COMPENSATION FOR DAMAGES FOR INFRINGEMENT OF ANTITRUST LAWS

Pablo Trevisán

"There was a man of Sicily, who, having money deposited with him, bought up all the iron from the iron mines; afterwards, when the merchants from their various markets came to buy, he was the only seller, and without much increasing the price he gained 200 per cent." Which when Dionysius heard, he told him that he might take away his money, but that he must not remain at Syracuse, for he thought that the man had discovered a way of making money which was injurious to his own interests."
Aristotle, Politics

1. INTRODUCTION

If the only purpose of antitrust law was to maximize the consumer's well-being by means of the most efficient allocation of resources and the reduction of costs, regulation and enforcement thereof would be relatively simple.

However, under antitrust law, various purposes have been taken into account, which are not at all related to the technical sense of the consumer's well-being, whereas others have been directly hostile towards the purpose of achieving efficiency in the allocation and resources and production.

The foregoing is mainly because antitrust policies are not empty but reflect the values and goals of the community at any given time. In this respect, antitrust law is filled with strain.

Within this framework, antitrust law, among other things, reflects the will of the State to intervene in the economic activities encouraging companies to focus their practices towards a greater purpose: that of a competitive market, where consumers may acquire quality goods at reasonable prices.

Thus, with such purpose in mind, deterrence has a key role in the public enforcement of antitrust laws, which are designed for economic agents to act and evolve in a market without harmful interference. Within such context, the task of the antitrust authority is one of general interest.

The deterrent level of a fine or penalty may be defined as the capacity to deter a potential offender from committing a certain offense, thus depending, on the one hand, upon the seriousness of the fine or penalty and, on the other hand, upon the likelihood that such infringement may be discovered. Consequently, the more the applicable regulations are likely to permit the offender to be caught, judged and punished to that no profits may be derived from such infringing *modus operandi*, the higher the deterrent effect will be.

Corrective measures applied by the antitrust authority -which are mainly based upon the community's general interest- contribute a certain degree of deterrence when faced by actual and potential offenders, though they are clearly not sufficient -*per se*- in order to protect the private interest as well within the framework of antitrust law. Within such context, and always bearing in mind that the main purpose of the actions for damages in

antitrust matters seek the protection of an interest that is mainly individual related to the compensation for the damages sustained as a result of an antitrust offense, it is important to take into account the deterrent effect of these actions[1].

In this respect, the combination and interaction of both enforcement methods (public and private) contribute to maintaining and restoring market integrity, to preventing artificial forces from having an impact upon prices, to an ideal provision of goods and services, to the removal of the barriers for access to the markets, to the innovation of competitive products and the consumer's increased general well-being[2].

This paper is aimed at making a general approach to the various aspects of the private enforcement of antitrust laws, by means of the particular analysis of the actions for damages caused as a result of antitrust violations. Within such framework, and without attempting a comprehensive analysis of every issue, we will examine the current antitrust situation in Argentina, why we believe that the compensation for damages is important as an antitrust remedy and who the potential victims of antitrust violations are. Then, we will make a brief analysis of the legal framework applicable in Argentina and we will concisely explain the elements of civil liability for antitrust violations. Finally, we will review some issues related to the legal capacity to sue, with special focus on class actions and their impact upon the subject-matter hereof, followed by certain conclusions[3].

2. CURRENT SITUATION WITH RESPECT TO COMPENSATION FOR DAMAGES

[1] There are a number of books of authority that widely discuss the actual scope of the deterrent effect of the actions for damages in Antitrust matters, the analysis of which exceeds the subject-matter hereof. However, we believe that, beyond such discussion, there are not doubts that the actions for damages represent a significant additional deterrence factor in those jurisdictions in which such actions have been subject to substantial growth. For a better illustration on the matter, see: ROSOCHOWICZ, Patricia H., *Deterrence and the relationship between public and private enforcement of competition law,* International Bar Association, EU Private Litigation Working Group, February 2005*;* WILS, Wouter P. J., *The Relationship between Public Antitrust Enforcement and Private Actions for Damages,* World Competition, Vol. 32, Nº 1, March 2009.

[2] FREDERIC JENNY, *Optimal Antitrust Enforcement: From Theory to Policy Options,* in I. LIANOS e I. KOKKORIS, *The Reform of European Competition Law: New Chalenge*s, The Hague: Kluwer, 2009. On the matter, Frederic Jenny rightly observes the close relation between civil sanctions and damages, from a deterrence perspective, even if the beneficiaries of the compensation are different in each case: *"It makes no difference whether payments are made to the state budget or to consumers. Thus, the current discussion in the EU on private enforcement should take into account the fact that even if the purpose of private enforcement is to compensate victims rather than to punish violators, the possibility of adding compensatory damages to administrative (or criminal) sanctions increases the overall cost of being caught and therefore increases the deterrent effect of the enforcement system"*.

[3] An important subject that we are not going to analyze hereunder is that related to leniency programmes and the possibility of having access to the documents of the administrative leniency procedure. That is because, as of the date hereof, Argentina does not have a leniency programme. The Argentine Antitrust Authority [CNDC] submitted a leniency bill to the Congress a few years ago, but it has not been discussed at Congress so far. Notwithstanding the foregoing, with respect to actions for damages for antitrust violations, it should be noted that, in those countries where there are leniency programmes there is also a quite delicate issue that may not be easily solved, i.e. whether defendants may or may not have access to the administrative documents filed by the companies under such programmes. In Europe, recently in the case *Pfeiderer* (*Pfleiderer AG v Bundeskartellamt*, Case C-360/09 [2011] ECR I-000), the European Court of Justice provided certain criteria in order to restrict or limit access to such documents whenever such evidence may compromise the effectiveness of the leniency programme.

2.1. Pending issue in Argentina

Reality indicates that antitrust private damages actions have not fired up yet in Argentina.

Surprisingly, since the enactment of Argentine Antitrust Law No. 25156 (hereinafter, the "Antitrust Law"), there have not been more cases seeking to impose civil liability upon the perpetrators of antitrust violations.

Even though there have been some precedents that could have been an indication that this type of actions would occur more often in Argentina,[4], truth is that, to date, little has happened in this respect.

Thus, the evolution of this matter in Argentina is similar to the path that other jurisdictions have gone through by means of a slow and non-problem-free experience. Even though in recent years there have been signs of progress and evolution, this area of Competition Law related to the compensation for damages for infringement of antitrust laws is one of the few areas that has not achieved consistent growth yet in connection with books of authority and case-law in Comparative Law[5].

On the other hand, the experience of the United States ("USA"), where there is greater awareness in the individuals regarding the importance of economic rules in the performance of the private activity and in general well-being, has contributed to the debate and development of the matter in Europe. In this respect, in the European Union ("EU"), not only has there been an increasing concern in legal scholars towards seizing the virtues of the US model, but authors have also tried not to disregard the principles of the European model nor adopt a litigation exaltation culture.

Accordingly, the European Commission ("EC") –on June 11, 2013- adopted a proposed Directive designed to regulate how citizens and firms might file claims for damages under the EU antitrust rules[6] (hereinafter, the "Proposed Directive on Antitrust Damages Actions"). Pursuant to the EC, the Proposed Directive on Antitrust Damages

---

[4] CERVIO, Guillermo J. y RÓPOLO, Esteban P., *Comentario a la Ley de Defensa de la Competencia*, Ed. La Ley, Buenos Aires, Argentina, p. 545.

[5] LEWIN MUÑOZ, Nicolás (2010), *Indemnización de Perjuicios por Atentados a la Libre Competencia: El Daño Anticompetitivo, su Relación con el Daño Civil y la Determinación de los Perjuicios*, Estudios de Libre Competencia, Sección Segunda, Anales UC, Chile, 2010.

[6] See *"Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union"*, (2013/C 167/07), Official Journal of the European Union, C. 167/19. Prior to the European Commission Proposal, and on the basis of the observations of the Ashurst report (to be discussed hereinbelow), they established that there is a lack of regulation concerning the channels that may facilitate the claims for this type of damages and, consequently, a need to work on these aspects in order to contribute to the construction of a private enforcement system for antitrust rules by way of claiming damages. Consequently, the European Commission published, on December 19, 2005, the Green Paper on "Damages actions for breach of the EC antitrust rules", whereby it invited all interested parties (governments, companies and public and private entities), to make comments and observations concerning the different aspects of the liability for antitrust violations. Upon expiration of the term provided for filing observations to the Green Paper, the European Commission started to draft a White Paper on the matter, which was published on April 2, 2008. The White Paper presents the conclusions drawn from the analysis of the comments and observations received as well as the proposed regulatory policies and measures that may facilitate the claims for damages derived from infringements of antitrust rules.

Actions is set to remove a number of practical difficulties which victims frequently face when they try to receive a fair compensation for the damage they have suffered before European courts. Suggested measures include extending access to evidence by the claimants[7], setting clearer rules in relation to the statutes of limitations and rules confirming –for certain circumstances- the capacity of defendants to assert passing-on defenses (further information to be provided hereinbelow) as well as in relation to quantifying the antitrust harm. In addition, the EC has adopted a recommendation to encourage the Member States to establish a mechanism providing for the possibility of class actions for victims of violations to EU rules, including antitrust rules. This Proposal of the EC is currently being discussed in the Parliament and in the European Council.

Prior to this Proposed Directive on Antitrust Damages Actions, the European Commission itself ordered a research study relating to how claims for damages derived from the violation of antitrust rules were heard in the different Member States, for the purpose of identifying the main obstacles, issues and conflicts on the matter in Europe. The analysis was conducted by the firm Ashurst and filed on August 31, 2004[8]. The authors of such research concluded that the claims for damages derived from infringements of antitrust rules at the time presented in the EU a noticeable lack of harmonization and total "underdevelopment".

The Argentine legal system is also subject to such issues. The Antitrust Law does not provide for specific rules on the matter and merely sets forth, in Section 51 thereof, certain conditions for exercising actions under the Antitrust Law[9]. Consequently, as outlined hereinbelow, the actions for damages are mainly governed by the general rules of the Civil Code.

The infringements of the provisions of the Antitrust Law may cause serious damage to the economy as a whole and interfere with the appropriate operation of the market. In order to prevent such harm, the Argentine Antitrust Authority [*Comisión Nacional de Defensa de la Competencia*] (hereinafter, "CNDC"), by means of a resolution laid down by the Secretariat of Domestic Trade (hereinafter, "SCI"; and collectively with CNDC, "CNDC/SCI"[10]), has been empowered to impose fines or penalties upon firms and associations whenever they infringe such competition rules. The purpose of the fines imposed by CNDC/SCI is to have a deterrent effect, i.e., penalize such firms (specific deterrent effect) and deter other firms from adopting or maintaining practices inconsistent with the provisions of the Antitrust Law (general deterrent effect).

---

[7] This proposal is a clear innovation for the EU –which has a civil law system based on the Roman-Germanic tradition-, because it incorporates elements of the discovery (USA) into civil procedure (EU).

[8] ASHURST REPORT, *"Study on the conditions of claims for damages in case of infringement of EC competition rules"*, http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/study.html

[9] Section 51, Antitrust Law: *"Any individual or legal entity that has sustained damage as a result of acts prohibited by this law may seek compensation for damages in accordance with the general rules of law, before any court having jurisdiction over the matter"*.

[10] See Supreme Court of Justice of the Republic of Argentina [CSJN]: Decisions "Credit Suisse First Boston Private Equity II LLC-Sucursal Argentina, Nueve Artes S.A. y HFD Media S.A. - Case File Nº S.C., C 1216, L.XLI", "Recreativos Franco s/ apelación resolución Comisión Nac. Defensa de la Competencia - Case File Nº R. 1170. XLII y R. 1172. XLII" and "Belmonte, Manuel y Asociación Ruralista de General Alvear c/ Estado Nacional - Case File N° B. 1626. XLII".

In addition, the infringement of the provisions of the Antitrust Law may cause serious damage to consumers and firms. Any person that has been adversely affected by an infringement of antitrust rules is entitled to compensation and such right is guaranteed under Section 51 of the Antitrust Law. Whereas the purpose of the fines or penalties is to deter, the purpose of the claims for damages is to remedy the damage caused by an infringement. This possibility available to consumers and firms to obtain compensation also has beneficial effects in terms of deterrence of future infringements, thus ensuring compliance with antitrust provisions.

As noted hereinbelow, the issue brought up upon judges and parties in actions for damages with respect to how to quantify the damage sustained is complex. Quantification is based upon a comparison of the current situation of the claimants with the situation in which they would be if no infringement had occurred. In any hypothetical evaluation of how market conditions and the interactions of market players would have proceeded if no infringement had been committed, very complex and specific legal issues usually emerge that are related to the antitrust area of expertise.

Additionally, and especially in Argentina, there are certain special features that indicate a lack of institutionalism on the matter, which make it difficult to achieve sustained growth on the matter, including, but not limited to:

- The serious failure by the successive national administrations to put the Argentine Antitrust Court [*Tribunal Nacional de Defensa de la Competencia*] into operation (hereinafter, the "Antitrust Court"; and hereinafter collectively or indistinctively with CNDC/SCI, referred to as the "Antitrust Authority")[11], an entity created by the Antitrust Law in 1999, which was one of the cornerstones taken into account by the lawmaker at the time of enacting the Antitrust Law[12]. The failure to put the Antitrust Court into operation as provided by the Antitrust Law is another example of how hard it is for Argentinians to cause the institutions created by law to come into operation in practice. The fact that a temporary provision –such as Section 58 of the Antitrust Law- persists over time for so many years without complying with the lawmaker's intention clearly evidences the foregoing[13].
- On another note, another issue that also puts any progress on the matter at risk is the absence of a legal system for class actions in Argentina. Even though in the past few years there has been some progress on the matter, particularly

[11] See article by the author, *El Tribunal de Defensa de la Competencia ya no puede esperar,* Suplemento Legales, Diario EL CRONISTA, March 23, 2010.

[12] The "new" Antitrust Law introduced two main modifications with the respect to previous Law No. 22262: (i) the creation of a system to control business combinations; and (ii) the creation of the Argentine Antitrust Court, as a governmental entity permitted to act independently, the members of which were guaranteed continuity in their offices, with the court being consequently less sensitive to political pressures.

[13] OCDE, *Derecho y Política de la Competencia en Argentina – Examen Inter-Pares,* 2006. In July 2006, OCDE filed a report about Antitrust laws and policies in Argentina, which was prepared in collaboration with the Inter-American Development Bank (IDB) and reviewed by peers, in the Latin American Competition Forum organized by OCDE and IDB. Such report describes and analyzes the enforcement of the antitrust law in Argentina and outlines far-reaching recommendations to improve it. The first recommendation made by such report is related to the need to put the Antitrust Court into operation, expressly stating that "the creation of such entity is designed to deal with two fundamental problems currently faced by CNDC: an inefficient budget and insufficient independence" (see Section 6.1 of such OCDE report).

following the decision in the case *Halabi* rendered by the Supreme Court of Justice in 2009, there is still a long way to go in Argentina and it is imperative that laws be enacted on the matter. Especially, the law provides nothing with respect to class actions within the framework of antitrust law, even though we believe that, following the decision in *Halabi* and, more precisely, following the recent decision in *PADEC*, the Supreme Court of Justice has shed some more light on the legal capacity to sue in this type of actions, which might be very useful when it comes to antitrust damages.

2.2. Why compensation, as a remedy in Antitrust matters, is relevant.

The subject-matter hereof introduces, in Argentina, a series of complex questions that need to be elucidated. Such questions include, but are not limited to, the following:

- Whether it is necessary that there is a prior decision of the Antitrust Authority in order to bring a civil action; and whether such decision -if any- must be upon the merits.
- If in any given case the Antitrust Authority imposes a penalty for specific acts, whether the civil court might extend the compensation to other events (e.g. related acts; the same acts but for a longer period of time; brand new acts; acts committed by other persons).
- If a prior resolution of the Antitrust Authority is infringed, whether it is sufficient to prove the infringement, or whether, additionally, evidence must also be given that the freedom of competition has been affected for the purpose of the compensation.
- Whether it is possible to bring a civil action when the action before the Antitrust Authority has been barred by the statute of limitations and, in such case, what rules apply to the statute of limitations.
- Whether, when it comes to the legal capacity to sue, the action may be brought by:
  - direct and/or indirect purchasers;
  - purchasers of other members of a cartel;
  - purchasers of the competitors of those who used to be a cartel;
  - suppliers.
- Whether, on the other hand, when it comes to the legal capacity to be sued:
  - only those who were reported or required before the Antitrust Authority may be sued;
  - and apart from that, whether those who benefited from, but did not commit, the violation may also be sued.
- Whether an action may be brought on the basis of a memorandum of agreement, settlement or compromise, without a qualification of the behavior by the Antitrust Authority.
- If the claimant passed on a portion of the increased cost to his/her/its own customers, whether claimant may actually sue or whether the defendant may assert such circumstance as a defense (“passing on defense”).
- Whether the problem related to the evidence may be somehow simplified.
- Whether there are specific methods to deal with the complexity of quantifying harm in this type of cases.
- Whether punitive damages may be demanded.

- Whether class actions may be brought.

We will deal with some of these issues hereinbelow, trying to make an initial partial approach to the subjects we believe are more important and which will require subsequent development in relation to laws, books of authority and case-law.

3. POTENTIAL VICTIMS

The potential victims of antitrust violations primarily result, whether directly or indirectly, from acts that involve (a) an abuse of dominant position (e.g. the monopolist imposing tie-in sales upon the buyer, the anticompetitive foreclosure in a market, the imposition of exclusivity, refusals to sell, setting of resale prices, the lower price received by a seller as a result of an abuse of the purchase position, etc.); or (b) collusive arrangements promoting cartelling in certain markets (e.g. the purchaser has to pay increases in price for the artificial increase agreed between the members of a cartel, etc.).

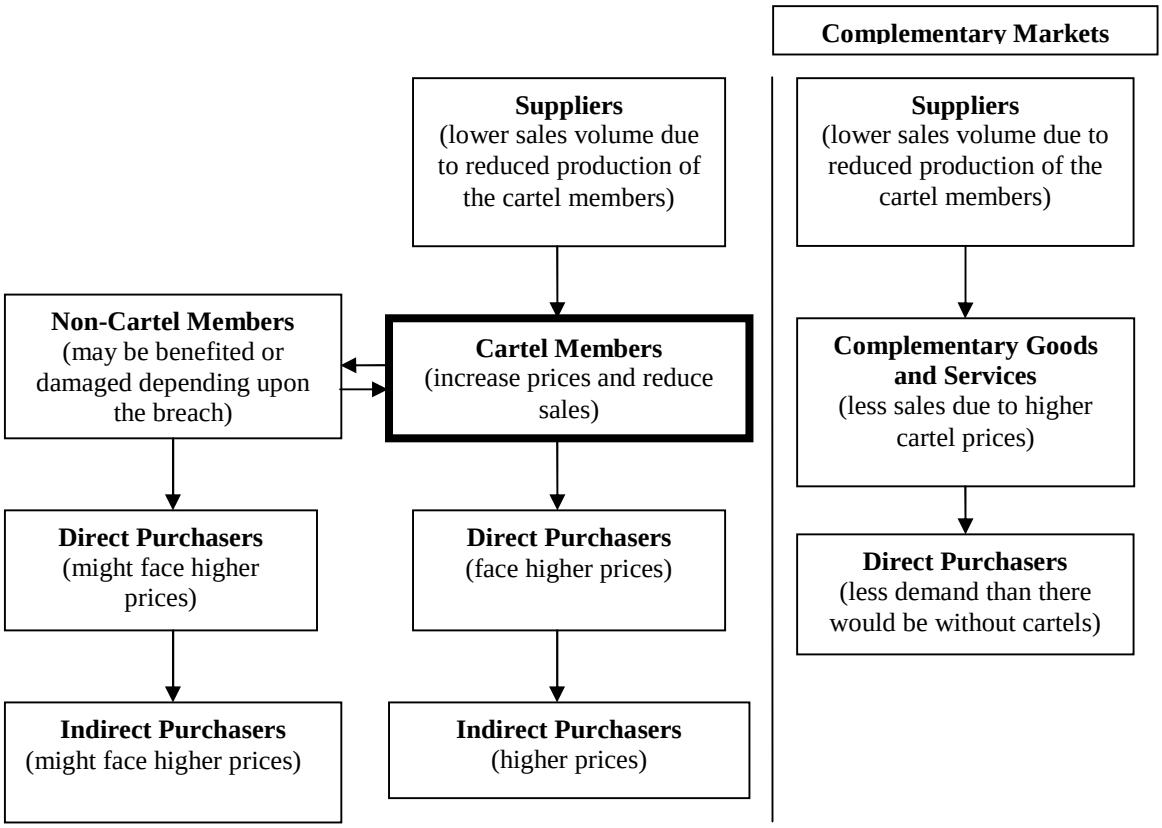
Pursuant to certain basic economic principles, collusion -whether explicit or implicit- is supported by the dynamic interaction between firms. Firms make their future behavior in the market conditional upon the current behavior of their competition.

When this type of dynamic interaction is actually implemented, the firms involved in this interaction are able to maintain their prices at levels that are close to monopoly prices and significantly above those that their unilateral acts may have permitted.

Dynamic price stabilization may be achieved through direct communication -i.e. the necessary condition of a cartel- or through coordination undertaken by means of observation and monitoring of the behavior of the other firms in the market. This is known as tacit coordination or coordinated effects, and is analyzed under the dominance evaluation criteria or business combinations control procedures, but it is not deemed as a cartel agreement (or collusion).

Economics books identify a wide spectrum of potential damages due to the collusion between firms.[14] Some of the various categories of adverse effects caused by a violation of antitrust rules are summarized in the following table[15]:

[14] Cartels may also result in positive effects for consumers (the so-called efficiencies), including, without limitation, lower freight costs. These effects -if significant in a particular case- must be balanced against the adverse effects upon consumers at the time of estimating the damages.
[15] See ASHURST REPORT.



In the first place, in a cartel, where competitors collude to set prices, the first victim is the direct purchaser, who must bear an artificial increase in prices. From the direct purchaser's perspective, there are three main effects: higher prices in certain sales (usually with price increases or consequential damage), the opposite pass-on effect (i.e. the portion of the price increase that is passed on through higher prices to indirect purchasers) and the quantitative effect (which is the loss of profit related to the profit that would have been earned by the purchasers in additional sales at competitive price level).[16]

The direct purchaser's purchasers may also be affected (i.e. indirect purchasers), who would have to bear a potential increase in their prices for the total or partial transfer of the surcharge represented by the price increase upon the direct purchaser. And thus the effects continue upon other indirect purchasers, up to the final consumer.

There will be potential purchasers that would have purchased at a lower competitive price, but who will not purchase at cartel price. Potential purchasers, thus, lose the profit they would have obtained from additional sales when they resell to final consumers in a competitive environment. In legal terms, whether due to less purchases or no purchases, this effect represents the loss of profits.

An equivalent effect may occur with suppliers, by exercising the cartel's purchasing power on an upstream basis. The suppliers of the members of the cartel may be adversely affected, since their sales volume may be reduced, to the extent that the

[16] FRIEDERISZICK, Hans W. – RÖLLER, Lars-Hendrik, *Quantification of Harm in Damages Actions for Antitrust Infringements: Insights from German Cartel Cases, Working Paper ESMT, Marzo 16, 2010 (ISSN 1866-3494).*

artificial price increase is a decisive factor in the sales volumes of such suppliers (upstream). In addition, another adverse effect may occur when these suppliers, in turn, pass-on these unfavorable sales conditions to their own chain of suppliers on an upstream basis.

So far we have been explaining the effects on a downstream basis as a result of this collusion between competitors. However, the cartel does not only have effects downstream or upstream, but also other competitors that are not a party to the collusion agreement but act under the cartel's artificial price increase may increase their prices as well (this situation is known as umbrella effect). The umbrella effect affects those direct or indirect purchasers of the agents that are not members of the cartel.

On the other hand, certain customers may also be harmed to the extent they might have been willing to pay a competitive price but, due to the artificial price increase by the cartel, choose to either acquire substitute undesirable goods or reduce the quantity of the goods they buy.

Additionally, producers of goods that complement the goods produced by the cartel members may also be affected, who, the same as the suppliers, may be subject to a reduction of their sales volumes as a result of increased prices, thus also adversely affecting the suppliers of the producers of these complementary goods.

If we also consider, in addition to the above, other acts that infringe the freedom of competition other than collusion, we will note that other market players may also be adversely affected[17].

4. COMPENSATION FOR DAMAGES FOR ANTITRUST VIOLATIONS

"(…) human laws do not forbid all vices, from which the virtuous abstain, but only the more grievous vices, from which it is possible for the majority to abstain; and chiefly those that are to the hurt of others, without the prohibition of which human society could not be maintained: thus human law prohibits murder, theft and such like"[18].
Thomas Aquinas

4.1. Legal Framework

The principle of civil liability whereby anyone causing harm must remedy such harm is fully applicable to the compensation for antitrust violations.

In practice, the parties and judges shall have to undertake a process to adapt the general principles and rules of civil liability to the specific situations that may arise as a result of anticompetitive practices. In this adaptation process, the principles and purposes of antitrust laws shall have to be observed. Consequently, the scenario generally introduces

[17] LEWIN MUÑOZ, Nicolás (2008), *La Indemnización de Perjuicios por Atentados en Contra de la Libre Competencia*, Tesis, Facultad de Derecho de la Pontificia Universidad Católica de Chile, Santiago de Chile, September 2008.
[18] THOMAS AQUINAS, *Summa Theologica, Part I-II*, Q. 96, Art. 2º.

the structural elements of civil liability, and then weighs up such liability on the basis of the governing principles and specific rules applicable to antitrust matters[19].

Accordingly, Section 51 of the Antitrust Law provides as follows: "*Any individual or legal entity that has sustained damage as a result of acts prohibited by this law may seek compensation for damages in accordance with with the general rules of law, before any court having jurisdiction over the matter"* (emphasis added). That is to say, the victims' right in connection with acts forbidden by the Antitrust Law shall be governed by the regulatory framework applicable to civil liability for damages contained in the Argentine Civil Code (see Sections 1066 through 1136).

Having said that, in the first place, we will have to elucidate the nature of this liability derived from antitrust violations. Some people believe that liability in these cases arises out of a contract, whether due to the existence of agreements restricting competition or an abuse of dominant position. That is to say, the antitrust violation affects a pre-existing business relationship, as a result of the breach by one or both parties.

In our opinion, the liability for antitrust violations is primarily tort liability. Any agreement, whether in whole or in part, written or oral, executed in violation of antitrust rules is null and void and, consequently, generates no contractual relationship between the parties. This is also applicable in those cases in which a breach of contract results from the commission of an antitrust violation, whether by collusion or exclusion, since in these cases it is not the anticompetitive behavior that supports the action to claim liability, but the consequences or effects of such behavior upon the contractual obligations.

Additionally, special consideration should be given to the fact that antitrust principles rank equally to the Argentine Constitution following the last 1994 constitutional reform and, therefore, this is a right and obligation imposed upon all contracting parties, even if nothing in this respect is provided in the agreement governing their business relationship. That is to say, this principle contained in the Argentine Constitution (Article 42[20]) constitutes a clear limitation to the free will of the contracting parties and, hence, an obligation that does not require an express contractual agreement[21].

---

[19] DE LA VEGA, Fernando, *Responsabilidad Civil Derivada del Ilícito Concurrencial, Resarcimiento del Daño Causado al Competidor*, Civitas, Madrid, 2001, page 56. This author states that *"(…) the civil liability for damages caused as a result of unfair competition should not, therefore, be deemed as a penalty of Competition Law; it is a legal consequence derived from acts performed in the market for competition purposes and is essentially and primarily subject to civil liability rules, superseding the legal framework applicable to competitive activities (…)"*.

[20] Argentine Constitution, Article 42: *"Consumers and users of goods and services are entitled, in the consumer relationship, to the protection of their health, safety and economic interests, as well as to adequate and accurate information, to the freedom of choice, and to equitable and decent dealing conditions. The authorities shall provide for the protection of these rights, for the education of consumers, for the protection of fair competition against any type of market distortion, for the control of natural and legal monopolies, for the quality and efficiency of public utilities, and for the creation of consumer and user associations. Laws shall establish efficient procedures for the prevention and resolution of disputes, and the regulatory frameworks of the public utilities that are in charge of the National Government, providing for the required participation of consumer and user associations and of any interested provinces, in the controlling entities."*

[21] MARTINEZ MEDRANO, Gabriel, *Control de los Monopolios y Defensa de la Competencia*, 1ª Edición, Buenos Aires, Depalma, 2002, p. 25, this author alleges that: *"The Constitution of 1994 provides for third-generation rights, including the right to effective competition. Article 42 of the Argentine Constitution provides for three cornerstones of effective competition: the consumer's freedom of choice,*

On the other hand, and even though the Antitrust Law does not include express provisions relating to the invalidity of the legal acts prohibited by this law, as other foreign laws do[22], we believe that the terms of the Antitrust Law (Section 1) serve as sufficient grounds for the invalidity provided for in the Argentine Civil Code in connection with such acts[23].

4.1.1. The grounds for the term of the statute of limitations applicable to actions for damages caused by antitrust violations

Even though the liability for antitrust violations is, as far as we are concerned, mainly of a tort nature, it should be noted that the term of the statute of limitations applicable to the action is not 2 years as provided under Section 4037 of the Argentine Civil Code (nor that of Section 847 of the Argentine Commercial Code). In these cases, the five-year term provided for under Section 54 of the Antitrust Law applies, which governs all actions arising out of the Antitrust Law, including civil actions for damages as a result of antitrust violations. The special rule (i.e. Section 54, Antitrust Law) prevails over the general civil rule on the matter (i.e. Section 4037, Argentine Civil Code).

However, in certain cases, the ten years statute of limitations has been applied when the victim of the harm caused as a result of the antitrust violation was able to prove that there was a contractual relationship with the violator. So was it resolved in the case *Autogas*, concerning the applicable term of the statute of limitations, taking into account that the relationship could be otherwise proved by means of, including, but not limited to, invoices, delivery notes and registered letters, which reasonably convinced the Judge, in accordance with the provisions of Section 1190 and subsequent Sections of the Argentine Civil Code[24].

With respect to the date that must be taken into account for the statute of limitations to start running, we believe that there might be two scenarios, depending on whether or not there has been a prior administrative resolution: (i) <u>If there has not been a final resolution by the administrative authority</u>: We believe that, even though, as a general principle, the statute of limitations for torts starts running on the date when the tort occurred, because ordinarily the harm is an immediate consequence of the event,

---

the protection of competition against any type of market distortion and the control of legal and natural monopolies. The consumer's freedom of choice involves the possibility of choosing among the offers existing in the market, which means that the existence of increasingly more offers will be encouraged, that is to say, the participation of the highest number of competitors in the market involved."

[22] See Treaty of Rome, Article 101, Paragraph 2).

[23] CABANELLAS DE LAS CUEVAS, Guillermo (h), *Derecho Antimonopólico y de Defensa de la Competencia*, Ed. Heliasta, Buenos Aires, T. II, page 393. Accordingly, this author alleges that *"(…) the terms of the prohibition contained in Section 1 of the Antitrust Law are sufficiently broad as to give rise to the invalidity provided for under Sections 953 and 1044 of the Argentine Civil Code, in accordance with the provisions of Section 18 of the Argentine Civil Code."*

[24] See *Auto Gas S.A. c/ YPF S.A. y otro s/Ordinario*, Court of Original Jurisdiction in Commercial Matters No. 14 [*Juzgado Nacional de Primera Instancia en lo Comercial Nº 14*], Court Clerk's Office No. 27, on September 16, 2009, where the Court resolved as follows: *"In this respect, since we are dealing with an action seeking compensation for damages resulting from the agreement between the parties, the statute of limitations provided for in the Civil Code is not applicable (Section 4037) to the extent this breach does not involve tort liability. The hypothesis described upon which the complaint is based falls within the scope of the ten-year statute of limitations, as provided by Section 4023 of the Civil Code, since we are dealing with a non-standard contract with no specific statute of limitations."*

[25]when the victim is not aware of the existence of the harm -as held by case law-, the statute of limitations should start running as from the date when the victim becomes aware of the harm; (ii) If there has been a final resolution by the administrative authority: In this case, we believe that the statute of limitations starts running as from the date such resolution becomes final, whether it is (a) an administrative resolution laid down by the Antitrust Authority imposing the penalty or (b) a court decision confirming such penalty, if any.

4.2. Elements of Civil Liability for Antitrust Violations

The compensation for damages as a result of antitrust violations is governed by the general rules of tort liability and, therefore, the following four elements must be evidenced: (i) the breach (i.e. the antitrust violation), (ii) the possibility to attribute liability for such violation (either on the basis of negligence or fraudulent intent); (iii) the damages sustained by the victim, and (iv) the causal connection between the violation and the harm sustained by the victim[26].

4.2.1. Violation:

The first element of liability consists in providing evidence that there has been an anticompetitive agreement, decision, recommendation, agreed practice, parallel conduct (collusive behavior) or other act involving an abuse of dominant position (abusive behavior). That is to say, the victim of the antitrust violation shall have to prove before the courts that the general economic interest, i.e. the legal right protected by antitrust laws, has been harmed.

For such purpose, the victim shall take into account the provisions of Sections 1, 2 and 7 of the Antitrust Law, which define the prohibitions of our legal system, therefore rendering the conducts described thereunder illegal[27].

---

[25] See CNCiv., Division E in re, *Lovera Maruto C/ Fernandez Alejandro,* dated October 25, 1994; idem CNCom, Division C in re, *Chemlik Martinec Andrés c/ Firestone de Argentina,* dated September 5, 2006; Division D in re, *Mattei Ana María c/ Banco de la Ciudad de Buenos Aires,* dated August 8, 2007; CNCiv., Division E in re, *Benítez Elena Claudia c/ Interacción A.R.T. S.A. s/ ordinario,* dated December 15, 2010.

[26] LLAMBIAS, Jorge J., *Tratado de Derecho Civil. Obligaciones,* Buenos Aires, Perrot, T. I, p. 119 y ss., 1975.

[27] Argentine Court of Appeals in Commercial Matters, Division C, Buenos Aires, *Equipos y Controles S.A. s/Concurso Preventivo,* December 27, 2002. Under such decision of Division C, the debtor has requested the exclusion of a group from the vote count, on the basis of an extensive application of Section 45 of the Argentine Bankruptcy Law and of the provisions of the Antitrust Law, because this was a creditor that was competing with the debtor. The court of appeals held that the creditor's conduct involved unfair competition. Even though the Court of Appeals, by a majority of votes, revoked the resolution subject to appeal, reference should be made to certain concepts expressed -in connection with the subject-matter discussed herein- in the dissenting vote cast by Dr. Monti, who held as follows: "*At this point, though it may seem obvious, it should be noted that the acts prohibited by Sections 1, 2 and 7 and other Sections of Law No. 25156 are illegal for the purposes of Argentine Law as a whole. Alleging otherwise would be absurd, as if a legal system may be fragmented into pieces totally separate from one another.*" He also stated that "*on the other hand, when examining the issue discussed herein, we need to consider other rules that converge with bankruptcy issues. From another perspective, it should be noted that the Argentine Constitution especially provides, in favor of consumers, the right to the "protection of their economic interests", and to "the freedom of choice and equitable and decent dealing conditions", thus establishing, for the purpose of protecting such rights, the duty of the authorities in connection with "the protection of competition against any type of market distortion" (Section 42). The foregoing necessarily*

Restrictive practices may be attributable to one or more firms, whether individuals, State-owned legal entities or private companies, whether for profit or not, which conduct business within the Argentine territory or overseas with effects within Argentina[28].

EU case-law has specified the scope of the term "firm", which has been defined to include professional associations, pension funds and State-owned entities when the same have acted as economic operators in any given market. On the other hand, CNDC, by means of a number of advisory opinions, has interpreted that one or more assets constitute a "firm" when a turnover (sales) may be independently derived therefrom.

Accordingly, evidence must be given that there has been (i) an express or implied agreement between the violators of the Antitrust Law; or (ii) a unilateral act that involves an abuse of dominant position. On the other hand, when dealing with voluntarily parallel conducts and for the purpose of presuming the existence of collusion, the victim of such conducts must show that the behavior of the firms in the relevant market constitutes an unreasonable coordinated conduct.

In addition, the victim shall prove that the act or conduct was intended to limit, restrict, alter or distort competition[29]. In this respect, proving the antitrust violation may be a complex task (i) because, in many cases, the very exercise of the freedom of competition in a certain market may be detrimental to certain market players without constituting a violation, or (ii) because sometimes it is difficult -if not impossible- to obtain proof of the violation when the evidence is in the possession of the violator, or (iii) due to the high costs of the analysis of complex economic, technical or market evidence, or (iv) due to the need to resort to presumptions in cases where the conduct may not be clearly proved or has been successfully concealed by the violators.

Please note that, irrespective of the type of evidence used, the existence of the antitrust violation does not prove the existence of damage in itself nor the violator's civil liability. There are conducts that, notwithstanding their illegal nature, do not cause harm, which situation occurs when the effects of an agreement restricting competition do not actually have an impact upon the market. In these cases, since the general interest has been clearly harmed, an administrative penalty may be imposed, but no civil penalty would be applicable.

Finally, we also believe that business combinations that are inconsistent with the Antitrust Law give rise to compensation for damages. We specifically refer to business combinations (i) that are executed without authorization, when authorization is mandatory, or (ii) in cases where the requirements set forth by the Antitrust Authority to authorize a business combination have not been met, or (iii) that exceed the terms of the authorization granted by the Antitrust Authority for the transaction involved. In these cases, evidence of the harm caused to the private interest protected must also be given.

---

involves the general interest of the community, which is also affected when acts are performed intending to take advantage of the means provided by law -in the case of the rules concerning the vote on the composition with creditors- for a purpose other than that sought by the law, i.e. a purpose not admitted by our legal system (Section 1071 of the Argentine Civil Code). "

[28] See Antitrust Law, Section 3.

[29] See Antitrust Law, Sections 1 and 7.

4.2.1.1. Whether or not there must be an administrative action prior to court proceedings

Reference should be made to the situation in which the relevant actions for damages are filed, which situation will vary depending upon whether or not there has been a prior administrative action whereby CNDC/SCI (or the Antitrust Court, if any) has entered a resolution in accordance with the provisions of the Antitrust Law. Section 4[30] of Law No. 22262, repealed by the Antitrust Law, provided, as a requirement, that an administrative resolution from CNDC shall have been previously obtained, or, failing this, that at least eighteen months shall have elapsed following the commencement of the investigation. This was a clear obstacle for victims to bring civil actions.

The Antitrust Law removed the need to file an action before the administrative authorities prior to the filing of civil actions before the courts. We believe that this has been a helpful amendment to the system, removing the filter whereby only the administrative authority could determine whether or not there had been an infringement of antitrust laws. Accordingly, the victims may choose to bring stand alone civil actions for damages, thus not depending upon the long periods of time during which the administrative authority conducts investigations or examines the reports received for infringement of the prohibitions contained in the Antitrust Law[31].

Especially taking into account the essentially economic nature of antitrust issues, we also believe that in cases where there has not been a prior resolution from the Antitrust Authority, the courts hearing actions for damages as a result of antitrust violations may request the administrative enforcement authorities under the Antitrust Law to issue an opinion.

Notwithstanding the foregoing and as long as appropriate, we believe that it is important to coordinate the legal actions with the administrative proceedings. In this respect, the provisions of Sections 1101 through 1106 of the Argentine Civil Code are fully applicable whenever the administrative action is filed with the Antitrust Authority before -or during- the court proceedings. Consequently, if the administrative action has been filed, no court decision may be laid down until such time as a resolution is rendered within the framework of the administrative proceedings[32]. On the other hand, if an administrative resolution has been rendered sustaining the the relief sought by the victim, the civil action may not discuss the existence of the infringement nor the

---

[30] Law No. 22262, Section 4: *"The victims of the acts prohibited by this law may bring a civil action for damages before the courts with competent jurisdiction over commercial matters, as from the date when: a) the resolution referred to in Section 19 becomes final; b) the resolution approving the proposed transaction referred to in Section 24 is issued; c) the resolution referred to in Section 26 is issued; d) the resolution referred to in Section 30 becomes final. Notwithstanding the foregoing, upon expiration of EIGHTEEN (18) months following the commencement of the investigation, the victims may bring an action for damages. The applicable statute of limitations will be TWO (2) years as from the date when the civil action may be filed, as provided herein"*.

[31] CABANELLAS DE LAS CUEVAS, Guillermo (h), *Derecho Antimonopólico y de Defensa de la Competencia*, Ed. Heliasta, Buenos Aires, T. II, p. 389. In this respect, Cabanellas further states that the removal of the requirement provided for under Section 4 of Law No. 22262 *"(…) is particularly important in light of the administrative authorities' unwillingness, following the enactment of Law No. 25156, to enforce the prohibitions contained in such law."*

[32] See Civil Code, Section 1101

defendant's fault[33]. Conversely, if an administrative resolution is entered acquitting the respondent, no allegations may be made in connection with the existence of the facts that are the subject-matter of such resolution[34].

As opposed to our interpretation, it should be noted that highly reputed legal scholars have stated that Section 51 of the Antitrust Law does not involve a departure from the system of Section 4 of Law No. 22262[35]. This position was adopted by the court precedents laid down by Division C of the Court of Appeals in Commercial Matters in the majority vote in the case entitled "*Equipos y Controles*"[36].

However, as noted above, we believe that the wording of the Antitrust Law concerning this issue puts aside the requirement in connection with the existence of a prior administrative resolution. If the intention was to maintain such requirement, the lawmaker would have expressly established such requirement, just as other laws have done that are similar to the laws of Argentina[37], mainly taking into account that its predecessor expressly provided for such requirement. Accordingly, we agree with the interpretation given by the dissenting vote in "*Equipos y Controles*", which held that the practices designed to obtain a dominant position in a market by means of the elimination of significant competition may not be disregarded by the court (in this case, the bankruptcy court) when evaluating the case[38].

On the other hand, and in line with the questions of law outlined above with respect to the nature of the provisions of the Antitrust Law, the violation of the provisions of the

---

[33] See Civil Code, Section 1102

[34] See Civil Code, Section 1103

[35] CASSAGNE, Bernardo, *Derecho Administrativo de Defensa de la Competencia: ¿Aplicación Administrativa o Judicial de la Ley 25.156? Interrogantes y planteamientos*, EDA, 2003-281. This author mentions two aspects to support such understanding. On the one hand, the proper operation of the Principle of Separation of Powers, in connection with the opinion of the Supreme Court of Justice that since such principle is related to "*the separation of the governance of a State into three branches: legislature, executive and judiciary, each with separate and independent powers and areas of responsibility so that no branch has more power than the other branches, the common or concurrent exercise of such powers would necessarily cause the dividing line to disappear and destroy the foundations of our form of governance"* . As the second aspect, this author believes that -even when a claim requires the existence of harm against a private interest- since the claim derives from anticompetitive practices, whether such practices may, in addition, give rise to damage to the general economic interest must be determined, which determination solely lies, pursuant to this interpretation, with the administrative authority, in this case the Antitrust Court.

[36] Argentine Court of Appeals in Commercial Matters, Division C, Buenos Aires, *Equipos y Controles S.A. s/Concurso Preventivo s/Incidente de Apelación*, dated December 27, 2002, ED dated December 1, 2003, pp. 9 et seq.

[37] Reference should be made to the case of Chile, which by means of a modification of its legal system, incorporated the requirement that the civil court hearing actions for damages as a result of antitrust violations shall enter a ruling on the basis of the decision laid down by the Antitrust Court. Paradoxically, as of the date of such modification, in Chile there had been only one decision sustaining the relief sought by victim for damages caused by antitrust violations (which situation is similar to that of Argentina as of the date hereof). The foregoing indicates that, till then, in Chile there was a clear discouragement to seek compensation for this type of damages, with obvious procedural difficulties. For more information on the matter, see LEWIN MUÑOZ, Nicolás (2010), ob. cit., pp. 44 et seq.

[38] Argentine Court of Appeals in Commercial Matters, Division C, Buenos Aires, *Equipos y Controles S.A. s/Concurso Preventivo s/Incidente de Apelación*, dated December 27, 2002, ED dated December 1, 2003; vote cast by Dr. José L. Monti, who further states, concerning the same topic and based upon Spanish books of authority, that the invalidity of the infringing acts under the Antitrust Law may be sought directly in ordinary jurisdiction, without first resorting to administrative jurisdiction.

Antitrust Law gives rise to the invalidity of such acts, agreements or practices and, therefore, such invalidity may be sought directly before ordinary courts. This interpretation is a necessary consequence of the general principle under Section 18[39] of the Argentine Civil Code that provides for the invalidity of any legal acts that are inconsistent therewith[40].

In addition to the main reasons noted above, at least two additional reasons should be taken into account, which are typical of Argentine idiosyncrasy. One of them is related to the legal scandal that the Antitrust Court[41] has not been created yet, after so many years of the enactment of the Antitrust Law. Unquestionably, CNDC/SCI, as the enforcement authority under Law No. 22.262, dependant upon the Argentine Executive, does not have the powers and independence that the lawmaker in 1999 intended to confer upon it[42]. In addition, it should be noted that the lawmaker has intended to

[39] Civil Code, Section 18 "*The acts prohibited by law are ineffective if the law does not provide for a different effect in the event of infringement*".

[40] URÍA FERNÁNDEZ, Francisco, *Las Consecuencias Jurídico-Privadas de las Conductas Contrarias a la Ley de Defensa de la Competencia. Aportaciones de la Ley 52/1999,* Anuario de Competencia 1999, Madrid-Barcelona, 2000, p. 171 et seq. This author has contributed valuable insight and draws the same conclusion, applied to the case of Spain, the legal system of which is similar to that of Argentina.

[41] There have been several court precedents in relation to this situation. To wit:

- CNCont. Adm. Fed., Division III, April 16, 2007, in the decision *Multicanal*, when analyzing and deciding whether CNDC was empowered to order injunctive relief, the court held that neither Section 35 nor Section 58 of the Antitrust Law provided anything in that respect, thus concluding that *"until such time as the Antitrust Court is created, any injunctive relief shall be subject to Section 24, Subsection (m) of the Antitrust Law, whereby such injunctive relief as deemed appropriate may be sought before the competent court… during the administrative proceedings, the administrative authority –due to the absence of an Antitrust Court- may not act at the same time as a party to the proceedings and judge. To expect the administrative authority to exercise the powers pertaining to courts and grant injunctive relief is inconsistent with the republican principle of separation of powers, and any administrative body so acting would be exceeding its powers"*.
- The Court of Appeals in Civil and Commercial Matters, Division II, on July 27, 2009, in the case Telefónica/Telecom, adopted a similar position to that of Division II in Multicanal: "…the power under… Section 35 of the Antitrust Law… is conferred upon an administrative court that has not been set up yet and has certain independence with respect to its creation and operation".
- CNAPE, Division A, on October 21 2009, also within the framework of the case entitled Telefónica/Telecom held that "…the exercise of a Judiciary function by a body belonging to the Executive, …infringes the provisions of Article 109 of the Argentine Constitution (…) the delay in setting up the administrative court is a "legal scandal".
- The Court of Appeals in Civil and Commercial Matters, Division II, on February 19, 2010, in the case *Cablevisión S.A.* held that *"pursuant to the criteria set by the Division in other actions, CNDC is not empowered to grant injunctive relief under the terms of Section 35 of the Antitrust Law (see "Telecom Italia SpA y otro") (…). CNDC has not been granted all of the powers Law No. 25156 confers upon the Antitrust Court"*. It added as follows: *"this Court of Appeals has recently stressed the failure by the Executive to set up the Antitrust Court –after over ten years-; therefore, such circumstance has been informed to the President of the Supreme Court of Justice of the Republic of Argentina so as to order such actions as deemed appropriate for the purpose of facilitating the organization of such court (see Convention No. 16/09, dated 12.02.09).* Accordingly, Division A served a notice upon the Supreme Court of Justice in that respect (see *"Telefónica de España, Olimpia y otros."*).
- Court of Appeals in Civil and Commercial Matters, Division 2, February 25, 2010, in the case entitled *Direct TV*, insists on stressing the obligation to set up the Antitrust Court.

[42] The independence of the Antitrust Court was one of the most endorsed features in Congress at the time of enacting the Antitrust Law. In addition, one of the most criticized aspects during such debate was the lack of independence of the previous body created under predecessor Law No. 22262. Beyond the so many Parliamentary precedents that are useful to properly interpret the intention of the lawmaker, a detailed analysis of the terms of Section 18 of the Antitrust Law is sufficient to conclude that there are no

maintain CNDC/SCI in operation[43] on a temporary basis and until such time as the Antitrust Court is put into operation, which situation has become permanent, thus constituting a violation by each of the Executives following the enactment of the Antitrust Law.

In addition, another factor should also be taken into account, which, by the way, has become increasingly worse year over year, in relation to the long periods of time required for CNDC/SCI to evaluate and solve claims, market investigations and/or business combinations. These periods of time, which in many cases consist of several years –e.g. in the case of business combinations[44]- and in other cases are not dealt with at all by CNDC/SCI –as in the event of claims that are discussed indefinitely over time-, would make the situation worse for those potential victims of antitrust violations, if having an administrative resolution prior to the filing of the civil action were a *sine-qua-non* requirement.

These additional issues support the questions of law outlined above and show that in Argentine it is important that the State should not deprive individuals of an effective system for the protection of their rights and interests.

Now then, if, as stated above, the removal of the administrative filter established by the predecessor of the Antitrust Law is helpful, we believe that, irrespective of this issue, the lawmaker could have also expressly granted more value to the resolutions laid down by the Antitrust Court.

That is to say, notwithstanding the possibility of bringing civil actions without a prior administrative procedure, in cases where the Antitrust Court has actually heard and resolved a case relating to antitrust violations that are the subject-matter of a civil action, the Antitrust Law might render the resolutions laid down by the Antitrust Court final and conclusive, so that they may then serve as basis for the judges and for the parties to the proceedings (we are talking about the so-called follow-on actions under Comparative Law)[45]. The foregoing, in addition to making the burden of proof upon the

---

doubts concerning the Executive's intention to confer independence upon the Antitrust Court, but not upon CDNDC/SCI. Such Section 18 provides as follows: "*The Argentine Antitrust Court shall consist of seven (7) members sufficiently qualified and skilled to hold such office, of which at least two shall be lawyers and two shall be experts in economics, all of them with over five (5) years experience in their profession. The members of the court shall be engaged in such office on a full-time basis, except for teaching*".

[43] Antitrust Law, Section 58: "*Law No. 22262 is hereby repealed. Notwithstanding the foregoing, any action pending as of the effective date of this law shall continue in accordance with the provisions thereof before the enforcement authority of such law, which shall survive until such time as the Antitrust Court is established and put into operation. In addition, the Antitrust Court shall hear all cases brought following the effective date of this law. Once the Antitrust Court has been established, the cases shall be sent to such Antitrust Court*".

[44] GRECO, E., PETRECOLLA, D., ROMERO, C. y ROMERO GÓMEZ, E., *El Control de Fusiones y Adquisiciones en Argentina (1999-2011): Indicadores de Desempeño*, Estudio, GPR Economía, September 2012, published in http://mpra.ub.uni-muenchen.de/41890.

[45] KOMNINOS, Assimakis, *Private enforcement: An overview of EU and national case law*, Foreword to the e-Competitions Special Issue, No. 44442, www.concurrences.com. This author, concerning follow on actions, generally states that in Europe, *"A comparative analysis of national competition laws shows that although a pre-existing decision by an administrative authoritymay be used by the courts and the litigants to establish and provecertain facts, in particular in case of follow-on civil actions, such adecision does not normally acquire the status of binding authority,though it can certainly be persuasive authority.*

victims lighter, would also permit proceedings to be conducted as summary proceedings and not ordinary proceedings. This has been proposed by the European Commission[46] by means of the Proposed Directive on Antitrust[47]Damages Actions.

In this respect, special reference should be made to the decision of the Court in the case *Autogas*, which held that the anticompetitive behavior attributed to YPF would not be discussed because the same had already been considered and penalized by CNDC and confirmed by the Supreme Court of Justice. Consequently, the Court held that evidence had already been given that the act had been performed with fraudulent intent[48].

4.2.2. Attribution of Liability for the Violation:

The attribution of liability has been defined as *"the determination of the minimum required condition for an act to be attributed to a person as the perpetrator thereof so that such person may bear the consequences thereof"*[49]. That is to say, this element of liability requires the existence of grounds to attribute liability for the illegal behavior to the alleged liable party.

As stated above, the proof of the antitrust violation may be a complex task for the victim, if not impossible, since in many cases there is no conclusive evidence permitting to prove the existence of the violation.

Thus, in cases where there is no resolution of the Antitrust Court, in line with the provisions of Section 51 of the Antitrust Law, the victim of the antitrust violation shall

---

However, some Member States have introduced a rule that civil courts in follow-on proceedings for damages are bound by final infringement decisions of national competition authorities" .

[46] To date, the countries the system of which provides for the binding effect upon civil courts of the resolutions laid down by the antitrust authority are: United Kingdom (Sections 58A and 47A of the UK Competition Act 1998), Germany (Section 33(4) of the GWB (i.e. German Competition Law)), Hungary (Section 88/B(6) of the Hungarian Competition Law), Poland (as provided by the Supreme Court of Poland). On the other hand, in certain European countries there is still a certain degree of refusal to accept the binding effect of the decisions of the administrative authority, such as Spain (see IBAÑEZ COLOMO, Pablo, *A Spanish Court refuses to qualify a contract as a resale agreement and holds that the qualification given by "administrative bodies" to similar agreements is not binding upon national Courts (Melón/Repsol)*, e-Competitions, No. 171, July 7, 2004.

[47] See *"Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union"*, (2013/C 167/07), Official Journal of the European Union, C. 167/19, Strasbourg, June 11, 2013: "*In accordance with Article 16, Paragraph 1, of Regulation No. 1/2003, the decisions of the Commission relating to the proceedings under Article 101 or 102 of the Treaty serve as evidence in subsequent complaints for damages, since no national court may render decisions that may be inconsistent with such decisions of the Commission46. A similar effect should be granted to the final infringement decisions laid down by the national competition authorities (or by a national court of appeals). If an infringement decision has already been entered and the same has become final, the infringing firm may not allege the same issues again in subsequent claims, since doing so would generate legal insecurity and would give rise to unnecessary costs for all of the parties involved as well as for the Judiciary"* (emphasis added).

[48] See *Auto Gas*, Whereas Clause II, Item 1: *"It should be noted that, concerning the abuse of dominant position, such aspect has been finally established. The foregoing on the basis of the decision laid down by the Antitrust Authority (CNDC) resulting in a penalty imposed upon YPF SA by the Secretariat of Industry, Trade and Mining under Resolution No. 189/99 (Exhibit V to the complaint). This was fully supported by Division B of the Court of Appeals in Criminal and Economic Matters in the decision dated 11.24.2000 (Exhibit VI to the complaint), as confirmed by the Supreme Court of Justice of the Republic of Argentina."*

[49] FLORIAN, E. *Trattato de Diritto Penale*, v. I, p.1, Nº 179.

have to give evidence before the courts for the attribution of liability to the alleged violator for such infringement, on the basis of general rules of law regarding tort liability. Evidence must be given that the violator's acts are punishable and that such acts derive from fraudulent intent (fraud) or from failure to act as required (negligence).

When trying to establish the extent of the violator's liability, the following must necessarily be taken into account (i) the magnitude of the harm caused, (ii) the proportion in which such harm may be attributed to this or other factors, and (iii) the extent to which it is fair to attribute such harm to the violator on the basis of the violator's negligence or fraudulent intent.

In this respect, the Argentine Civil Code adopts the foreseeability approach -i.e. the generic duty to act with full knowledge- and the actual precaution -i.e. the intellectual and specific act of precaution-. Consequently, liability may be attributed to a person when (i) the violator has acted knowingly with respect to the harmful consequences of his/her/its acts (fraudulent intent); (ii) the violator did nothing to prevent but could have prevented the consequences (negligence).

Now then, the extension of the liability in the event of negligent anticompetitive practices, in addition to extending to any persons directly or indirectly harmed by the antitrust violation[50], will only take place in connection with the direct and indirect consequences, when the latter could have been prevented[51]. In the event of fraudulent intent, in addition to the consequences referred to in the event of negligence, liability may also be attributed for the unexpected consequences[52]. The victim of an allegedly fraudulent infringement has the burden to prove such fraud beyond a reasonable doubt, since any doubt will be interpreted in favor of the violator and the absence of fraud.

Direct consequences include, without limitation, the exclusion of competition -as a result of predatory practices- and higher prices payable by purchasers -as a result of abuse of dominant position-. On the other hand, foreseeable indirect consequences include, without limitation, the harm caused to suppliers or employees of excluded competitors.

Finally, it should be noted, in this respect, that, even though the Argentine Civil Code provisions referred to above are mainly related to the violator, the scope of application thereof extends to the victim of the antitrust violation, whenever such victim has somehow acted negligently[53]. Consequently, the victim's negligence may have an impact upon the degree of damages and interest that should be compensated by the perpetrator of the antitrust violation, and may even remove liability if the damages may be attributed to the victims.

Notwithstanding what has been herein outlined regarding the attribution of liability as the second element of liability, nothing contained in the current provisions of the Antitrust Law will prevent courts from rendering the resolutions of the administrative competition authority useful as evidence, taking into account that these resolutions

[50] See Civil Code Section 1079.
[51] See Civil Code Sections 903 and 904.
[52] See Civil Code Section 905.
[53] See Section 1111 of the Argentine Civil Code provides as follows: *"Any event that does not cause any damage to the victim, other than as a result of the victim's fault, shall not give rise to any liability"*.

identify the violation and establish the liability of the relevant violators[54]. In these cases, the victims must essentially focus on proving the harm and the causal connection between the antitrust violation and the damage sustained.

In addition, and as stated above (Section 4.2.1.1.), if the Antitrust Law is amended to render the resolutions laid down by the Antitrust Court final and conclusive, the civil courts will have to render a decision on the basis of the final resolution of the Antitrust Court ("follow-on actions"). Accordingly, the civil court would base its decision on the acts, facts and legal description arising out of the final decision of the Antitrust Court and, hence, there would be no need to discuss such elements again in court. On the other hand, as noted above, the foregoing would permit to incorporate, into the Argentine legal system, summary proceedings, thus saving time and resources for the parties to the proceedings[55]. However, we believe that the implementation of such a system should take place after the Antitrust Court is set up and put into operation and after the antitrust law enforcement system is consolidated.

Finally, it should be noted that, in this respect, the European Commission has repeatedly considered that the element of liability is an obstacle that hinders the filing of actions for damages derived from Sections 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU"). In most Member States of the EU, the attribution of liability is not an additional element that must be proved in actions for damages as a result of antitrust violations, whether because providing evidence of the violation is sufficient or because once the violation has been proved, there is a presumption of liability. The European Commission believes that liability is implicitly included in the element of illegality, since demanding evidence of liability severely hinders the actions for damages in antitrust matters[56].

---

[54] See *Auto Gas S.A. c/ YPF S.A. y otro s/Ordinario*, Argentine Court of Original Jurisdiction No. 14 [*Juzgado Nacional de Primera Instancia en lo Comercial Nº 14*], Court Clerk's Office No. 27, September 16, 2009. In Chapter II, Section 1 of the Whereas Clauses of the decision, the Judge held that "*it should be noted that, concerning the abuse of dominant position, such aspect has been finally established. The foregoing on the basis of the decision laid down by the Antitrust Authority (CNDC) resulting in a penalty imposed upon YPF S.A. by the Secretariat of Industry, Trade and Mining under Resolution No. 189/99 (Exhibit V to the complaint). This was fully supported by Division B of the Court of Appeals in Criminal and Economic Matters in the decision dated 11.24.2000 (Exhibit VI to the complaint), as confirmed by the Supreme Court of Justice of the Republic of Argentina*".

[55] The proposal referred to in this paragraph is somehow very similar to how the system currently works in Chile, following 2003 amendment under Law No. 19911. By means of such amendment, Section 30 of Executive Order [*Decreto Ley*] No. 211 was modified, to include a topic that was previously regulated similarly to the current Argentine legal framework (i.e. it was governed by the general rules of tort liability). The new Section 30 of Executive Order No. 211 provided for special summary proceedings before civil courts to hear actions for damages caused as a result of antitrust violations. Such Section 30 provides as follows: "*The applicable action for damages, by reason of the pronouncement by the Antitrust Court of a final decision, shall be filed before the civil court with competent jurisdiction in accordance with the general rules under summary proceedings, as provided in Book III, Title XI of the Code of Civil Proceedings. The civil court, at the time of rendering a decision on the compensation for damages, shall base its decision on the acts, facts and legal description arising out of the decision of the Antitrust Court entered by reason of the enforcement of this law*". For more information on the matter, see LEWIN MUÑOZ, Nicolás (2010), ob. cit., pp. 44 et seq.

[56] See *"Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union"*, (2013/C 167/07), Official Journal of the European Union, C. 167/19, Strasbourg, June 11, 2013. This EC's Proposal expressly provides as follows: *Establishing an infringement of the competition rules, quantifying antitrust damages, and establishing causality between the infringement and the harm suffered typically require a complex factual and economic analysis. Much of the relevant evidence a claimant will need to*

4.2.3. Harm sustained by the claimant:

The third element of liability is the harm suffered by the claimant. If the infringement or violation does not give rise to harm upon the claimant, in our case, the victim of the antitrust violation, the claimant may not seek compensation for an inexistent harm, since otherwise we would be dealing with unjust enrichment[57].

4.2.3.1. General Competition Damage and Private Competition Damage

In the first place, a difference should be made between general competition damage, i.e. any damage affecting the freedom of competition and, strictly speaking, public interest, and private competition damage, i.e. any damage caused as a result of a behavior inconsistent with the freedom of competition that has an impact upon the assets or personal rights of one or more economic operators.

In this respect, there are competition damages that might not affect personal interests and, thus, penalties mainly of an administrative nature should apply to them. Such is the case of agreements restricting competition that do not have an impact upon the market and, consequently, do not cause harm. This conclusion is drawn on the basis of the opinion of highly reputed legal scholars, within the framework of the Argentine legal system, that since the term damage is defined as actual harm capable of giving rise to an action for damages, obviously, there may be an illegal act without damage[58]. That is so whenever the event does not give rise to an action for damages, though it might give rise to other actions for the protection of lawful interests.

However, in most cases, in the event of an antitrust violation, both the market in general and the individual rights of certain competitors or consumers will be affected. In these cases, both administrative penalties (i.e. public enforcement of competition rules) and civil penalties (i.e. private enforcement) shall apply, thus requiring some sort of coordinated action between public and private enforcement with respect to antitrust rules.

4.2.3.1.1. General Competition Damage

Antitrust offences may give rise to the loss of social well-being, as well as result in the inefficient use of resources. This loss is reflected in a reduction in the production of goods, with the quantity produced being less than the quantity that would be ideal under

---

prove his case is in the possession of the defendant or of third persons and is often not sufficiently known or accessible to the claimants ('information asymmetry'). It is widely recognised that the difficulty a claimant encounters in obtaining all necessary evidence constitutes in many Member States one of the key obstacles to damages actions in competition cases."

[57] As outlined hereinbelow, this situation may occur in antitrust violations, to the extent that –as already noted- the Argentine legal framework governing tort liability applies not only to direct victims (as in USA), but also to indirect victims (similarly to the European system). In these cases, when dealing with the issue of the passing-on defense, we will analyze the special features of the case, taking into account that admitting the legal capacity to sue of indirect victims involves the possibility that defendants may also assert, as a defense, that these victims, whether direct or indirect, have passed on the effects of the violation to third parties. Otherwise, the victims would be benefited.

[58] BORDA, Guillermo A., *Tratado de Derecho Civil Argentino – Obligaciones, Segunda Edición,* T. II, p. 224, Editorial Perrot, Buenos Aires.

perfect competition conditions. This reduction necessarily results in an increase of the prices of the goods traded in the market involved.[59]

The loss of social well-being occurs as a result of the loss of the consumer's surplus under perfect competition conditions, where the equilibrium price would be determined by the intersection of the producer's marginal cost curve and the demand curve in the relevant market. In addition, there may be a price increase since the monopolist will produce quantities of goods permitting it to match its marginal cost with its marginal revenue, charging the price at which such produced quantity intersects demand.[60]

This loss of social well-being may not be attributed to a specific person, and thus, redress thereof by means of the theory of civil liability may not be possible. Therefore, the general competition damage classifies antitrust law as a public order law, which serves as basis for the specific sanctions provided for under the Antitrust Law, which will differ from those applicable under the compensation for damages in accordance with the general rules of law.

Chapter VII of the Antitrust Law[61] provides for the applicable penalties in the event of antitrust violations. This penalties are native to criminal administrative law, and all guarantees pertaining to criminal law are applicable thereto. Such penalties vary from the cessation of the acts or practices and the removal of the effects thereof, the imposition of fines, the satisfaction of conditions designed to neutralize the distorting effects upon competition or requesting the competent courts that the infringing firms be dissolved, liquidated, split or divided. All these penalties shall apply notwithstanding any other remedies available.

4.2.3.1.2. Private Competition Damage

In addition to the penalties referred to above, which are mainly designed to correct, penalize and prevent antitrust violations, as reviewed above, the Antitrust Law provides for the possibility that the victims of the acts prohibited by such law may file an action

---

[59] PINDYCK, Robert S. – RUBINFELD, Daniel L. (1995), *Microeconomics*, Part III *Market Structure and Competitive Strategy*, Chapter 10.4. *The Social Costs of Monopoly Power*.

[60] LEWIN, Nicolás (2010), ob. cit., p. 47.

[61] Antitrust Law, Section 46: "*Any individual or legal entity that does not comply with the provisions of this law shall be subject to the following penalties: a) Cessation of the acts or practices provided in Chapters I and II and, if any, the removal of the effects thereof; b) Those who undertake any of the acts prohibited under Chapters I and II and Section 13 of Chapter III shall be subject to a fine between ten thousand Argentine Pesos (AR$ 10,000) and one hundred and fifty-million Argentine Pesos ($ 150,000,000), on the basis of: 1. The loss incurred by all persons affected by the prohibited activity; 2. The profit obtained by all persons involved in the prohibited activity; 3. The value of the assets involved owned by the persons referred to in 2 above, at the time the violation was committed. In the event of a second offence, the amounts of the fine shall be doubled. c) Notwithstanding other remedies available, in the event of acts constituting an abuse of dominant position or whenever a monopoly or oligopoly is established in violation of the provisions of this law, the Court may demand the satisfaction of certain conditions designed to neutralize the distorting effects upon competition or request the competent courts that the infringing firms be dissolved, liquidated, split or divided; d) Any person who does not comply with the provisions of Section 8, 35 and 36 shall be subject to a fine of up to One Million Argentine Pesos (AR$ 1,000,000) per day, as from the date when the proposed business combination should have been notified or as from the date when the order of cessation or restraining order is breached. The foregoing notwithstanding any other remedies that might be available*".

for damages in accordance with the general rules of law, before a court with competent jurisdiction to hear the case[62].

This is consistent with the general principle of law that states that any damage wrongfully caused to another person must be remedied. This principle has been expressly provided for under Section 1077[63] of the Argentine Civil Code and is fully applicable to damages caused within the framework of antitrust matters.

It is important to make a distinction between antitrust offenses that may harm a specific competitor and those that have an impact upon the rights of a group of persons as a whole, i.e. third parties, with whom the violator has no relationship whatsoever[64]. Also, an antitrust offense may even have an impact upon consumers or users of services or products that conduct business in the same market or in related markets. Finally, consideration should also be given to the fact that the anticompetitive practice may even have an impact upon markets that are geographically distant, often in different domestic jurisdictions[65].

In this respect, we understand that the private competition damage consists of the harm suffered by the victim of an antitrust violation on his/her assets, as a result of the violator's breach. This damage consists of two elements: (i) *the consequential damage*, which consists of the loss sustained as a result of the non-receipt of the consideration due; and (ii) *the loss of profits*, which represents the profits that were not obtained by the victim as a result of the violator's breach.

Thus, the compensation for damages as a result of competition offences will consist in the valuation in money of the entire damage that the violator will have to pay in favor of the victim. On the basis of the need for justice, the main purpose of this compensation consists in attempting to remedy the imbalance caused to the legal system as a result of the violator's breach and restore the victim to the financial situation that is closest to the situation in which the victim would be had the competition offense not occurred (balancing and leveling function)

In addition, for the damage involved to be capable of being remedied, the typical requirements applicable to civil liability must be satisfied. That is to say, the damage must be *actual* (and not potential), *persist* at the time demanded, *personal* to the individual or legal entity seeking compensation, affect a *lawful interest* of the aggrieved party and have a *causal connection* with the offense attributed to the offender. Special emphasis should be made on the fact that within the framework of private competition, damages must necessarily be *unlawful*, since many of the damages caused in antitrust matters may be lawful. That is to say, damages may be caused as a result of the normal

[62] See Antitrust Law, Section 51.

[63] Civil Code, Section 1077_ "*All offenses give rise to the obligation to remedy the damage caused to another person as a result thereof*".

[64] For example, in the case of a price agreement in which not only a specific producer but also distributors were affected, whose business was affected as a result of the aforementioned agreement restricting competition.

[65] For example, the case of the cartel of the airlines that were penalized by the competition authorities of various jurisdictions (including USA and Europe), and, later on, damages actions were filed by private victims that were also affected in different jurisdictions.

operation of the freedom of competition in the market, which, consequently, must be borne and are not subject to compensation[66].

4.2.3.1.2.1. Punitive Damages

Following the principles of tort liability, it should be noted that -apart from being of a subsidiary and monetary nature- pursuant to the Argentine legal system, the compensation must be primarily aimed at redressing the harm caused.

However, we believe that nothing prevents the consumer[67] or user victim of antitrust offences from expressly requesting the court that a penalty be imposed upon the violator as punitive damages,[68] as provided under Section 52 bis[69] of Consumer Protection Law No. 24240.

Punitive damages act as some sort of accessory civil fine in addition to the compensation for damages –which is compensatory in nature-, applied for the benefit of the aggrieved party, for the purpose of punishing the supplier that has committed serious misconduct, with an ultimate deterrent function[70]. That is to say, punitive damages are granted to the victim of a damage beyond that actually sustained, and in addition to the material damage (consequential damages and loss of profits) and of the non-material damage (pain and suffering or emotional distress)[71].

Without intending to go deeper into the analysis of punitive damages, which are not the subject-matter of this report, it should be briefly noted that punitive damages are

---

[66] In other words, the loss of *market share* in a certain market, the reduction of sales, the loss of clients or similar events caused as a result of lawful strategies by competitors or because of the access of new players to the market or other lawful situations, do not constitute unlawful damages and, therefore, do not entitle anyone to seek compensation for damages.

[67] Both natural persons and corporations may be considered "consumers" under the Argentina legal system, if the acquisition is made as final and not related with the productive cycle or the corporate activity of the companies. For a deep analysis of what might be understood as consumer, among others, please see SANTARELLI, Fulvio Germán, *Hacia el fin de un concepto único de consumidor*, La Ley, 2009. Also, the Argentine Supreme Court has defined which individuals might be excluded from the "consumer" concept (eg. precedents *Artemis S.A.* and *Aman*) and which may be understood as such (eg. precedent *Mosca*).

[68] LORENZETTI, Ricardo L., *La responsabilidad civil*, LLP, 2002-1302. In this book, Lorenzetti states that one of the main functions of tort liability is the preventive function, which is fulfilled by means of the protection granted by restraining orders, including, without limitation, punitive damages.

[69] Law No. 24240, Section 52 bis: *"Punitive Damages. Any supplier failing to performing the obligations prescribed by law or contract towards the consumer may, if requested by the aggrieved party, be subject to the imposition of a civil fine by the courts in favor of the consumer, which fine shall be adjusted depending upon the seriousness of the event and other circumstances of the case, regardless of any other remedies available. Whenever two or more suppliers are liable for the breach, they shall all be jointly and severally liable to the consumers, notwithstanding any actions for recovery available to them. The civil fine imposed may not exceed the cap of the fine provided for under Section 47, Subsection b) of this law."*

[70] VÍTOLO, Daniel Roque, *Sanciones Pecuniarias Disuasivas*, Diario La Ley, 4 de septiembre de 2013, p. 2. This author outlines a similar definition, makes a preliminary useful analysis of punitive damages, a detailed analysis of the current wording of Section 52 bis of Consumer Protection Law No. 24140 and a well-founded review of the virtues and defects of the new proposals submitted on this matter in the Civil Code and Commercial Code Unification Project.

[71] SANCHEZ COSTA, Pablo F., *Los daños punitivos y su inclusión en la ley de defensa del consumidor*, Diario La Ley, July 20, 2009, p. 2.

currently growing and subject to discussion in Argentina[72]. In this respect, some people allege that they are unconstitutional[73], on the basis of the fact that they allegedly infringe certain constitutional guarantees (including the *non bis in idem*) and that, strictly speaking, they should be subject to the guarantees and principles of criminal law applicable to crimes and punishments. In our opinion, punitive damages are constitutional (following the preceding example, the *non bis in idem* is not violated, because punitive damages represent an additional punishment), to the extent our lawmaker has already admitted other similar remedies that are intended to prevent anyone causing harm from deriving profits therefrom[74]. However, we believe that since punitive damages have already been admitted into the Argentine legal system, our efforts should be focused on them being regulated by law. For such purpose, we need to determine whether including them under the consumer protection system within the framework of general civil liability has been appropriate, as well as the required guarantees to the defendants, the mechanism to adjust the civil fine, the purpose of the fine and other issues, in order to prevent abuses.

Having said that, we believe that, for the purposes hereof, punitive damages represent an undoubtedly useful tool to reinforce the deterrent effect upon potential violators of the Antitrust Law, restrict the abuses of certain firms and, particularly, prevent situations in which it might seem cheaper to cause the harm and then remedy it, instead of preventing the harm at all.

In this respect, we believe that evidence shall be given of the existence of the three main elements required by Section 52 bis of Consumer Protection Law No. 24240 for the purpose of the application of this tool within the context of damages actions for antitrust violations, i.e. there must exist: (i) a consumer relationship; (ii) a supplier that breaches the obligations prescribed by law or contract; and (iii) a consumer that has been injured. In light of these three elements, and subject to the victim having previously and expressly claimed punitive damages, the court shall evaluate whether such petition should be sustained.

4.2.3.2. Methods for Quantifying the Harm

Pursuant to books of authority and case-law, civil liability is intended to restore the situation to the status prior to the harm or, at least, to a situation as similar as possible to that in which the aggrieved party would be should the harm not occurred[75]. Whenever possible, and for the same purpose, in antitrust cases, a compensation shall be set at amounts permitting the victim to return to the situation in which the victim would have been if there had been no anticompetitive practices giving rise to the harm.

That is to say, once the existence of the harm has been ascertained, such harm shall have to be quantified, for the purpose of obtaining compensation accordingly.

---

[72] For a deeper analysis, see: LÓPEZ HERRERA, Edgardo, *Los Daños Punitivos*, Abeledo Perrot, 2nd edition, 2011; PIZARRO, Ramón D., *Daños Punitivos*, in *Derecho de Daños*, part 2. Libro Homenaje al Profesor Félix Alberto Trigo Represas, Buenos Aires, La Rocca, 1993.

[73] PICASSO, Sebastián, *Sobre los denominados daños punitivos*, La Ley, 2007-F, p. 1154.

[74] Argentine laws provide for the possibility of agreeing upon penalty clauses (Section 656, Civil Code), fines (Section 666, Civil Code), penalty interest (Section 622, paragraph two, Civil Code; Section 565, Commercial Code; Section 45, Code of Civil and Commercial Proceedings).

[75] ALTERINI, Atilio, *La Limitación Cuantitativa de la Responsabilidad Civil*, Abeledo-Perrot, 1997, p. 7.

The complexity in quantifying harm in antitrust cases is increased by the number of persons that may be harmed and thus become entitled to seek compensation for damages. As analyzed above, there might be several aggrieved parties.

In connection with *consequential damages* the greatest challenge to be faced by the court will be to determine how the higher costs arising out of the illegal act are passed on to the various players, with an analysis of the scenario in which each of the economic players would act should the antitrust violation not been committed. On the other hand, the difficulty that arises for the determination of the *loss of profits* is related to the great variety of factors that may have an impact upon profits, which may be increased in certain cases by the withdrawal of the victim from the market. For such purposes, there are a number of empirical methods used in comparative law to quantify the harm caused by a cartel, which, in principle, are not exclusive of each other.

First, it should be noted that, since there are no legal provisions indicating the prevalence of one method over the other (instead, they might be overlapped, supplemented or used to compare and contrast the result of their practical application), the court hearing the specific case will have to assess the usefulness and reliability of each method, based upon the court's own discretion.

Without intending to make a thorough description of each of these approaches, which would exceed the purpose hereof, we will describe some of the main approaches, following the classification of the Ashurst Report (2004)[76], to the extent such classification seems to be consistent with the terminology most widely accepted by economists and experts[77]:

- The ***before and after approach*** consists in conducting a comparative analysis of the victim's situation before and after the restrictive practices and, specifically, setting the prices applied before and after the damage, for the purpose of establishing the adequate level of the prices in an infringement-free scenario or under perfect competition conditions. The main difficulty posed by this approach is to establish the exact period during which the cartel operated.
- The ***yardstick approach*** consists in comparing the affected market (the victim belongs to) with other similar markets that have not been affected (or alternatively, with similar competing firms), for the purpose of identifying the conditions that have been altered as a result of the restrictive practices. This will permit to establish the conditions in which the victim would be should the infringement not been committed and, consequently, the damages derived from the alteration of such conditions. Certain specific challenges apply to this approach, such as excluding the indirect effects of the cartel (e.g. the "umbrella

[76] ASHURST REPORT, ob. cit. Part I, Section 3, p. 17

[77] A more detailed description of these approaches may be found in the paper prepared for DG Comp, by Oxera, a team of lawyers led by Dr. Komninos and a team of economists: OXERA, KOMNINOS ET AL. (2009), *Quantifying Antitrust Damages – Towards Non-Binding Guidance for Courts*, December, 2009. Also see (i) ASHURST REPORT, ob. cit. Part I, Section 3, p. 17; (ii) LEWIN MUÑOZ, Nicolás (2010), ob. cit., Ch. 5, p. 51; (iii) note prepared for DG Competetion by Oxera: OXERA (2011), *Comments on the European Commission's Draft Guidance Paper on Quantifying Damages*, September 2011; (iv) RUBINFELD, Daniel (2011), *Antitrust Damages.*

effect", if markets located in areas nearby the market under review are used as *benchmark*).

- The ***cost based approach*** compares the average production costs of an individual product, by adding a reasonable profit margin in order to determine the applicable price under normal market conditions. The resulting price is compared to the price applied by the victim company following the violation of competition rules. One of the difficulties posed by this approach is to be able to get reliable and material cost information, since accounting book costs don't usually reflect actual economic costs. On the other hand, it also requires sufficient understanding permitting to properly determine a reasonable profit margin if the market operates under normal competition conditions (i.e. no cartel).
- The ***simulation approach***[78] is connected with the previous approach (***cost based approach***), since it requires certain cost information, but its approach uses a specific competition model, permitting to "simulate" profit margins. Basically, apart from cost information, it requires information concerning the structure of the market and demand (such as the elasticity of demand).

In Argentina, reference should be made to the work of Germán Coloma[79], in which this economist proposes a simplified prospective approach that is useful to estimate damages in antitrust cases in which there is no information with respect to a situation that is alternative to that of the allegedly anticompetitive behavior (e.g. in the case of anticompetitive practices persisting for a long period of time, where there is no alternative situation).

As might be noted, the different approaches for quantifying damages converge in the fact that the quantification of damages is based upon a hypothetical analysis consisting in determining the situation in which the victim of the anticompetitive practice would be should the infringement of competition rules not occurred. There are other alternative approaches for quantifying damages, the detailed analysis of which exceeds the purpose hereof.

It should be noted, once again, that the Argentine legal system does not provide for the criteria on the basis of which the compensation amount should be determined, neither it provides for the approach that may be eventually used for such purpose. Notwithstanding the foregoing, there is no obstacle for one or several of the approaches described above to be used by the courts at the time of estimating damages, mainly taking into account that the same are commonly used in various European countries the legal systems of which are similar to the Argentine system in this respect.

Among other factors, the determination of damages will depend upon the position adopted by the claimant. That is to say, whether the claimant passed on the harm (e.g.

[78] The second report prepared by Oxera regarding the quantification of damages (OXERA (2011) ob. cit., Section 3.2, p. 6) criticizes the use of the term "simulation" since it creates the appearance of something very elaborate, and, instead, proposes the term ***market-structure-based approach***.

[79] COLOMA, Germán, *Un Método Prospectivo Simplificado para la Estimación de Daños en Casos de Defensa de la Competencia*, Serie "Documentos de Trabajo", Universidad del CEMA, Buenos Aires, Argentina, November 2011.

price increase) to the subsequent stages of production or distribution. This subject will be dealt with hereinbelow, at the time of discussing the "*passing-on defense*"[80].

The US case has its own characteristics, since the American legal system provides for the possibility of claiming "*treble damages*"[81], which is one of the major deterrent effects of antitrust regulations in the US, i.e. the possibility of claimants to recover three times the amount of the actual financial losses , in addition to legal costs and fees.

On the other hand, in the EU there is no possibility of claiming *treble damages* as in the US, but due to the long period of time during which cartels generally operate, the possibility of adding interest may easily permit to double the actual damage caused. In addition, the European Court of Justice, in the case *Manfredi*, held that the victims should not only be able to claim actual damages, but also loss of profits and interest.

4.2.4. Causal Connection:

Pursuant to books of authority, it should be taken into account that the ontological principle of cause and effect derives from the logical principle of sufficient reason, i.e.: *everything happens for a reason*[82].

At this point, a distinction should be made between the causal connection and the factors used to attribute liability because, even though they both seem to be related, the former is associated with the person that caused the harm and the latter, on the other hand, is associated with whether such person should be actually held liable for such harm.

Legally speaking, the causal connection may be defined as the external material relationship existing between the damage and the act performed by the person or thing[83].

Pursuant to books of authority and case-law, for liability to exist for a damage, the same must have been "caused" by an act or omission attributable to a person. In this respect, the causal connection is an essential element for redressing the damage.

This element of liability perhaps is the most difficult to prove for the victim of the antitrust violation. In many cases, it is not only the anticompetitive behavior of the violator that causes the harm, but there are also other external causes that give rise to the business risk[84]. Explaining these causes in order to later conduct the analysis concerning

---

[80] In the decision in *Autogas*, the Court of Original Jurisdiction made a clear description of how a portion of the price increase had been passed on downstream, for the purpose of estimating the amounts of the compensation claimed by plaintiff. For more information, see *Autogas S.A. c/ YPF S.A. y otro s/Ordinario*, Argentine Court of Original Jurisdiction No. 14 [*Juzgado Nacional de Primera Instancia en lo Comercial Nº 14*], Court Clerk's Office No. 27, September 16, 2009.

[81] See Section 4, Clayton Act.

[82] GOLDENBERG, Isidoro, *La Relación de Causalidad como eje del sistema de responsabilidad civil,* in the book *Responsabilidad Civil – Presupuestos,* Avocatus, Córdoba, 1997, p. 112

[83] TRIGO REPRESAS, Félix A. – LÓPEZ MESA, Marcelo J., *Tratado de la Responsabilidad Civil,* La Ley, 2004, T.I, p. 580.

[84] These causes or factors that are external to the antitrust violation may vary from the incorporation of new competing firms or technologies into the market to the implementation of market intervention policies by the Government or inflation and deflation. Also, as noted above, the victim's own fault may

the attribution of liability may be a complex and expensive task for the victims of anticompetitive violations, who will have to request advice from experts to facilitate the production of the evidence.

4.3. Legal Capacity to Sue and Be Sued

4.3.1. Legal Standing to Sue and the Passing-on Defense

In this paper[85], we have analyzed who the potential victims of competition offences are. The right to claim damages undoubtedly arises from Section 51 of the Antitrust Law; however, there are two interrelated enigmas in this context: (i) on the one hand, the issue of who is entitled to bring damages actions and, specifically, whether only the direct victims (direct purchasers) are entitled to do so or they might also be filed by the indirect victims (indirect purchasers) of the anticompetitive practices; and (ii) on the other hand, whether defendants are entitled to assert the so-called *passing-on defense*.

Concerning who is entitled to file damages actions for anticompetitive practices, there is no unanimous opinion in comparative law. As already noted, even though there are no doubts with respect to the legal capacity to sue of direct purchasers, in certain jurisdictions, the legal capacity of indirect purchasers is contested.

On the other hand, in the United States, only direct purchasers have legal capacity to sue, whereas indirect purchasers are not entitled to bring any action[86]. The decision rendered in *Illinois Brick*[87] by the US Supreme Court, in 1977, resolved that compensation for damages may not be sought by indirect purchasers, considering the essentially punitive and deterrent nature of the compensation for damages in such legal system, which entitles the victim to recover three times (*treble damages*) the amount of the damages actually suffered[88].

Conversely, Europe generally admits the legal standing of indirect purchasers[89]. As from the decision in *Courage*[90] it is clear that, in Europe, damages may be claimed by

---

have caused, in whole or in part, the damage involved (in which case, Section 1111 of the Argentine Civil Code shall apply), or the damage may have been caused by a catastrophe or a third party.

[85] See Section 3 hereof.

[86] See *Schaffer v. Universal Rundle Corp*., 397 D. 2d 893 (5th Cir. 1968); *Productive Inventions Inc. v. Trico Products Corp*., 224 F. 2d 678 (2nd Cir. 1955).

[87] See *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

[88] Most books of authority have also held that indirect purchasers should not be entitled to sue, upon the understanding that the immediate cause of the damages sustained by the indirect purchaser is not the behavior of the perpetrator of the competition offence, but, instead, the fact that the direct purchaser has passed on, downstream the distribution chain, the price increase imposed upon the direct purchaser by the violator.

[89] It should be noted that, in Europe, some domestic legal systems contain restrictive rules concerning the legal standing to sue for damages actions related to the freedom of competition. In civil law systems based on the Roman-Germanic tradition, the issue regarding competition offences has been more or less clear in those jurisdictions that have adopted the French Civil Code (Section 1382), thus permitting a broader approach with respect to who has legal standing to sue. However, there have been certain problems in countries that have adopted the German system of *Schutznorm*, whereby the plaintiffs claiming damages should belong to a group of persons that is intended to be protected by the lawmaker. On the other hand, in other countries –such as Italy- courts have found it difficult to grant legal standing to sue to certain persons, particularly consumers, as a result of the distinction between legal rights (*diritti soggettivi*) and lawful interests (*interessi legitimi*). Pursuant to this approach, competition rules are only

firms as well as by any other aggrieved third party, whether consumers, users, shareholders, investors or any person adversely affected by the restrictive practices. This criterion adopted by the European Court of Justice has been confirmed in the recent Proposed Directive on Antitrust Damages Actions, to the extent Article 2 thereof provides that "any person", whether an individual or a legal entity, adversely affected by an infringement of competition rules should be granted equivalent protection across the EU and should be entitled to efficiently exercise his/her/its right to claim compensation for damages before the domestic courts[91]. The Proposed Directive on Antitrust Damages Actions therefore adopts a compensatory approach: its purpose is to compensate those that have been harmed by an infringement of competition rules, which compensation shall be borne by the infringing firm(s).

We understand that an approach similar to that applicable in Europe is applicable in Argentina. In this respect, compensation for damages under Section 51 of the Antitrust Law may be sought by both the parties directly affected by the anticompetitive practices and the competitors excluded by the predatory practices, whether or not they have a relationship with the infringing firm, as well as the consumers that have paid price increases as a result of an abuse of dominant position, and the employees or suppliers of such excluded competitors. Thus, the civil liability applicable under Argentine law is more extensive than that under US laws[92].

We understand that this is a challenge, as a consequence of this broad legal standing to sue, to the extent that even the firms that were a party to the agreement restricting competition may seek compensation for damages. Within such context, paradoxically, those firms will be in a better position in connection with the evidence than the third parties that have nothing to do with the wrongful act. In this case, courts will have to analyze whether the claimant may seek compensation for damages in such cases or whether, on the other hand, the persons involved in the wrongful act are not entitled to damages because nobody can take advantage of their own misconduct.

Accordingly, we understand that, within the framework of Argentine Law, the doctrine of estoppel applies and, consequently, the infringing firm is not entitled to claim compensation for the damages suffered as a result of the illegal behavior in which it was involved. Otherwise, in the event the action for damages is sustained under such circumstances, the provisions of the Argentine Civil Code will be fully applicable with respect to the consequences upon any person exposed to harm because of reckless behavior and who, therefore, implicitly accepted the potential consequences of their acts, thus restricting their right to compensation.

We are going to analyze now the *passing-on defense*. Let's suppose that the members of a cartel that produce wood have been setting prices during a certain period of time. Their immediate customers (direct purchasers) that purchase wood to manufacture

---

intended to protect lawful interests and consumers may not make use of this protection (which approach, in turn, is currently being discussed in Italian courts).

[90] See *Courage Ltd. c. Crehan Bernard*, C - 453/99 (2001), ECR I-6297.

[91] See *Proposal for a DIRECTIVE 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*, Strasbourg, June 11, 2013, COM(2013) 404, 2013/0185 (COD), Ch. I, Art. 2.

[92] See CABANELLAS DE LAS CUEVAS, Guillermo (h), *Derecho Antimonopólico y de Defensa de la Competencia*, Ed. Heliasta, Buenos Aires, T. II, page 390.

furniture have paid for the wood more than what they would have paid if such cartel didn't exist. However, the price increase may be *passed on*, in whole or in part, by these purchasers to their own customers, i.e. the purchasers of furniture (indirect purchasers). What is more, such purchasers may themselves pass on all or a portion of such price increase downstream in the distribution chain.

Some issues arise out of this situation: in the first place, if the producers of furniture (direct purchasers) sue the cartel members, may the cartel members allege, as a defense, that the producers of furniture passed on their loss to their own purchasers (indirect purchasers)? In other words, may they assert the *passing-on defense*?

These issues are complex. On the one hand, denying the possibility of asserting, as a defense, that the higher costs have been passed-on to other tiers of the distribution chain would permit the producers of furniture (direct purchasers) to recover damages for a loss that they have not actually suffered. On the other hand, admitting the passing-on defense suggests that firms, or eventually final consumers too, way down in the distribution chain, may also claim compensation for damages. However, as we go down the distribution chain, the calculation of the damage suffered becomes more difficult and there is a risk that, since the damage sustained by firms or final consumers is so negligible, nobody may eventually claim compensation for damages at all: this would precisely confirm the profit improperly obtained by the cartel members.

The US Supreme Court dismissed the *passing-on defense* in *Hanover Shoe*[93], because – as noted above- in the US damages have a fundamental role in deterring cartels[94]. In this respect, the general principle whereby indirect purchasers may not file complaints established by the US Supreme Court in *Illinois Brick*[95] is a natural corollary of the decision rendered in *Hanover Shoe* in connection with the dismissal of the passing-on defense.

In Europe, the general criterion is to permit the passing-on defense. The decision entered by the European Court of Justice in *Manfredi*[96] does not specifically deal with the passing-on defense; however, it holds that "any" individual should be entitled to claim compensation for damages for losses caused by anticompetitive practices, which means that both direct and indirect purchasers may bring legal actions.

Notwithstanding the foregoing, it should be noted that, in Germany, courts have found it difficult to grant legal standing to certain claimants, because there is a specific rule against the *passing-on defense*[97]. In contrast, French courts fully admit the passing-on defense, since the issue of the legal standing to sue of indirect purchasers is not a contested issue in such jurisdiction.

As noted above, in Argentina, any aggrieved party may claim compensation for damages, adopting an approach that is most similar to the European approach.

---

[93] See *Hanover Shoe Inc. vs. United Shoe Machinery Corp*, 392 US 481 (1968).

[94] By granting the claimant the possibility of recovering three times the amount of the damages actually suffered (*treble damages*), instead of simple compensatory damages.

[95] See *Illinois Brick Co v Illinois*, 431 US 720 (1977)

[96] This decision is confirmed in *Pfleiderer AG v Bundeskartellamt*, Caso C-360/09 [2011] ECR I-000, [2011] 5 CMLR 219.

[97] See GWB - German Competition Law, Section 33(3).

Accordingly, the decision in *Autogas* also sheds some light on the viability of asserting the passing-on defense by resolving to sustain in part the defense filed by YPF in this respect. Specifically, the court held that a portion of the damage claimed by plaintiff was not capable of being compensated, because plaintiff had passed on "downstream" a portion of the price increase claimed from defendant[98]. On the basis of the foregoing, we believe that indirect purchasers (e.g. final consumers) –which, in our opinion, have sufficient legal capacity to sue under Argentine laws- may claim for the excess of the portion of the damages not granted to the direct purchaser, i.e. the plaintiff in the case *Autogas*.

4.3.2. Collective Redress Mechanisms

Within the limited scope of this work, we will now briefly deal with what has been referred among us as "class actions", but that we shall referred to as "class proceedings"[99], following respected authors on this subject and in order to honor the most precise use of our language (Spanish, in the original text of this work).

Current laws are very different from the laws in force at the time of our parents and grandparents.

Among other differences, nowadays is common practice to identify groups of contracts subject to general hiring conditions or standard provisions. Consequently, proceedings will normally change to "mass" proceedings that require decisions with a general scope similar to the cases giving rise to such proceedings. Accordingly, class actions are undoubtedly a fact in Argentina. They have been developing for some time now and they finally are here to say, beyond the discussions regarding the eventual costs of their implementation in Argentine law, the effort involved in trying not to "copy and paste" foreign systems in Argentine local reality or other issues arising in the discussions concerning class actions[100].

It is truth that the implementation of these class actions involves costs. However, we do think that continuing with the current situation is more expensive, with courts crammed with case files, cases that go on for years with no resolution, several courts hearing the same cases, at the risk of obtaining different solutions for identical situations, in addition to the multiplier effect of having so many employees and hours of work in so many different courts hearing so many similar cases.

It is necessary –and imperative- to accept that, in Argentina, class actions are a fact and that, concerning the risks arising out of the absence of express legal provisions to

[98] See *Autogas*, where the Court took into account the information supplied by CNDC that the price increases had been passed on to the final price paid by consumers (i.e., the persons adversely affected by YPF's acts had been mainly the consumers, and not GLP's distributors). Based upon the accounting expert's report, the court decided to accept 30% of the amount claimed by plaintiff.

[99] GARCÍA PULLÉS, Fernando, "Acumulación de procesos y procesos de clase", Ed. Ad Hoc, Buenos Aires, 2002, pp. 79 y ss.;

[100] Over sixty years ago, Marco Aurelio Risolía stated in his doctoral dissertation that, at the time, there was already a common denominator for law as a whole, which he described as *"(…) the undermining of the individual perspective and the strengthening of social perspective in the relationships between human beings"*.

regulate the matter[101], the only viable option left is to regulate class actions as best as possible. Thoroughly and properly regulating class actions will also permit to mitigate the costs of their implementation and benefit all of the parties to the proceedings equally (plaintiffs and defendants).

Clearly, the class actions are not a creation "made in Argentina". Class actions originated between the XVIth and XVIIth centuries[102] and are typical of US Law and have consolidated under US Law during the second half of the 20th Century. They are proceedings in which legal standing is given to a class or group the individual and/or collective rights of which have been affected.

The US Federal Rules of Civil Procedure substantiated the so-called "class actions". The current wording of Rule 23 provides the following prerequisites to bring a "class action": *"One or more members of a class may sue orbe sued as representative parties on behalf of all members only if: (i) the class is so numerous that joinder of all members is impracticable; (ii) there are questions of law or fact common to the class; (iii) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and(iv) the representative parties will fairly and adequately protect the interests of the class."* Rule 23 also provides for the general and procedural guidelines concerning admissibility, effects, joinder and notice, among others.

In Europe, efforts have been made to introduce class actions; however, to date, there is no full consensus on the matter and, in contrast, there is a refusal to implement class actions without first adjusting class actions to conform to the culture and legal criteria of the Old Continent.

Thus, the European Commission's Green Paper of 2005 -concerning damages actions in antitrust matters at European level- states that, for practical reasons, it is very unlikely, if not impossible, that consumers and purchasers with small claims may file an action for damages for breach of antitrust laws. Therefore, efforts were made to find the ways in which these interests may be best protected by class actions, thus saving time and money. However, after the relevant public consultations, both on the Green Paper and on the subsequent White Paper of 2010, the recent Proposed Directive on Antitrust Damages Actions chose not to provide anything concerning class actions specifically

[101] GARCÍA PULLÉS, Fernando, *Las sentencias que declaran la inconstitucionalidad de las leyes que vulneran derechos de incidencia colectiva. ¿El fin del paradigma de los límites subjetivos de la cosa juzgada? ¿El nacimiento de los procesos de clase?,* La Ley 2009-B, p. 186. In this article, the author states that, for the purpose of regulating class actions, the following will have to be considered: the composition of the class, whether they have to be conducted at the request of plaintiff, defendant or ex officio, which court will have jurisdiction to hear the case, whether the existence of interests subject to several jurisdictions will justify the intervention of the federal courts or they must be filed before regional courts, how to prevent the duplication of identical cases, whether a class action registry will be created, how the class members are to be summoned, who will represent the class, whether the legal counsel will be chosen by the class members themselves based upon priority in the filing of the complaint or by public bodies, whether special qualifications and periodic reporting will be required from the legal counsel, what role the Ombudsman, the Associations and Public Prosecutor's Office will have in these proceedings, what provisions will be established in connection with how these proceedings are to be conducted, the evidence consisting in the testimony of the parties or whether the method in which certain hearings are conducted should be changed, how settlements will be regulated, what the effects of the decisions entered will be, what kind of appeals may be filed against such decisions and who will be entitled to lodge such appeals.

[102] CUETO RÚA, Julio, *La acción por clase de personas (Class Actions),* La Ley 1988-C, p. 952.

applicable to antitrust matters and, instead, the European Commission adopted a horizontal framework providing for common rules on class actions for all political spheres, including antitrust matters, in which damages are often caused, which consumers and small and medium sized companies find it difficult to recover[103].

In Argentina, the constitutional reform of 1994 extended the spectrum of persons entitled to sue, which was traditionally limited to those holding an individual legal right. Later, the Argentine Supreme Court, in the *Halabi*[104] case, tried to clarify the scope and application of certain constitutional rules and invited the legislators to adequately regulate the matter, under the guidelines set forth in *Halabi*. Thus, the Court shed some light on the scope of Section 43 of the Argentine National Constitution, more specifically paragraph two thereof, by incorporating class actions into the Argentine legal system. Thus, the case *Halabi* has become a clear turning point with respect to collective redress mechanisms, since the position upheld in such decision was successively confirmed in its most recent decisions[105].

The decision in the case *Halabi* is particularly important to settle the issue related to the legal capacity to sue seeking the protection of collective rights. In this case, the Supreme Court understood that the following needs to be determined: (i) in the first place, the legal nature of the rights the protection of which is sought by means of the complaint filed; (ii) in the second place, the individuals entitled to file such action and the conditions that must be satisfied for it to be admissible; and (iii) finally, the effects derived from the resolution ultimately rendered.

Concerning the first item, i.e. the legal nature of the rights the protection of which is sought, the Supreme Court distinguished among: (1) individual rights,; (2) collective rights for the protection of the collective good; and (3) collective rights as individual homogeneous rights.

With respect to the rights referred to in (3) above —which are involved herein— the Supreme Court expressed that the same derive from paragraph two of Section 43 of the Argentine National Constitution, such as "*the personal or proprietary rights derived from damage to the environment and competition, the rights of users and consumers and the rights of discriminated against individuals*".

The Report of the Attorney's General Office in the recent decision in *PADEC*, when referring to *Halabi* stated that "*in these cases, there is no collective good, to the extent that individual rights have been affected that are entirely divisible. However, the opinion has also been that there is a unique and continuous event that causes the harm to all of them and, therefore, a homogeneous factual cause may be identified. The claim must be focused on the common effects of this event and not on what may be claimed by each individual. Thus, the existence of a cause or issue, in these cases, is not related to*

[103] Communication from the European Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *Towards a European Horizontal Framework for Collective Redress,* COM(2013), 401 final.
[104] CSJN, Fallos 332:111.
[105] CSJN "Cavalieri, Jorge y Otro c/Swiss Medical S.A. s/Amparo", June 26, 2012, Fallos 335:1080; CSJN, "PADEC c./Swiss Medical S.A. s/nulidad de cláusulas contractuales", August 21, 2013, Case File Letter P, No.: 361. Volume: XLIII.

the separate damage suffered by each individual, but to the homogeneous elements of such plurality of individuals that are affected by one and the same event."

The third element, i.e. the effects of the resolution ultimately rendered, arises from the verification of a clear impact upon the access to justice. This is due to a factual and regulatory homogeneity that leads us to reasonably consider that it is advisable to conduct a single lawsuit with expansive effects of the final decision rendered therein, except concerning the evidence of the harm caused[106].

The foregoing in addition to the fact that this must be a group of persons for whom the separate protection of their rights is not efficient, because the extent of the harm, taken individually, is less significant than the cost of prosecuting on their own.

Regarding the person with legal standing to sue seeking protection of collective rights, in connection with homogeneous individual interests, the Supreme Court held that it is absolutely acceptable within the framework of the Argentine legal system for an aggrieved party, the Ombudsman or certain associations to file, under the terms of paragraph two of Section 43 of the Argentine National Constitution, a class action with characteristics and effects similar to those available under US laws[107].

The decision in *PADEC* was rendered at a time when virtually all courts of first instance of the Federal District of Buenos Aires have accepted the legal standing of consumer associations to bring class actions. Even though class actions arise from Section 54 of Consumer Protection Law No. 24240, we believe that those associations engaged, for example, in the protection of consumers against any damage caused to them as a result of infringements of antitrust rules shall be collectively entitled to bring a class actions on behalf of the individual, economic and divisible rights of consumers.

There is still a lot of work to do on class actions. However, under the current state of development of these proceedings, we believe that the same may be an important tool for the purpose of permitting the sustained and actual growth of damages actions for antitrust violations. Particularly, we believe that class actions may have a very important role in that respect, when it comes to actions for damages the individual amount of which is insignificant (e.g. damages as a result of the increase in the prices of products that are very fragmented in the community), which do not justify the commencement of individual legal actions, as where there are many aggrieved parties as a result of anticompetitive practices, whether due to agreements restricting competition or abuses of dominant position.

4.3.3. Legal Standing to Be Sued

Antitrust damages actions are generally filed against firms, irrespective of the corporate type adopted.

Additionally, the managers of firms that have infringed the Antitrust Law may be defendants in civil liability actions. The managers and representatives of the companies

[106] See Whereas Clause 12, Decision "Halabi", Fallos 332:111.
[107] See Whereas Clause 19, "Halabi", Fallos 332:111.

have a duty to act faithfully and with due diligence and reasonable care[108]. The breach of this duty gives rise to personal joint and several liability for the damages caused by the acts or omissions of the party at fault.

5. CONCLUSION

Even though, as expressed herein, the compensation for damages as a result of infringements of the freedom of competition has recently originated, there are sufficient factual and legal bases for such actions to grow in Argentina.

The reality of Argentine economy provides a lot of opportunities for the consolidation of the rights to compensation for infringements of antitrust rules. However, the political and social reality of Argentina reflects a serious lack of institutionalism concerning antitrust matters and, in turn, there is a significant degree of lack of information in general on the matter, both among consumers and firms.

As discussed above, the private enforcement system of antitrust rules provided for under the Antitrust Law, by means of general rules of civil liability, supplements and reinforces the public enforcement in charge of the State by means of its law enforcement bodies. This sort of mixed system provides more protection to the public and private interests and may become a useful tool for the protection of the rights of individuals and legal entities that may be affected by this type of infringements.

In addition, we understand that the possibility of claiming punitive damages, as an additional punishment, as well as the alternative to bring class actions, serve as important incentives to promote this type of claims which constitute an important deterrent element for eventual future abuses and antitrust violations. The development of both systems should be closely monitored, for the purpose of preventing abuses in the use thereof.

In this report, we have tried to make an initial approach to the subject, in order to make a small contribution to better understanding this matter and its potential scopes.

We believe that, if damages actions for antitrust violations are finally consolidated, we will be experimenting a new dimension of antitrust law in Argentina, which will undoubtedly result in new advantages, both for consumers and for firms equally, will provide more institutionalism and, more importantly, will contribute to furthering the protection of the general economic interest, which is the ultimate purpose of the Antitrust Law.

[108] See Argentine Business Companies Law No. 19550, Section 59.