offered by the appointed time, the action may be dismissed.

In Cyprus, it is against the rules of professional conduct to work with a contingency fee arrangement.

9. Do you anticipate any significant increase in damages actions in your jurisdiction over the next year or two? If so, where and why do you anticipate these increases coming?

With the implementation of Directive 2014/104/EU on Anti-Trust Damages Actions, which essentially removes certain legal and practical obstacles that stand in the way of effective compensation and in turn harmonises important aspects of national rules governing antitrust damages actions, as well as with the setting up of the Administrative Court in 2015, it is possible that a slight increase in damages actions in the short- to medium-term occurs especially if one takes into account that the first sector inquiry has been conducted by the CPC on petroleum products. However, a significant increase is not expected since it will be a lengthy process for the CPC and the judiciary, as well as for the private enforcement sector, to implement to the fullest the provisions of the Directive.

10. In your opinion, what are the key changes (if any) required in your jurisdiction to improve the effectiveness of private enforcement of competition law?

In order to improve the efficacy of private enforcement of competition law in Cyprus, various concerns need to be addressed, such as the provision of legal aid to Plaintiffs wishing to lodge a damages action, issues of standing, the passing-on effect used as a defence by cartelists, the characterisation of damages, the difficulties arising from the

- quantification of damages, and the inquiring as to the binding effect of such decisions. Moreover, following the *Pfleiderer* case in 2011, concerns were raised in relation to the access to the files of applicants, and greater emphasis was placed on leniency applicants. It was stressed that, on the one hand, leniency applications must be protected and, on the other hand, it was pointed out that there must be a balance regarding what to and what not to disclose.

Also, under the Cypriot jurisdiction, although an individual has the choice and the right to sue for private and direct enforcement of Articles 3 and/or 6 of the Protection of Competition Laws 2008 and 2014 and/or Articles 101 TFEU and/or 102 TFEU, the reality is that, according to Article 40 of the Protection of Competition Laws 2008 and 2014, “an irrevocable decision of the Commission or of

other Competition Authority or of the European Commission, ascertaining the said infringement shall constitute a rebuttable presumption about the truth of its context”. In practice, this has led to individuals waiting for a finding from the CPC that a breach of competition law has occurred in order to use such a decision as a presumption about the truth of its context before the Courts. Therefore, it is evident that a significantly long time-frame exists in such cases if one considers the time needed for the CPC to issue its decision and for the Supreme Court to examine the potential appeal of said decision. The whole process is considered as time-consuming and costly, and the above-mentioned impediments, such as the fact that no legal aid is available for Plaintiffs in such proceedings, act as disincentives to individuals wishing to lodge a claim for competition damages.



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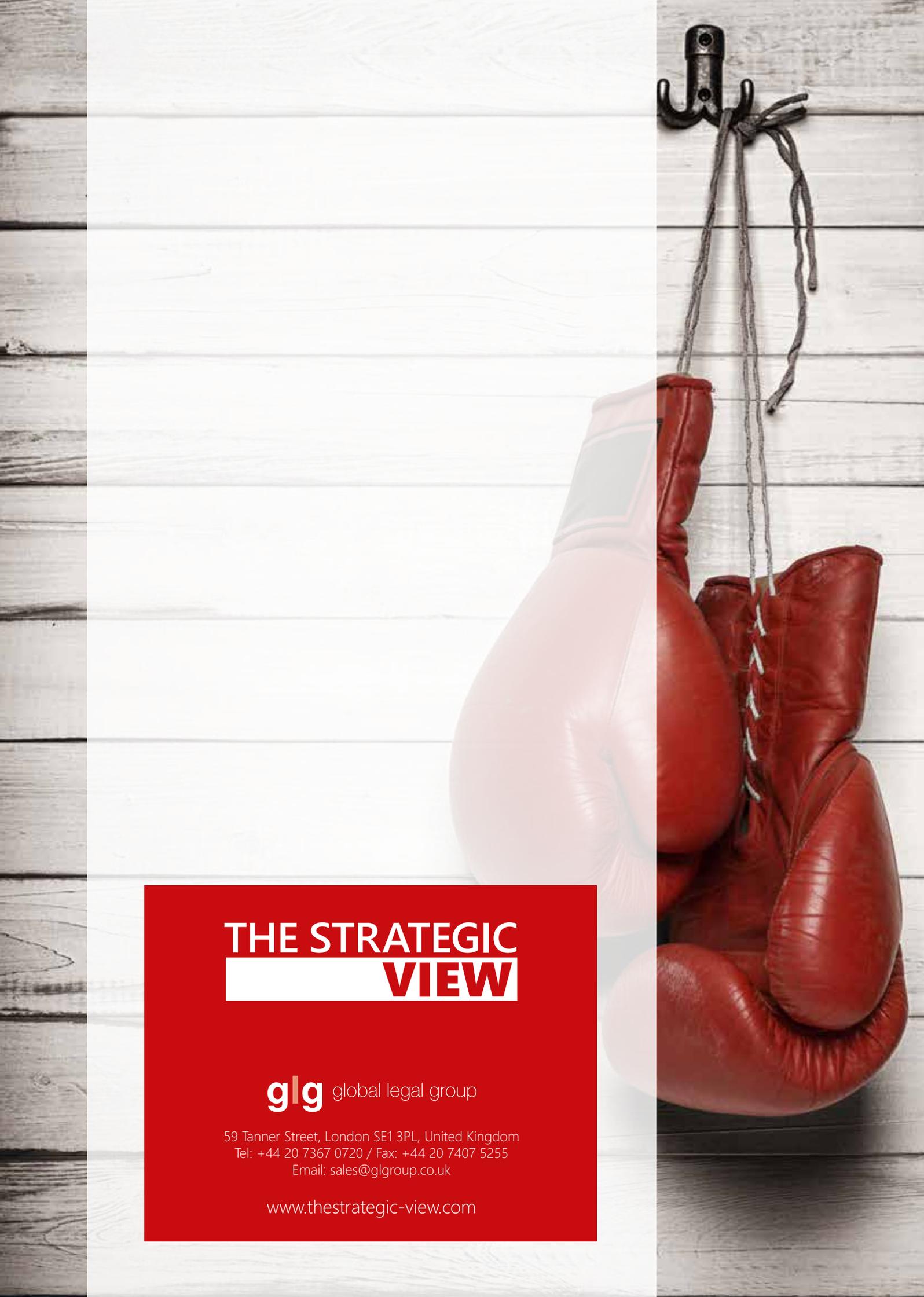
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