Private enforcement of antitrust/competition law

Class actions based on antitrust/competition claims face new challenges in some jurisdictions and are bolstered in others.

Focus on the US

The US Supreme Court addressed standards for class certification in private antitrust actions, underlining the difficulty of demonstrating damages on a class-wide basis in some circumstances. In Comcast Corp. v. Behrend, the Supreme Court held that plaintiffs failed to demonstrate at the class certification stage that damages could be established on a class-wide basis at trial. Absent a method for establishing damages on a class-wide basis, "[q]uestions of individual damage calculations will inevitably overwhelm questions common to the class." The Supreme Court found that the class was improperly certified because the finding that common questions predominated rested on a damages model that did not fit the substantive legal theories remaining in the case. The inability of the damages model "to bridge the differences between supra-competitive prices in general and supra-competitive prices attributable to the deterrence of overbuilding" precluded a finding that common questions predominated.

Focus on Canada

The Supreme Court of Canada held in a trilogy of cases in 2013 that indirect purchasers are able to sue for damages in class actions for contraventions of the conspiracy provisions of the Competition Act. While plaintiffs will still have to address the evidentiary burden of proving their damage claims, this decision could embolden plaintiffs and their counsel to pursue more competition class actions in the coming year.

Focus on the EU

Under EU law, any person who has suffered harm caused by an antitrust infringement can claim compensation based on national law. Most cases are brought in very few Member States - primarily the United Kingdom, Germany, and the Netherlands.

In June 2013, the European Commission adopted a series of documents aimed at facilitating the development of private antitrust enforcement in the EU Member States, including: a proposal for a directive on certain rules governing actions for damages under national law for infringements of national and EU competition law; a Commission communication on quantifying harm in actions for damages; a communication regarding a series of common, non-binding principles for collective redress mechanisms in Member States; and a recommendation that Member States establish collective redress mechanisms for breaches of EU law (including competition law) within two years. On January 27, 2014, the European Parliament voted on changes to the draft directive and agreed to enter into three-way talks with EU governments and the European Commission (which may start as early as February 2014) to work out the final version of the legislation. This means the bill may be passed by May 2014.

The Parliament rejected a proposal to incorporate in the draft Directive a reference which would prompt EU governments to encourage class litigation in the antitrust area, out of fear it would open the door to US-style litigation. There was no clear consensus on other sensitive issues, which are now bound to lead to heavy discussions during tripartite negotiations. This includes the question of disclosure of evidence from the cartel investigation, protecting leniency applicants from larger damages payouts, and how indirect purchasers are treated.

A major issue that has emerged in the EU is the extent to which potential plaintiffs in antitrust damages actions should have access to documents gathered by the Commission (or national competition authorities) in the course of antitrust investigations. Access to such information highlights a tension between the Commission's drive to develop private antitrust enforcement and the concern that public antitrust enforcement could be jeopardized. This tension may be

addressed in 2014 through cases such as: Netherlands v Commission; Commission v EnBW Energie Baden-Wurttemberg; Henkel v Commission; and Pilkington Group v Commission.

Focus on China

On August 2, 2013, the Shanghai High Court released the final decision on Beijing Ruibang Yonghe Technology & Trade Co v. Johnson & Johnson Medical (Shanghai) Ltd. and Johnson & Johnson Medical (China) Ltd., the first civil action on vertical monopoly agreement in China. The court's decision provides a framework for several previously unclear legal issues in the AML, including the establishment of the "rule of reason" principle in deciding the legality of a vertical monopoly agreement, the key factors in deciding the impact of the restraint on trade and the economy, and the standard for calculating damages caused by such agreement.

As vertical arrangements such as resale price maintenance between manufacturers and distributors are not uncommon in China, this case may serve as a precedent for more civil actions brought by distributors against manufacturers/licensors. We also note that both the plaintiff and defendant in this case presented data on sales and change of prices of the product, market analysis conducted by professional market research firms and expert witnesses. This case may represent the beginning of a new level of complexity in AML cases.

Companies that engage in vertical price maintenance agreements are advised to seek legal counsel to review local distribution contracts, business policies and internal rules to better understand and make informed decisions regarding potential civil liability.