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Introduction

Singapore's competition law regime has been in place since 2006 but you may not be aware that Singapore's competition law regime provides for the Right of Private Action, under Section 86 of the Competition Act (Cap. 50B). The Right of Private Action offers remedies for victims of anti-competitive conduct to obtain compensation for loss and damage suffered. It is also intended to be a further deterrent to anti-competitive conduct, resulting in a fairer market for all. Apart from facing fines for anti-competitive conduct, entities may still be taken to task for loss and damage suffered by third parties as a result of such anti-competitive conduct.

The Right of Private Action

The Right of Private Action arises in limited, but clear, circumstances. Section 86(2)(a) provides that a claim for damages only arises upon a final determination that an entity has infringed:

1. Section 34 (by entering into agreements which have as their intended objective or result in the prevention, restriction or distortion of competition within Singapore);
2. Section 47 (by abusing the entity's dominant position in a market in Singapore); and/or
3. Section 54 (where a merger with another entity results or is expected to result in the substantial lessening of competition in a market in Singapore).

Such a determination may be made by the Competition Commission of Singapore (the CCS) but is subject to the entity's rights of appeal, from the decision of the CCS to the Competition Appeal Board, which in turn is appealable to the High Court of Singapore and from there to the Court of Appeal within prescribed time limits. In waiting for the final determination, third parties may therefore have to wait until an entity exhausts all of its rights of appeal.

Once a final determination is made, third parties will have only two years to commence civil proceedings against the entity.

Given the complexity of the area of law, parties dealing with entities under investigation by the CCS would be advised to consult their lawyers and other experts to consider their likely losses resulting from the alleged anti-competitive conduct under investigation as soon as it is apparent that investigations are underway to ascertain if they are in fact victims of the anti-competitive conduct.

Victims must have suffered loss directly

Singapore's competition law regime limits the Right of Private Action to persons who have suffered losses directly as a result of such anti-competitive conduct. For example, in the case of commodities or consumables, aggregators may form a cartel to inflate wholesale prices, only for wholesalers and retailers to pass on the inflated prices to final consumers. Based on this requirement of direct losses, consumers may not be able to commence civil proceedings against the anti-competitive entity. Although the courts in Singapore have not yet authoritatively ruled on this issue, wholesalers not involved in the cartel activity would be able to recover damages for losses suffered instead.

Damages recoverable by victims of anti-competitive conduct

As the anti-competitive nature of the entity's conduct may not be challenged, an anti-competitive entity is likely to focus its efforts in contesting a third party's quantification of its damages. Damages are generally intended to compensate the third party's for its losses.

Such losses may include:

1. lost profits on actual and potential sales;
2. lost sales (due to consumers turning to available substitute goods); and
3. lost market share.

Quantifying such losses is usually a matter for expert evidence on complex microeconomic and econometric analysis. Such detailed expert analysis will also have to be interpreted and directly linked to the entity's anti-competitive conduct before third parties will be awarded damages. While the assessment of damages and analysis of microeconomic and econometric analysis are generally complex matters, it is likely that the direct victims of anti-competitive conduct will be able to establish their losses with greater ease and clarity than indirect victims.

As with other claims, it is unlikely that the Singapore courts will award exemplary or punitive damages, or require entities to disgorge their profits as it is more likely that the direct victims of anti-competitive behaviour in Singapore will be able to quantify their losses more readily. In this case, it is much more important for victims of anti-competitive behaviour to be certain of their losses. This, of course, is easier said than done.

Conclusion

Since January 2016, the CCS has issued two negative determinations in the life insurance industry and the fresh poultry industry; has issued statements in response to queries in two further industries; and, is currently considering a variety of complaints in separate industries.

To date, no third party has exercised their Rights of Private Action pursuant to Section 86 of the Competition Act. This however is a development which may take place in the near future..

Your Key Contacts



Ajinderpal Singh

Senior Partner, Singapore

D +65 6885 3619

ajinderpal.singh@dentons.com