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Harbour View

Competition (r)evolution

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Featuring topical articles by guest authors and the Harbour Team.

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South East Asia & Australia
A new dawn?

By Ruth Stackpool-Moore, Asia Dispute Funding

Competition law was established as early as the Roman Empire and has continued to evolve ever since. With companies becoming more global, developments in this area of law are closely monitored by businesses and consumers worldwide.

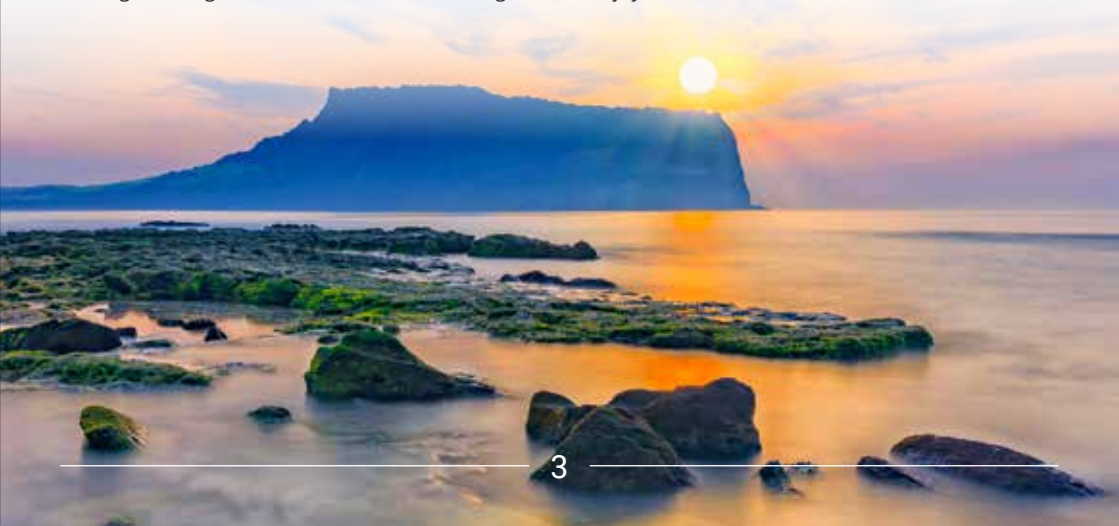
Mature jurisdictions such as the US and EU have well entrenched anti-trust or competition laws. Reforms in emerging jurisdictions have been prevalent – take the recent competition law developments in South East Asia, for example. But will they bring the desired impact?

Herbert Smith Freehills summarises key South East Asian competition law regimes and Rajah & Tann offers the bird's eye view, approaching the legal changes from the defendant's angle. 20 Essex Street investigates whether any of the new South East Asian regimes strike gold in creating a promising new centre for competition law damages claims.

Could recent reforms offer a much-needed turnaround for private litigation in Australia? Webb Henderson explains why private enforcement actions of anti-competitive conduct are so rare and how reforms may shift that notion.

Our team looks at what options to fund private actions for competition law damages are available and, to conclude, outlines the questions one should ask when choosing a funder.

Enjoy the edition!

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Competition law damages
Options for funding private actions

By Stephen O'Dowd, Senior Director of Litigation Funding, Harbour

In the UK, it is becoming increasingly common for private parties to seek damages for infringements of competition law. Infringements include cartel behaviour, where companies conspire to fix the price of a product at an illegally high rate, and exploitation of a dominant market position.

Competition infringements typically affect multiple victims. This fact, coupled with the cost-intensive nature of competition litigation, has undoubtedly led to the prevalence of group or class actions in this space.

The starting point for any action is an initial investigation by competition litigation specialists, to see whether a good claim exists and is worth pursuing. Following a positive investigation, funding options come into sharp focus.

Self-funding

A claimant may be willing and able to fund its own individual action and meet the costs of its legal team, as well as carrying the risk of paying its opponent's costs if the action is unsuccessful – a trait of most common law jurisdictions. Where the claimant is part of a group or class, it can share the own-side and adverse costs burden with other group members.

CFA and ATE

An alternative funding option is Conditional Fee Arrangement (CFA), coupled with After The Event (ATE) insurance.

This option enables a claimant to share the costs risk of a competition action with its lawyers. The lawyers may act on a 'no win-no fee' basis, or 'no win-low fee' basis. Typically, the claimant will pay for the ATE insurance to cover, predominantly, the adverse costs risk if the action is unsuccessful.

The definition of 'win' or 'success' under a CFA is a matter for negotiation between the claimant and its lawyers. A CFA has two key elements, which will only trigger if the action meets the CFA's definition of success:

The first element is the uplift, which is payment of any fees the lawyers have risked i.e. not billed to the claimant throughout the action. For example, the lawyers bill the claimant 50% of their fees throughout the action, and on success receive an uplift of the remaining 50%.

The second is the success fee. This is a defined fee payable in addition to the uplift. The success fee can be up to 100% of the lawyers' standard fees, but it cannot be a percentage of the level of damages awarded to, or agreed in settlement by, the claimant.

It is worth noting that it is possible to define 'success' such that the uplift and success fee trigger even when no damages are recovered by the claimant in the action. Also, the uplift and success fee were previously recoverable from the losing party in the action, but that is no longer the case.

Damages Based Agreement (DBA)

Such agreements entitle lawyers to be paid an agreed percentage of any damages recovered in an action by a claimant. For UK competition actions, the DBA percentage is capped at a maximum of 50%.

The UK regulations which govern DBAs have been the subject of much controversy, due to a perceived lack of certainty/clarity in their drafting. In particular, a strict interpretation of the regulations appears to preclude lawyers from acting on a 'no win, low fee' basis. Many lawyers lack the appetite or capacity to enter into 'no win, no fee' DBAs, especially in relation to complex and cost-intensive competition actions.

Some litigation funders have developed products which enable lawyers to, effectively, enter into a 'no win, low fee' DBA. However, continued uncertainty surrounding the regulations has meant that the general take-up for such products has been low.

Outside the UK, DBAs are commonly referred to as contingency fee agreements.

ATE

ATE insurance is a product commonly used to cover the risk of losing an action and having to pay the opponent's costs.

A claimant, guided by its lawyers, will estimate its likely exposure to the opponent's legal costs in an action. The claimant will then purchase ATE insurance at a level equivalent to that estimate, and if the action is unsuccessful, the insurance will pay out at that level.

The ATE insurance premium can either be paid for up front, or in stages as the action progresses. Some insurers will even offer deferred contingent premiums, which are only payable out of damages recovered by the claimant in a successful action.

Litigation funding

Litigation funding is now a widely accepted part of the litigation and arbitration landscape in the UK and in many other jurisdictions. Funders are typically asked to pay all of the claimant's legal costs associated with pursuing an action, as well as to indemnify the claimant for any adverse costs. It is non-recourse, in that a funder is only paid if the action is successful and damages are recovered. A funder is paid an agreed portion of the claimant's damages and never more than the total amount of damages recovered.

Funding has moved from its early days of financing impecunious claimants, otherwise unable to secure access to justice, to financing well-resourced corporates. Such corporates are attracted to the litigation funding option because of its risk-management qualities – a corporate can pursue an action either partially or fully 'off balance sheet'.

Funding is prevalent in competition damages actions, especially group actions, because the complexity and costs-intensity of such actions can deter even the largest corporates from self-funding.

What funding will cover depends on the funder. Typically, it will be a matter of what the claimant requires. By way of example, a funder can cover some or all of the following:

- The costs of an initial investigation and due diligence

- Own-side legal costs and disbursements once the action is on foot
- Adverse costs
- Historic legal costs (incurred before the funder's involvement)
- Maintenance costs for the claimant

Funding can be sought at any stage, although many funders will decline to consider an action where trial or final hearing is imminent. This is mainly for practical reasons – there is insufficient time for the funder to conduct thorough due diligence and to finalise the funding arrangements.

For competition actions, it is typical for a funder to be involved at an early stage, before proceedings are issued. This is due to the aforementioned complexity and costs-intensity of such actions, which can deter even the largest corporates from participation unless there is a third-party funding option available.

Options combined

A claimant may opt for a combination of the above options. They are not mutually exclusive.

For example, a claimant could opt to self-fund all the legal costs of a competition action but may decide that the ATE premium is too expensive, and approach a funder to gauge whether they would be willing to finance the ATE cost. Alternatively, a claimant may agree for a funder to pay all legal costs but decide to self-fund the ATE premium.

Lawyers are increasingly asked to take costs risk in running disputes, including competition actions, with fees collected only if there is a successful outcome. A lawyer and its client can enter into a risk sharing agreement, with the lawyer foregoing all or part of its fees. With the client's full knowledge and consent, the lawyer can then enter into an agreement with a funder to provide funding for certain costs of the action.

The funder pays a proportion of the lawyer's fees and typically covers disbursements in addition, such as the cost of counsel and experts.

With such an arrangement, any damages recovered can be divided between the lawyer and funder, typically in proportion to the respective financial risk taken i.e. costs paid by the funder and fees at risk/unbilled by the lawyer.

It can be helpful to a funder if a lawyer is willing to take risk on an action, because it often signals that the action has good prospects of success. In fact, some funders insist that the lawyer take risk before they commit to a funding arrangement. However, it is important to note that not all funders require this.

"A claimant may opt for a combination of the options. They are not mutually exclusive."

Competition law in South East Asia

Riding the wave of development

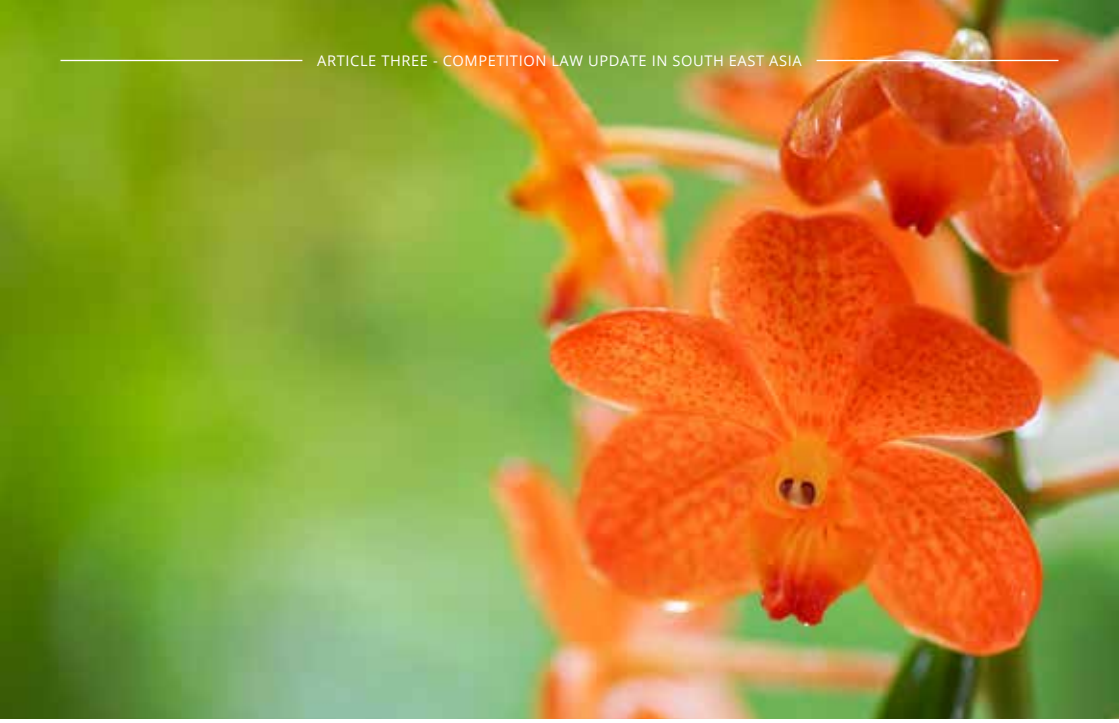
By Mark Jephcott, Partner and Head of Competition Asia, Herbert Smith Freehills LLP; Ajit Kainth, Registered Foreign Lawyer (England and Wales) and Howard Chan, Associate, Herbert Smith Freehills

> **"... the competition law landscape in the region is evolving and becoming increasingly sophisticated."**

There has been a flurry of activity in several South East Asian (SEA) competition law regimes recently, which signals that the competition law landscape in the region is evolving and becoming increasingly sophisticated. In this article, we look at some of the recent key developments in SEA as well as some of the broader changes in Asia and the implications of the latter for the former.

The ASEAN Experts Group on Competition (AEGC) have been committed to fostering a competition culture since 2007. Improved cooperation and coordination between competition authorities in SEA is a priority and it has been reported that a number of initiatives have been put in motion to further that goal (for instance, a regional cooperation framework being drafted).

It remains to be seen whether a fully-fledged ASEAN network, which will conduct joint investigations, will be put in place in the near future as a result of the AEGC. A step in that direction may be taken later this year when the ASEAN competition law enforcers network will reportedly be established.



Singapore

There have been several notable developments in Singapore since the start of 2018. On 1 April 2018, the Competition Commission of Singapore was renamed the Competition and Consumer Commission of Singapore (CCCS). It will now be both the competition enforcer and the consumer protection watchdog for Singapore. It is expected that the CCCS' two functions will not overlap in individual cases, but could overlap where the CCCS is conducting a market study where it may look at both competition law issues and consumer protection issues. In addition, since January 2018 the CCCS has taken on the Chairmanship of the afore mentioned AEGC. In terms of recent enforcement, the CCCS imposed a record-breaking fine of S$19.5 million (€12.2 million) on five companies for the sharing of pricing information to fix the prices of aluminium electrolytic capacitors, which are used in domestic appliances, in January 2018. The fining decision in Singapore came ahead of fines being imposed in relation to the same cartel conduct in the EU where the fines imposed totalled over €250m. The CCCS has also recently investigated an alleged refusal to supply lift spare parts for the maintenance of lifts in Singapore public estates, which resulted in voluntary commitments from the two companies involved in the infringement.

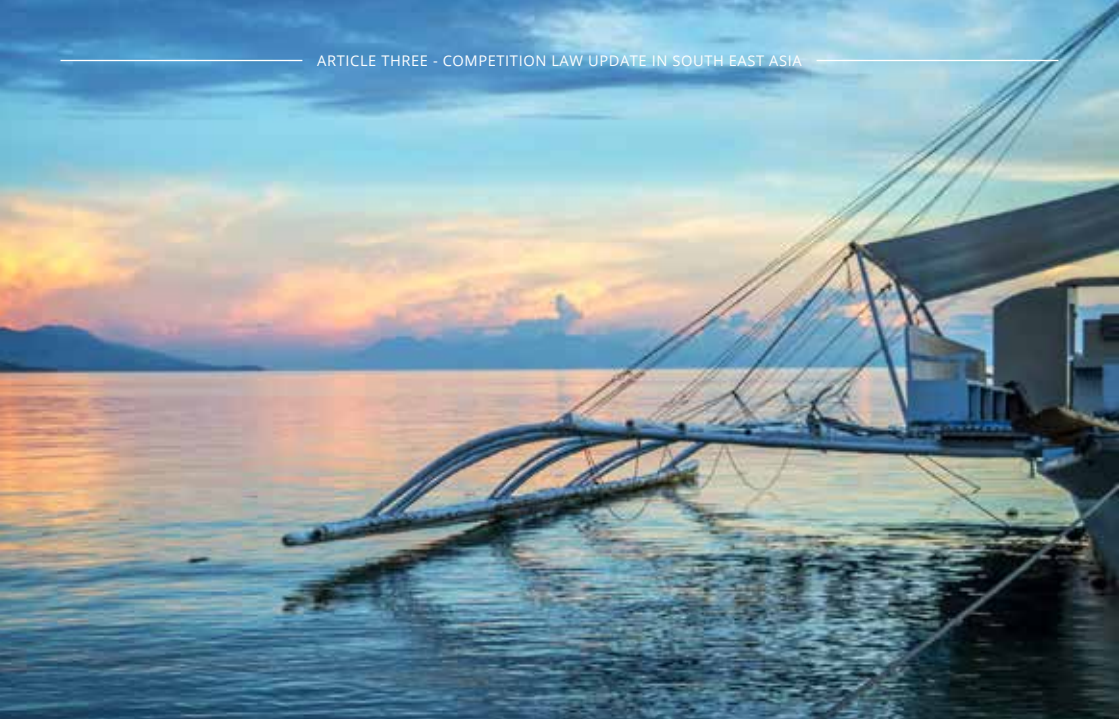
Aside from these cases, the digital sector has been a key focus for the regulator. For example, according to public sources, the CCCS is expected to investigate the commercial arrangements between third-party online travel-booking platforms and the providers of flights and hotels later this year. The regulator will look at how they are negotiated and applied, and how online travel-booking platforms and service providers compete. The CCCS and the Personal Data Protection Commission are also launching a joint study of the competition, personal data protection and consumer protection issues that might arise if a data portability requirement is introduced in Singapore.

Indonesia

Long awaited changes to the competition law of Indonesia are at its most advanced stage in the legislative process since the competition law regulator of the country, the Commission for the Supervision of Business Competition (KPPU), began lobbying for amendments to the regime over a decade ago. These changes include increasing available penalties for anti-competitive behaviour and broadening the investigation powers of the KPPU. According to recent reports, however, the latest drafts of the law require that some of these investigation powers be exercised by the police and not the KPPU itself.

Meanwhile, the KPPU appointed a roster of new commissioners in April 2018 following the expiration of the terms of the previous commissioners. The new commissioners have hit the ground running. They announced a budget proposal featuring a 27% budget increase for 2019 and publicly stated that they are considering procedural changes of the KPPU's operations, aimed to address criticisms over the KPPU's procedural propriety. The latter comes after the Supreme Court of Indonesia's recent decision to uphold a lower court decision to set aside the KPPU's penalty on local food and beverage producer Forisa, on the grounds of procedural impropriety during the course of witness examination by the KPPU. These changes could include fundamental reforms to the present hearing system, in which commissioners involved in the investigation of a case also act in a judicial capacity during the case hearing.

The KPPU continues to pursue a number of ongoing enforcement cases relating to tender and bid rigging issues, which has historically represented the majority of the KPPU's cases, as well as a number of merger control related breaches. In addition, the KPPU has made public statements that its key enforcement focuses include the staple foods, agriculture and banking sectors.



Philippines

The Philippines Competition Act is one of the newer competition law regimes within the region, having been passed into law only in 2015. However, since its establishment, the Philippines Competition Commission (PCC) has quickly made headlines for its efforts in grappling with the nation's telecoms sector after the two largest telecoms service suppliers acquired the assets of the third largest provider and left the country with a duopoly. The PCC has been an active merger control authority in the region – it has received over 150 notifications relating to over 130 transactions since it was set up in February 2016. In addition to its active enforcement of the merger control regime, the PCC has also been investigating a number of antitrust cases, including ongoing investigations into suspected cartels in the cement, garlic, power and healthcare industries.

Under the Philippines Competition Act, the PCC has jurisdiction over administrative proceedings and penalties, whereas the country's Department of Justice has jurisdiction over criminal proceedings and penalties. However, the two bodies entered into a memorandum of agreement in June 2018, under which the parties agreed that the PCC would be the lead agency on investigations and prosecutions related to anti-competitive practices. The PCC has also stated that it is close to finalising its leniency program, which will be harmonised with the relevant rules enforced by the Department of Justice.

Malaysia

Despite having been established since 2011, the Malaysian Competition Commission ("MyCC") has reportedly been hindered by lack of resources and has to date only issued a relatively small number of infringement decisions. However, according to recent reports, the regulator is hopeful that greater support will come from the recently elected government, which is expected to appoint a new Minister of Domestic Trade, Cooperatives and Consumerism (head of the government department to which MyCC reports), a position that is currently unoccupied.

Nevertheless, the MyCC stated in April 2018 that it has in fact probed over 80 cartel cases since its establishment.

The MyCC has also recently conducted market reviews of the building materials and pharmaceutical sectors in Malaysia.

From a policy perspective, the MyCC has recently commenced a consultation on its draft guidelines on intellectual property rights and competition law. The MyCC is also reportedly interested in introducing a new merger control regime. In contrast to many other Asian jurisdictions, Malaysia currently has no merger control system.

Vietnam

Vietnam approved a new law on competition on 12 June 2018, which is expected to come into force in June 2019.

The new law is expected to:

(a) enable the regulator to pursue all acts which affect competition in Vietnam (i.e. the regime will have extraterritorial application for the first time);
(b) introduce a leniency programme for the first time (which will apply to all anticompetitive conduct, not only cartel conduct as is the case in most other systems); and
(c) introduce a new National Competition Agency.

The new law is also expected to introduce new merger control thresholds. The current thresholds are based on market shares.

The new thresholds are expected to be more flexible and could be triggered on the basis of revenue or assets in the jurisdiction as well as the value of the transaction.

Other relevant developments in SEA and Asia

Both Thailand and Myanmar have newly introduced competition laws that came into force during the course of 2017. In both cases, the new legislation seeks to introduce a regime that is largely aligned with other international models. The practical impact of the new laws remains to be seen, as both regimes remain in the early stages of implementation.

A number of regulators throughout Asia (including in China, Japan and South Korea) have suggested that the digital sector will be a key focus in the coming years. This is echoed by many of the regulators in SEA and we expect this trend to take shape in SEA in the near future. Indonesia's KPPU will continue to focus on the digital economy as a key priority in 2018, according to a speech made in December 2017 by the KPPU's then Chairman Syarkawi Rauf. In February 2018, the Head of the CCCS, Toh Han Li stated that the CCCS is looking at the use of big data as its next project and also commented that the CCCS already has the necessary tools to deal with competition cases involving digital disruptor firms (there is an ongoing debate in Asia and beyond as to whether new antitrust tools are needed).

While it remains to be seen whether Asian competition authorities will amend their existing laws, guidelines and tool box for dealing with antitrust issues relating to the digital sector (for example, in the context of the amendments of Indonesia's antitrust laws), it is possible that Asian authorities may in due course adopt a different approach to the assessment of issues in the sector. This difference in approach could extend, for instance, to a greater analysis of alleged anticompetitive conduct in multi-sided markets and the greater use of market studies and monitoring mechanisms (as opposed to enforcement action) by authorities. This approach, and in particular the use of market studies, has already been adopted in other jurisdictions in Asia as well as in the EU.

Conclusion

The competition law regimes in SEA appear to be undergoing another wave of development, with established regulators continuing to grow and the newer regulators bedding down and/or consolidating their regimes. There is no reason to assume any let up in this growth and the coming years will no doubt continue to witness increased activity on part of the regulators in SEA, as they evolve to deal with the plethora of antitrust issues that arise across the region.

Competition law in South East Asia

The defendant's perspective

By Kala Anandarajah, Partner and Head of the Competition & Antitrust and Trade Practice, and Dominique Lombardi, Partner (Foreign Lawyer) and Deputy Head of the same practice at Rajah & Tann Singapore LLP

When one talks about competition laws, one simply considers the law as a piece of legislation and nothing more. When there is a contravention, one looks to see what needs to be done to defend the matter, but with no real focus as such. This is myopic. Competition law is a multifaceted piece of legislation with stakeholders coming from different directions.

There is the regulator, which seeks to enforce the law, the party caught up in the alleged violation, i.e. the defendant or respondent (hereafter referred to as the defendant), the other parties in the value chain that could be affected by the violation as well as the end consumers. How a matter should be defended will require an understanding and an analysis of the impact of the violation on the different stakeholders, and the market as a whole.

If the violation is established, a defendant could see itself having to pay very hefty financial penalties the competition regulators can impose on infringers. Additionally, defendants could be subjected to various non-financial penalties, including stop orders and divestment directives. Additionally, what businesses may not be fully aware of, is the risk of also having to pay substantial damages to their customers who have suffered a loss as a result of their anti-competitive activities. Clearly, the introduction of competition laws is of significance to businesses.

What does this mean in practice?

It means that the more effective competition authorities are in their enforcement, especially against cartels, the higher the financial risk for infringers. In a typical prosecution, a plaintiff would normally have to establish at least on a balance of probabilities (if not beyond reasonable doubt) the fact of:

a) an infringement in which the defendant participated;
b) the existence of the damages,
c) the amount of the damages suffered, and
d) the causal link between the claimed damages and the infringement.

In competition law, the relevant legislation aids regulators who enforce using two key methods: first, by providing tools to competition authorities to uncover and efficiently prosecute cartels; second, by seemingly alleviating the burden on the plaintiff to prove that an infringement occurred. On this front, the last 24 months or so have seen numerous changes in the competition regulatory landscape in ASEAN. While established jurisdictions such as Indonesia, Thailand or even Singapore are reviewing or have amended their existing generic competition laws, other countries have just started enforcing their competition laws or are amid setting-up their competition commission to review anti-competitive activities. This has significant consequences for defendants.

"The risk of becoming a defendant to private actions started by the victims of cartels has become very real in this part of the world."

As the risk of being caught increases…

Out of the nine South East Asian countries that have passed generic competition laws, six (Singapore, Malaysia, Brunei, Myanmar, Cambodia, Philippines) have provided for the implementation of a leniency programme and two (Indonesia and Vietnam) are in the midst of introducing such programme into their revised legislation. Leniency is a strong tool that is frequently used against defendants in the uncovering of anticompetitive behaviour, and in fact was the reason for the record breaking fines referred to in the previous article.

The impact of leniency

There are variations amongst the South East Asian jurisdictions on the scope of leniency. By way of a quick reminder, under a leniency programme, a participant in a cartel who is the first to disclose the cartel and provide evidence of it to the competition authority may benefit from an immunity from (administrative) fines. Lenient treatment extends, in some instances, to other participants in the cartel, who would then benefit from a reduction on the financial penalties imposed on them depending, inter alia, on the stage at which they come forward and the quality of the evidence and information they provide to the regulator. This is done through a marker system.

Leniency programmes have proven to be very efficient and hence effective in assisting competition regulators in their enforcement against cartels. This possibly explains why the competition authorities in South East Asia have sought to introduce this programme, with the exception of Thailand. To illustrate, whilst Myanmar has yet to establish its Competition Commission, the Ministry of Commerce has issued in late 2017 the Myanmar Competition Rules, which provide details on the leniency regime to be put in place.

Typically, leniency applicants only benefit from immunity from the financial penalties that can be imposed by the competition authority. However, leniency does not protect an infringer from private actions and damages that could be allocated thereunder. Given the amount of damages that may have to be paid to those directly affected by a cartel, an infringer must weigh off the consequences and thus may be persuaded to hesitate lodging a leniency application. This is particularly so where the financial penalty that can be imposed by the local regulator is low.

A unique feature of the Philippines Competition Act, however, is to include 'the immunity from any suit or charge of affected parties and third parties'. In short, a leniency applicant would be immune from private action, a good incentive to blow the whistle.

Other enforcement tools

Competition commissions possess various other enforcement tools such as the powers to conduct dawn raids, to undertake interviews of any persons believed to have knowledge of a relevant matter and to seize documents. Several of these powers are backed by criminal sanctions, thus requiring defendants to be alert and to cooperate as best as possible in an investigation.

Given the effectiveness of such tools, even countries which previously did not have the tools are amending to allow for this.

In Indonesia, one of the significant amendments to the Anti-Monopoly Law aims to finally empower the Competition Commission ('KPPU') to conduct 'dawn raids' and seize documents at the businesses' premises as part of their investigation. Another example can be found in Singapore where the Competition Act was amended earlier this year to empower the Competition & Consumer Commission (CCCS) to conduct general interviews during inspections and searches made during an investigation. Before this amendment was introduced, the CCCS had no power to ask general questions without first serving a written notice on each individual to be interviewed. With this change, the CCCS now has the power to orally examine any individual on the premises who appears to be acquainted with the facts and circumstances relevant to the investigation that is being carried out; and to require such individual to answer any question relating to the investigation.

Yet another tool in Singapore - in addition to a very-much used leniency programme - is the introduction by the CCCS of a reward scheme: any individual which brings useful information to the CCCS and assists in the unveiling of a cartel may receive up to S$120,000. Whilst such reward scheme is quite unique in South East Asia for now, it is possible that other regulators in the region will likewise consider introducing a similar scheme given its effectiveness.

Cartels aside, competition regulators do also actively pursue abuses of dominance as well as mergers which are not notified in the market. Apart from the tools already identified, the former is one which the CCCS tries to identify as it undertakes markets studies in particular areas of concerns. A market study, although seemingly innocuous, could trigger investigations. The latter is reviewed, inter alia, in the context of Singapore through a merger monitoring unit which identifies mergers not notified in Singapore where thresholds are crossed and then investigates as necessary.

..... the risk of being sued becomes greater every day!

It was thought when competition law was first introduced into Singapore, private actions that were already prevalent in the US will likewise flourish in Singapore and subsequently across South East Asia. It has not panned out that way yet. Nevertheless, it is strongly believed that it is a matter of time before third party follow on actions will hit this region.

"... it is a matter of time before third party follow on actions will hit this region."

A key reason why we believe the region is ripe is primarily because awareness levels of competitions laws and the consequences of violations have increased in the region. This coupled with the likelihood of third party litigation funding being available can only mean that the leap from knowing one's rights to pursuing a claim with minimal risk can be quite easily be made.

Note further that the awareness referred to in the preceding paragraph is not one without bite. A number of competition laws in South East Asia expressly provide for follow-on actions. This means that a person who suffered a loss or damage as a result of the infringement can claim damages (in Court) against any participant in the cartel. Importantly, the plaintiff will not have to prove the infringement nor the participation of the defendant(s) in the infringement; the infringement decision (once final) will suffice. Even where the competition law does not expressly provide for a right of follow-on actions, private actions may nevertheless be available under other laws, as is the case for example under the new Civil Code in the Philippines.

Another reason why we believe the time is right, is because of developments on-going silently in the background. In bid-rigging cases, for instance, it is not unusual for the infringers to receive requests from the tenderor for an 'amicable indemnification'. In other words, the tenderor will request for a compensation or else will threaten to start an action for damages in front of the relevant Court.

What next for defendants in competition law investigations?

The key point to note for a defendant is that competition law cannot be taken lightly. An understanding of the law is important to ensure compliance, and hence, an avoidance of violation. This calls for pre-emptive work to be undertaken, including introducing a robust compliance programme with appropriate training provided to employees. At best, this avoids any violation; and at worst, it acts to mitigate against potential financial penalties that a regulator could impose.

Where a defendant is caught up in an investigation, it is key to ensure that there is an understanding of the scope of the investigation, to strategise carefully and to cooperate. Cooperation does not equate blind provision of information to the regulator. It means ensuring that all relevant requests are met. Putting a team together immediately to manage the investigation is critical and must be done in a timely manner. As the defendant provides information to a regulator in one jurisdiction, it must ensure that as best as possible this is contained within one regulator and not shared across jurisdictions. Where appropriate, claiming confidentiality and privilege is important. Not only does it ring fence the use of the information within the investigation, but potentially also against third party suits.

Conclusion

The risk of becoming a defendant to private actions started by the victims of cartels has become very real in this part of the world. There will be interesting times to come for all parties involved, including lawyers, as untested arguments will certainly be made. One such example relates to the discoverability and use in courts of documents provided to a Competition Authority under a leniency programme.

“A hot new market for competition litigators is one where international cartels and abuses of dominance in high value industries can be pursued.”

Litigating competition claims in SEA
The new El Dorado?

By Sara Masters QC and Josephine Davies, Barristers, 20 Essex Street

Whilst competition law is well-established in many jurisdictions - e.g. North America, the EU, Australia and Korea - this is not universally true. The SEA countries (members of ASEAN) are a case in point.

Since the 2015 creation of the ASEAN Economic Community, there is a plan to establish, amongst other things, "effective competition regimes" in all ASEAN Member States, more specifically via the ASEAN Competition Action Plan 2025.

This has led to a flurry of new legislation in ASEAN countries and established regulators have been invigorated. Herbert Smith Freehills' article summarises some of these developments earlier in this edition.

How to find a claims El Dorado

The crucial question for claimant litigators is whether any of the new regimes creates a promising new centre for competition law damages claims. The bottom line will dictate the answer.

Experience in Europe shows that many claims would not be brought were it not for funding and contingency (or similar) fee arrangements. Such arrangements can only operate effectively if the eventual damages cake is big enough to share with the claimants. Competition damages claims are expensive; even follow-on actions require extensive disclosure and expert reports.

A hot new market for competition litigators is one where international cartels and abuses of dominance in high value industries can be pursued. To maximise recovery, claims should be brought in a jurisdiction which permits follow-on and stand-alone damages actions against a wide range of defendants (including those domiciled outside the jurisdiction).

Follow-on actions are most important and have had a major role in the European post-2004 boom in private enforcement. A regulator's powers to gather evidence greatly exceed those of a private litigant. This means that a good jurisdiction is one where the regulator is vigorous and takes decisions which are both plentiful and, importantly, sufficiently detailed to assist in proof of loss.

Leniency and settlement regimes can have a significant effect on how useful infringement decisions are to claimants. Both regimes promote infringement findings but may (as is the European experience) result in decisions which contain far less helpful detail in follow-on damages actions.

Provisions for punitive or multiple damages (as in the USA) are a bonus for claimants. Other features of the legal systems, such as costs rules and whether proceedings are adversarial or inquisitorial should also be considered.

Is El Dorado an ASEAN member state?

At present, no ASEAN regime has all the features required to be a claims El Dorado.

Singapore is generally regarded as the leading ASEAN enforcement regime. Indonesia may be catching up and the Malaysian regime also has attractions. All three regimes have been in place for some time.

Thailand and Vietnam are the other ASEAN nations with established competition laws from 1999 and 2004 respectively. To date, neither has produced much to interest the international claimant. Both, however, are being reformed. The changes are substantial and these two countries are among the 'new kids' on the block.

Four of the remaining ASEAN member states (Myanmar, Philippines, Brunei and Laos) have new laws following 2015, whilst Cambodia's law is a 2016 draft. All have some promising features. For example, Brunei's law is of extra-territorial effect (only an effect on competition within Brunei is required) and includes leniency. On the other hand, only follow-on actions seem to be permitted and there are extensive exclusions, notably (like Singapore) of vertical agreements. We understand that in the Philippines the new regulator, the PCC, has got off to a good start.

Quite how these new regimes will work out in practice remains to be seen. They are certainly not designed to encourage free-standing private actions. That is unsurprising where, for policy reasons, a coherent development of the law is expected to follow from decisions by the regulator rather than in private litigation (the parallel with Europe is obvious; there liberalisation occurred only after many years). Given that lawyers are risk averse, it seems unlikely that any of these brand new regimes will see international claimants piling in until after the local authorities have made a number of decisions developing the principles applicable to competition damages claims (including issues like pass-on).

Singapore

Singapore's Competition Act 2004 was modelled on the UK's 1998 Competition Act, itself modelled on EU law. This has the benefit of predictability.

Like the UK/EU law, Singapore law is extraterritorial – all that needs be shown is an effect on competition within Singapore. This is useful for international claimants, widening the pool of possible infringements. On the other hand, Singapore law contains a large number of exemptions, including vertical agreements, thereby restricting the scope of possible infringements.

Singapore also has a leniency regime. This includes leniency plus (i.e. declaration of a completely separate cartel in a second market). Experience in Europe suggests that a leniency regime is an effective way of exposing a large number of infringements that can form the basis for damages actions. On the other hand, only follow on actions are available. Whilst this is the easiest basis for private damages actions, the possibility to widen a claim by a stand-alone element can be advantageous.

Given the clarity of the regime, the enthusiasm of the regulator and Singapore's recognised status as a popular and effective centre for international litigation, it is not surprising that it is usually said to lead the pack in the region.

It is also worth noting that the other small island with a big economy in the region, Hong Kong, is vying for the crown relying on its 2015 Competition Ordinance which is similarly based on UK/EU law.

Malaysia

Although less well promoted, Malaysia's Competition Act 2010 also has promise for claimant litigators. Again, its provisions resemble EU law.

Like Singapore, Malaysia's competition law has extraterritorial effect. Unlike Singapore law, there are fewer exclusions. Vertical agreements are covered. Moreover, in Malaysia, private damages actions are not restricted to follow-on actions and may be brought regardless of whether the claimant dealt directly or indirectly with the defendant.

Malaysia also has a leniency regime and an increasingly active regulator (although many decisions concern bid rigging which may have less appeal to the international claimant).

It follows that Malaysia is a forum worth considering for private competition law damages claims.

Indonesia

Indonesia has a rather different regime. The 1999 Indonesian law remains in use although we understand long awaited changes are at an advanced stage. The law applies only to business in Indonesia, although defendants need not be Indonesian. The prohibited actions are not modelled on EU law and are wide-ranging covering vertical and horizonal agreements, division of territory and a range of market power abuses.

Damages can be awarded for competition law infringements by the Indonesian regulator (KPPU) and potentially from the courts. This appears to give the claimant a wide remit. Another encouraging feature is that recently, the KPPU has been vigorous in its enforcement efforts and produced a significant number of decisions that could found follow on actions (bid rigging being a large part of this perhaps reflecting Indonesia's economic focus). Indonesia does not have a leniency programme although this has been proposed.

Overall, Indonesia has promising features but there is room for improvement. One proposal which would have significant claimant benefits would be introduction of extraterritoriality (i.e. an effects based jurisdiction). If this was done, more and bigger claims could be litigated in Indonesia.

Conclusion

Bigger and more valuable competition damages claims spring from bigger and therefore more valuable markets. This makes those competition regimes which include extraterritorial jurisdiction particularly attractive. A single ASEAN market (part of ASEAN's aspirations) would clearly also help and bring in many market partitioning claims.

Currently, Singapore and Malaysia are both reasonably attractive to competition damages claimants. If Indonesia reforms to introduce extraterritorial jurisdiction and leniency then it could well catch up quickly, given the size of its economy and scope for further growth. As for the other SEA countries, there competition regimes remain a work in progress but with promising signs of development.

Who knows, one or more of these countries may even strike gold.

Anti-competitive conduct in Australia

A turnaround for private litigation?

By Tom Bridges, Partner, Webb Henderson

The legislative framework in Australia supporting the private litigation of anti-competitive conduct has recently undergone significant reform. Whether these reforms will have an impact on the historical relative paucity of private claims for damages arising from anti-competitive conduct bought in Australia remains to be seen, although it is difficult to argue that they are not a step in right direction.

Setting the scene

Part IV of the Competition and Consumer Act 2010 (Cth) (CCA) prohibits a wide range of anti-competitive conduct in Australia including cartel conduct, misuse of market power, anti-competitive mergers and acquisitions, exclusive dealing and, following recent amendments, concerted practices.

Proceedings to recover loss or damage suffered as a result of anti-competitive conduct in Australia are commenced under section 82 of the CCA. Like most jurisdictions, private litigation of anti-competitive conduct in Australia enables the remedy of consequences of the conduct through compensatory damages. In making an award of damages, section 82 requires the Court to select a measure of damages which conforms to the 'remedial purpose of the CCA' and the 'justice and equity of the case'. In this regard, damages are calculated by reference to the detriment suffered by the parties that are subject to the conduct in question.

In the case of class action litigation, the resolution of common issues and factual disputes amongst a group or 'class' of affected consumers presents an efficient platform for multiple firms and individuals, aggrieved by the same or similar conduct, to be compensated through the one process. In the Federal Court, class action litigation is facilitated by the regime contained in Part IVA of the Federal Court of Australia Act 1976 (Cth) (FCA), which is accepted as the effective regime through which competition and consumer related class actions in Australia are pursued.

The dominance of public enforcement

Notwithstanding the regimes established by the CCA and FCA outlined above, when compared to the United States and European Union, litigation in relation to anti-competitive conduct in Australia is largely dominated by public enforcement by Australia's competition regulator, the Australian Competition and Consumer Commission (ACCC). In bringing these proceedings, the ACCC will typically pursue the imposition of pecuniary penalties, rather than redress for affected consumers, the primary object being deterrence – putting a price on the contravention that is sufficiently high to deter repetition of the anti-competitive conduct in the future.

Amendments to section 76 of the CCA introduced from 1 January 2007, substantially increased the potential penalties the Court can award for contraventions of Part IV of the CCA, lifting the $10 million cap existing prior to that date. It also enabled the Court to determine the pecuniary penalty payable by the contravenor by reference to either three times the value of the benefit obtained by the contravenor from the relevant contravening act or, where the value cannot be determined, 10% of the annual turnover of the contravenor during a prescribed 12-month period.

Rarity of private enforcement

In contrast, private enforcement actions of anti-competitive conduct in Australia are rare. By sharp comparison, in the United States it is estimated that around 90% of antitrust cases are commenced by private litigants.

This is likely due to the high cost of conducting proceedings in the Federal Court of Australia, the more stringent constraints on access to documents and proffers obtained by the ACCC in investigating anti-competitive conduct compared to other jurisdictions, and the difficulties assessing damages. Determining the damages suffered by the applicant as a result of anti-competitive conduct will usually require the application of economic principles – in many cases this requires the Courts to calculate lost profits by establishing the hypothetical "free market price" that would have been charged absent the conduct at issue. In the case of class actions for price-fixing cases, making this determination is particularly difficult due to the large number of firms and individuals who have purchased goods at excessive prices as well as the threshold question of which firms and individuals comprise part of the class itself.

A number of authors have also argued the lack of private enforcement action and recovery of damages in Australia is a result of the inadequacy of the legislative regime to provide

an effective compensation mechanism, such as affected commerce models or treble damages in the United States. Similar mechanisms in other jurisdictions are considered to encourage the pursuit of private litigation.

Where damages are sought by a competitor of the contravenor, an additional complication exists: is the complainant in fact seeking redress for economic harm arising from anti-competitive conduct or merely seeking redress for injury or loss suffered from or caused by competitive conduct (which will not be recoverable)? In some instances, these losses will be difficult to distinguish. If courts do not endeavour to draw this distinction, it would effectively defeat the policy rationale for the competition law provisions of the CCA, namely to promote competition for the protection of consumers rather than to ensure the protection of particular competitors.

Reforms for the better?

As foreshadowed above, there have been a number of significant recent reforms to the CCA. Of relevance to private follow-on litigation which succeeds enforcement action by the ACCC, are amendments which broaden the scope of section 83. An admission of a fact made by a party in an earlier proceeding, in addition to a finding of any fact by a court in an earlier proceeding, can now be used as prima facie evidence in subsequent proceedings (the scope of s 83 previously being limited to findings of fact made by a Court only).

Other relevant reforms have also included:

- the strengthening of the definition of 'competition' under the CCA, meaning goods and services capable of importation, in addition to those actually imported, now clearly fall within the compass of the CCA
- the reframing of the prohibition on the misuse of market power contained in section 46 of the CCA to introduce an 'effects test' and
- confining the application of the CCA's cartel provisions to conduct which has an effect on trade or commerce within Australia, or between Australia and elsewhere.

These latter amendments to the cartel provisions can be contrasted with the recent High Court decision of *Air New Zealand v ACCC*; *PT Garuda Indonesia Ltd v ACCC [2017] HCA 21*, in which the High Court unanimously dismissed two appeals from a decision of the Federal Court and thereby affirmed an expansive view of the concept of a 'market', affirming that the same market might exist in more than one jurisdiction (including Australia) and that a domestic market might exist by reference to the demand for services being derived locally, rather than by reference to the location in which the acquisition of services was transacted. The decision has thereby arguably broadened the jurisdictional reach of the CCA involving the consideration of markets in respect of other forms of anti-competitive conduct prohibited by Part IV of the CCA.

Future outlook

The recent case law developments and reforms to the CCA, in particular the amendments to section 83 which have the potential to facilitate the ease at which private litigants can pursue follow-on litigation, should – in theory – liberalise the legal landscape in Australia to facilitate an increase in the number of private actions pursued arising from anti-competitive conduct.

Whether these reforms will actually result in an increase in private litigation of anti-competitive conduct is uncertain. Relevantly, the difficulties around the quantification of damages in these actions remain a significant obstacle – as does the prohibitive cost for firms and individuals in bringing such actions, although the recent growth in the litigation funding market in Australia may work to alleviate this constraint.

Choosing a funder
The unasked questions

By Stephen O'Dowd, Senior Director of Litigation Funding, Harbour

We are often surprised by how seldom we are asked about the fundamentals of funding and what that means for Harbour. The following questions may help in building a picture of the funder(s) you are having a conversation with. In the spirit of the theme of this edition, we have made the references competition law specific, but they are valid for all claims.

Make sure you are clear, early in the conversation, whether you are dealing with a funder or a broker. Brokers may describe themselves as funders, or use 'funding' in their name, but they essentially act as an intermediary between those in need of funding and those who have funds.

Using brokers can be helpful when you hope to receive offers from several funders for your consideration, but it is important to know that not all brokers work with all funders. In addition, if your matter is time sensitive it may save you time if you engage with the funder directly.

Capital adequacy

In a sector where financing is at the core of its business, it is vital to establish that the funder has the required capital to support your action. In the UK, it is advisable to work with a funder who is an approved member of the Association of Litigation Funders of England and Wales (ALF). The **ALF's Code of Conduct** sets out the standards by which funder members must abide, one of them being capital adequacy.

Some jurisdictions outside of the UK are starting to consider how to deal with capital adequacy when it comes to third party funding, such as the implementation of a Code of Practice equivalent to the UK regime. Until then, asking the question is a must.

Other key questions

Do you ring-fence the costs/budget you agree to fund? Ring-fencing means that the funds are set aside immediately for use in your case, and only in your case.

Do you leverage your funds? Leveraging means that a funder a) commits to financing more cases than it possesses funds, b) borrows money to fund or c) does both. If cases exceed the original budget, unexpectedly fail or take longer than anticipated, the funder ultimately may not be able to pay all of your legal costs when they fall due.

Do you have experience in the relevant area of law or jurisdiction? This is especially important in the field of competition litigation, which is a highly specialised area. A funder with substantial experience in this space is unlikely to panic when complexities inevitably arise.

Do you have experience of funding group or class actions? Group/class actions are common in the field of competition litigation, and are subject to complexities not found in standard disputes. If you are going to be part of a claimant group, it is preferable to be backed by a funder with deep experience of funding group actions.

Can you cover my adverse costs exposure in this action? Although this question is linked to the overall importance of a funder's capital adequacy, some funders have access to dedicated ATE insurance facilities which can provide excellent support in relation to adverse costs exposure. It may save time and offer access to competitive pricing.

Practical questions

In our discussions with lawyers, practical questions tend to come up in conversation. However, such questions mainly relate to our due diligence process (what it entails), the period it takes to get funding approval and whether we exercise control over the litigation or interfere with settlement negotiations (we don't do either).

What funders may ask you

Funders may have different criteria that they apply before deciding to finance a competition action, but most will look for the following:

- A defendant with enough capital to meet the claim.
- A reputable and experienced claimant legal team.
- Written analysis of the strengths and weaknesses of the proposed action.
- A realistic estimate of damages.
- A clear budget for the amount of funding required.
- An estimate of the likely duration of the action.
- A clear strategy for prosecution and resolution of the action.

In the field of competition litigation, experienced funders will work with the claimant and the claimant's legal team in satisfying the above.

Conclusion

Asking the right questions will offer you a more comprehensive insight into how the funder operates, so that you can make an informed decision. And no reputable funder should struggle to answer any of the above.

"...no reputable funder should struggle to answer any of the above."

Harbour news

Harbour was recognised as one of the most respected and ground breaking UK litigation funders in the newly launched 'Professional Advisors Litigation Support' guide published by leading legal directory Chambers & Partners.

Chambers has been ranking the best lawyers since 1990, now covering 185 jurisdictions. The directory highlights:

"An early groundbreaker in litigation funding, Harbour is a respected veteran of the industry. Clients and peers note its funding experience, as well as the team's ability to accurately and quickly judge the merits of a case. Commentators remark that "they understand what the case is about instantly - they're incredibly on the ball."

The firm has raised over GBP760 million across four funds, with the most recent launching in March 2018, and considers cases with small or large claim values. Clients have praised their "efficient" decision-making process, and their decisive approach. "They are no-nonsense: they know what cases they want, and do them well," says a client.

Their dedication to cases undertaken receives praise, with one lawyer commenting that "once they commit to funding, they are totally committed," while another remarks that "if things go wrong, you feel like they're a solid firm to deal with."

It is rewarding that independent research recognised the elements we view as fundamental to a successful partnership – deep funding experience, the team's ability to accurately and quickly judge the merits of a case, plus our commitment and dedication to cases we fund – as our strengths.

We would like to take this opportunity to thank all our clients for their continued support.

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