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Competition Authorities' Growing Support of Damages Actions: A Delicate Balance

Competition authorities around the globe are taking an increasingly active part in the pursuit of civil claims for damages for antitrust infringements. The decision by the Korean Fair Trade Commission ("KFTC"), announced on 24 January, to finance a damages action brought by the Green Consumer Network against Samsung and LG on the basis of its infringement decision in this respect marks a new and interesting development. The increasingly proactive assistance and support provided by competition authorities to follow-on claims for damages is a matter that undertakings will need to consider when deciding whether to inform competition authorities of their own anti-competitive conduct in the context of an application for leniency or immunity from fines.

There are a number of different ways in which competition authorities can support follow-on civil claims based on findings of competition law infringements. First, recent legislative developments in certain jurisdictions permit competition authorities to file actions for damages on their own initiative. The decision of the KFTC to fund a private plaintiff is another example of competition authority support for civil follow-on actions. Finally, competition authorities can invite input from those arguably harmed by alleged anti-competitive conduct during infringement investigations and proceedings and, if an infringement is found, make express reference to the scope of the harm resulting from such conduct, and the damage caused, in their final decision.

Hungary is a good illustration of the first example. Since 2011, the Hungarian Competition Act allows the Hungarian competition authority to pursue civil law claims based on competition law infringements on behalf of consumers if a number of conditions are met. The competition authority must have either initiated proceedings or closed a case with a finding of an infringement, and the legal basis and the causal link between the infringement and the damages must be clearly identifiable. In addition, the amount of damages must be determinable, and the infringement must affect a large number of consumers who are identifiable, at least as a group. Affected consumers continue to retain the right to initiate their own civil law actions against the infringers.

In Australia, similarly, Section 87 of the new Competition and Consumer Act 2010 allows the Australian Competition and Consumer Commission ("ACCC") to act on behalf of one or more persons who have suffered (or are likely to suffer) loss or damages from competition infringements. With the consent of the affected persons, the ACCC can seek a wide range of compensation orders, including disgorgement of the benefit obtained as a result of the anti-competitive behaviour or the payment of compensation to those affected.

As mentioned above, on 24 January the KFTC announced that it would financially support the Green Consumer Network's class action lawsuit against Samsung and LG. The KFTC reportedly based its decision on the consideration that the fines which it imposed 11 days earlier for a price fixing infringement in relation to household electronics were not a sufficient deterrent.

But even less direct active intervention by competition authorities can have a significant impact on the success of follow-on damages actions. For example, in the inves-

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tigations of cartel practices in the automotive parts sector, the U.S. Department of Justice and the Canadian Competition Bureau have reportedly sought and obtained input from car manufacturers who arguably would have been harmed by the alleged cartel and who would therefore potentially be significant plaintiffs in any private follow-on actions. Similarly, the EU Commission has a practice of requesting information from third parties in the course of infringement investigations and proceedings, and thus has the opportunity to obtain input from potential private plaintiffs, if deemed useful. This could put potential plaintiffs in a position to influence the scope and the direction of the authorities' investigation and, ultimately, the content of the final decision.

Finally, a recent decision of the Italian competition authority illustrates the potential impact of a more "damages conscious" approach by competition authorities in their decision making. In its 11 January 2012 decision fining Pfizer €10.6 million for the abuse of its dominant position in the market of ocular glaucoma drugs, the Italian authority determined that Pfizer's infringement, which it found consisted of delaying the entry of competing generic pharmaceutical products, had resulted in €14 million in lost savings to the Italian national healthcare system.

Competition authorities' increasing support for follow-on actions for damages raises complex questions in relation to the optimal combination of private enforcement on the one hand, and effective public enforcement which is heavily dependent on leniency applications, on the other hand. It may increasingly cause undertakings to reconsider the merits of a leniency application in light of the detailed information requirements involved and the impact disclosures may have on the scope of follow-on civil actions. If competition authorities become increasingly proactive in pursuing and assisting private follow-on claims, undertakings may well question whether the opportunity for avoiding some or all of a fine by making a leniency application is off-set by an increased risk of successful private follow-on claims.