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11 June 2013

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Anti-Trust Briefing Client Alert:
In-house counsel as a profit-centre? Competition litigation and funds

Competition issues have traditionally meant only one thing for in-house counsel — cost (and quite often a large cost).

Too add to the pain, redress for corporate victims of anti-competitive behaviour has been notoriously difficult: in the UK, follow-on damages claims in the specialist Competition Appeal Tribunal are rare and often arduous processes.

However, things are changing.

In-house counsel can now feel more confident about proactive engagement with litigation on competition grounds. There is a real prospect of substantial damages, with the UK courts being a "favourite" jurisdiction. The on-going Mastercard litigation, which is continuing in spite of Mastercard's appeal against the Commission's interchange fee decision, is a notable example.

The messages on competition litigation from the European Union are similarly encouraging:

- The Commission has adopted today long-awaited proposals aimed at facilitating damages claims. The new Directive's main purpose will be to help claimants win compensation from companies breaking competition rules.
- The Court of Justice has very recently opened up the possibility of claimants gaining greater access to confidential documents — including whistleblowing and leniency claims — from cartel investigators' files. (See C-536/11 *Donua Chemie and others).* This ruling should make it easier for claimants to establish a cause of action in litigation.

But, how can I be a "profit-centre" when I need a budget for litigation and we may not win?

In reality, competition litigation may not be as risky as other litigation claims. Often the cause of action is already established. Companies have made admissions to regulators publicly. The only issues (albeit complicated in some cases) are causation and quantum. This should make claims more attractive for companies.

In addition, we have seen heightened interest from **litigation funds** in providing support for competition litigation claims (probably because a significant part of the work — the cause of action — has already been established).

This is potentially where in-house counsel can offer their businesses a real profit centre: at its simplest, a litigation fund will pay legal costs and take its cut of any final award. This removes risk from the whole process for companies: even those that could potentially self-fund the litigation. It is an interesting proposition for both in-house counsel and their business colleagues: the prospect of substantial damages at no or little initial cost.

But competition litigation has broader consequences. It may be that competition law infringers deserve to be sued by their victims, but it isn't necessarily that straightforward.

We have seen an increase in claims being filed across the globe, based simply on statements of investigation (not even decisions) by authorities in Europe. In addition, parties that are **not** being investigated are being dragged into large class action suits, in the United States in particular.

This is troubling, particularly if these practices finds their way into European domestic courts. This is why a number of organisations are worried by the proposed opening up of competition litigation claims in Europe, particularly around class-actions: business associations from France and Germany recently wrote to European Commissioners to criticise collective-redress plans, citing the potentially significant burden of defending spurious claims.

In addition, faced with an investigation, there is often a strong instinct to settle — even if the regulator's prospects of success are uncertain. However, in the UK in particular, "settlement" comes with a mandatory admission of guilt. This will almost certainly be seized upon as providing an automatic cause of action in any follow-on damages litigation.

So companies now face a difficult decision. What is the incentive to settle with regulatory authorities? The cost of defending an investigation may well be much smaller than the cost of paying a fine (even if settlement-reduced) and defending any

follow-on damages claims. This may cause companies to "fight it out to the last" with the regulator. Competition litigation can therefore create a strange reverse incentive that directly affects regulatory outcomes. This is hardly what law-makers are trying to achieve: by easing the way for private damages claims, they are seeking to spread the enforcement burden, not to encourage longer investigations.

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