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**Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed
Equitable Principles and Rules for the Control of Restrictive Business Practices**
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Item 6 (a) of the provisional agenda
Review of application and implementation of the Set

Model Law on Competition (2010) – Chapter XIII

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Actions for damages

To afford a person, or the State on behalf of the person who, or an enterprise which, suffers loss or damages by an act or omission of any enterprise or individual in contravention of the provisions of the law, to be entitled to recover the amount of the loss or damage (including costs and interest) by legal action before the appropriate judicial authorities.

COMMENTARIES ON CHAPTER XIII AND ALTERNATIVE APPROACHES IN EXISTING LEGISLATION

Introduction

1. In several countries, the competition laws are not only publicly enforced via sanctions imposed by the administering or judicial authority, but also via private actions for damages by individuals or enterprises that suffered losses from anti-competitive behavior (so-called private enforcement). The proposed provision of the Model Law on Competition would give the right to an individual/enterprise or to the State on their behalf to bring a suit in respect of breaches of law, in order to recover damages suffered, including costs and interests accrued. Such civil action would normally be conducted through the appropriate judicial authorities, unless States specifically empower the administering authority in this regard.

Trend to promote private enforcement in well-established competition law regimes

2. Although several competition law regimes contain the legal basis for private actions for damages, until recently, mainly the United States actively promoted private enforcement. However, over the last number of years, other well-established competition law regimes have begun to encourage civil actions in competition cases. For instance, in its White Paper on damages actions for breach of the European Union (EU) antitrust rules, the European Commission (EC) considers it necessary to improve the legal conditions in EU member States for victims to exercise their right to reparation of all damage suffered because of a breach of the EU antitrust rules. Within the EU, private actions for damages can only be made on the level of EU member States and are subject to national law. In other words, the European institutions do not have any jurisdiction to award damages in private actions for competition law breaches. The White Paper's call for an improvement of the national legal framework for private actions is justified as follows: "More effective compensation mechanisms mean that the costs of antitrust

infringements would be borne by the infringers, and not by the victims and law-abiding businesses. Effective remedies for private parties also increase the likelihood that a greater number of illegal restrictions of competition will be detected and that the infringers will be held liable. Improving compensatory justice would therefore inherently also produce beneficial effects in terms of deterrence of future infringements and greater compliance with EC antitrust rules.”

Forms of private actions for damages

3. Competition law regimes vary with respect to the forms of private actions for damages. Firstly, individual actions need to be distinguished from class actions. In the first case, each person/company that alleges harm must pursue its own independent action. That is to say only the person who suffered harm from anti-competitive conduct has standing to file a claim for damages. In a class action, a single action may be commenced on behalf of many persons/companies alleging harm from the same contravention.

4. Depending on the procedural provisions of a country, persons who are entitled to commence a single action may also transfer its claim to another person who then has standing to file the claim. Individual actions may be limited to so-called follow-on actions. That is to say, plaintiffs have to wait until a final decision states the anti-competitive conduct, before filing a claim for damages resulting from this conduct. This limitation is based on considerations of procedural efficiency and in a jurisdiction, where the competition authority responsible for prosecuting and sanctioning anti-competitive behavior, it ensures that the civil courts do not assess the conduct in question differently from the way it is being assessed by the competition authority. Also, plaintiffs often prefer follow-on actions as they don't have to pay the costs of proving the competition law infringement.

5. Through representative or class actions, a group of plaintiffs collectively brings a claim for damages to court. The rationale for allowing such collective actions in competition matters is twofold: firstly, each individual claim may be too small to justify separate action and a possibly lengthy court procedure; and secondly, the class action may significantly reduce the costs of an action for each plaintiff. A class action can be brought on behalf of a class of persons whose identity need not be ascertained when submitting the claim, but the membership of the class must be ascertainable. For example, a class may consist of direct purchasers of cartelized products, whereas indirect purchasers and end-consumers may form further classes.

6. In most jurisdictions, damages to be obtained by the plaintiff are limited to full compensation of the loss suffered from the anti-competitive conduct, including costs of the legal proceedings and interest rates. However, in the United States, a plaintiff may benefit from so-called punitive damages, which can amount to triple the actual damage.

Alternative approaches in existing legislation – Private actions for damages

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| Individual actions only | |
| China | <p>In China, according to Article 50 of the Anti-monopoly Law of the People’s Republic of China, the business operators that carry out the monopolistic conducts and cause damages to others shall bear the civil liability according to law. However, there is no detailed provision about the proceeding and factors to determine the amount of compensation.</p> |
| Germany | <p>According to Section 33 (1) of the German Act against Restraints of Competition (ARC), whoever violates a provision of ARC, Articles 81 or 82 of the EC Treaty or a decision taken by the cartel authority shall be obliged to the person affected to remediate and, in case of danger of recurrence, to refrain from his conduct. A claim for injunction already exists if an infringement is foreseeable. Affected persons are competitors or other market participants impaired by the infringement.</p> <p>Paragraph 3 stipulates that whoever intentionally or negligently commits an infringement pursuant to paragraph 1 shall be liable for the damages arising therefrom. If a good or service is purchased at an excessive price, a damage shall not be excluded on account of the resale of the good or service. The assessment of the size of the damage pursuant to § 287 of the Code of Civil Procedure may take into account, in particular, the proportion of the profit which the undertaking has derived from the infringement. From the occurrence of the damage, the undertaking shall pay interest on its obligations to pay money pursuant to sentence 1. §§ 288 and 289 sentence 1 of the Civil Code shall apply <i>mutatis mutandis</i>.</p> <p>Paragraph 5 stipulates that, where damages are claimed for an infringement of a provision of this Act or of Article 81 or 82 of the EC Treaty, the court shall be bound by a finding that an infringement has occurred, to the extent such a finding was made in a final decision by the cartel authority, the Commission of the European Community, or the competition authority – or court acting as such – in another member State of the European Community. The same applies to such findings in final judgments resulting from appeals against decisions pursuant to sentence 1. Pursuant to Article 16(1), sentence 4 of Regulation</p> |

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| | (EC) No. 1/2003 this obligation applies without prejudice to the rights and obligations under Article 234 of the EC Treaty. |
| Japan | <p>Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of 14 April 1947)</p> <p>Article 25</p> <p>(1) Any entrepreneur who has committed an act in violation of the provisions of Articles 3, 6 or 19 (in the case of entrepreneurs who have committed acts in violation of the provisions of Article 6, limited to those entrepreneurs who have effected unreasonable restraint of trade or employed unfair trade practices in the international agreement or contract concerned) and any trade association that has committed an act in violation of the provisions of Article 8 shall be liable for damages suffered by another party.</p> <p>(2) No entrepreneur or trade association may be exempted from the liability provided in the preceding paragraph by proving the non-existence of intention or negligence on its part.</p> <p>Article 26</p> <p>(3) The right to claim for damages pursuant to the provisions of the preceding article may not be alleged in court until the cease and desist order provided in the provisions of paragraph (1) of Article 49 (in the case that no such order is issued, the payment order provided in paragraph (1) of Article 50 (excluding those issued against an entrepreneur that constitutes a trade association that has committed an act in violation of the provisions of item (i) or (ii) of Article 8)) or the decision set forth in the provisions of paragraph (4) of Article 66 has become final and binding.</p> <p>(2) The right set forth in the preceding paragraph shall expire by prescription after a lapse of three years from the date on which the cease and desist order or the payment order or the decision set forth in the said paragraph became final and binding.</p> |
| South Africa | <p>According to Section 65 (6) of the South African Competition Act, a person who has suffered loss or damage as a result of a prohibited practice –</p> <p>(a) may not commence an action in a civil court for the assessment of the amount or awarding of damages if that person has been awarded damages in a consent order</p> |

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| | <p>confirmed in terms of section 49D(1); or</p> <p>(b) if entitled to commence an action referred to in paragraph (a), when instituting proceedings, must file with the Registrar or Clerk of the Court a notice from the Chairperson of the Competition Tribunal, or the Judge President of the Competition Appeal Court, in the prescribed form:</p> <p>(i) certifying that the conduct constituting the basis for the action has been found to be a prohibited practice in terms of this Act;</p> <p>(ii) stating the date of the Tribunal or Competition Appeal Court finding; and</p> <p>(iii) setting out the section of this Act in terms of which the Tribunal or the Competition Appeal Court made its finding.</p> <p>(7) A certificate referred to in subsection (6)(b) is conclusive proof of its contents, and is binding on a civil court.</p> <p>(8) An appeal or application for review against an order made by the Competition Tribunal in terms of section 58 suspends any right to commence an action in a civil court with respect to the same matter.</p> <p>(9) A person’s right to bring a claim for damages arising out of a prohibited practice comes into existence –</p> <p>(a) on the date that the Competition Tribunal made a determination in respect of a matter that affects that person; or</p> <p>(b) in the case of an appeal, on the date that the appeal process in respect of that matter is concluded.</p> <p>(10) For the purposes of section 2A(2)(a) of the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), interest on a debt in relation to a claim for damages in terms of this Act will commence on the date of issue of the certificate referred to in subsection (6).</p> |
| Tunisia | <p>Tunisian civil law complements Tunisian competition law by allowing victims of anti-competitive conduct to file an action for damages with the civil courts.</p> |

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| <p>Class actions and individual actions</p> | |
| <p>Australia</p> | <p>The Federal Court Act provides a class action regime for private litigants to claim damages resulting from contraventions of the anti-competitive conduct provision of the Trade Practices Act (TPA). Once a class is described, every person in that class is assumed to be part of the class unless they decide to “opt out” of the action by filing a notice with the court in a specified form.</p> <p>The ACCC has the power under s87(1B) of the TPA to seek damages on behalf of third parties who have suffered damages resulting from contraventions of the anticompetitive conduct provisions of the TPA. The parties must “opt in” by giving their consent to the proceedings on their behalf.</p> |
| <p>United States</p> | <p>The multiparty litigation in the United States was dramatically transformed by the 1966 amendments to Federal Rule of Civil Procedure 23, which provides the governing framework for class actions today:</p> <p>Rule 23(a) sets out the four prerequisites for a class action. First, there must be numerosity of class members such that “joinder of all members is impracticable”. Second, there must be commonality, meaning there are “questions of law or fact common to the class.” Third, there must be typicality of “the claims or defenses of the representative parties” as compared to the rest of the class. And fourth, the representative parties must “fairly and adequately protect the interests of the class”.</p> <p>Rule 23(b) further provides that common issues must predominate over individual issues and that a class action must be superior to other methods of adjudication of the matter.</p> <p>Rule 23(c) lays out the class certification process. The court must hold a hearing to determine whether to certify the lawsuit as a class action, and an order certifying a class action must define “the class and the class claims, issues, or defenses, and must appoint class counsel”.</p> <p>Rule 23(f) provides that a court of appeals, in its discretion, may permit the appeal of the decision granting or denying class certification. If a class is certified, the court typically must “direct to class members the best notice practicable under the circumstances”, which must concisely and clearly state in plain, easily understood language the following information: the nature</p> |

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| | <p>of the action; the definition of the class certified; the claims, issues, or defenses; the ability and method to opt out of the class; and the binding effect of a class judgment on members.</p> <p>Rule 23(g) states that, unless a statute provides otherwise, a court that certifies a class must appoint class counsel, who must fairly and adequately represent the interests of the entire class. In appointing class counsel, the court must consider the work that counsel has done in identifying the claims in the action.</p> <p>Counsel’s experience with class actions, other complex litigation, and the type of claims asserted in the action; counsel’s knowledge of the applicable law; and the resources counsel will commit to representing the class.</p> <p>Further, Rule 23(h) permits the court to award reasonable attorneys’ fees to class counsel in a lawsuit certified as a class action. A claim for such an award must be made by motion to the court. A class member may object to a motion for attorneys’ fees, and the court may, in its discretion, hold a hearing to address such a motion.</p> <p>Rule 23(e) provides that the court must approve any settlement or other disposition of the matter and direct notice in a reasonable manner to class members. The court, however, must hold a hearing to determine whether the disposition is fair, reasonable and adequate. Class members may object to proposed dispositions that require court approval.</p> |