Capsulas

Greater pressure against anti-competitive practices: the Public Administration can also claim compensation

On the February 2023 report of the Catalan Competition Authority (ACCO) on damages claims against public administrations for anti-competitive practices

Competition law in the life sciences sector

In recent years, competition authorities have intervened in a number of cases in the life sciences sector.

In Spain, for example, sanctions have been imposed for abuse of a dominant position, for selling orphan drugs at excessive prices, for allegedly taking unjustified legal action against a competitor, or for resale price maintenance.

Being involved in a competition case entails serious drawbacks: dawn raids, lengthy and costly procedures, and serious consequences if illegal behaviour is found - sanctions for companies and their managers, exclusion from contracts with public administrations, criminal liability, reputational risks, and so on. Among these consequences, the Spanish Law on the Defence of Competition ("LDC"), allows individuals or legal entities who have suffered damage as a result of an anti-competitive practice to seek compensation. Recently, the Public Administration has shown clear signals that it intends to make use of this possibility (see, for example, the case of the "diaper cartel", where the Catalan administration is claiming over 500 million euros in damages).

Public sector damages claims for competition law infringements

ACCO's "Report on Damages Claims Caused to Public Administrations as a result of Anti-Competitive Practices" illustrates the interest of the administration in this issue. The objective of this study is to promote public sector claims for damages caused by competition law infringements, by providing practical guidance on how to bring such claim. This includes alternatives for financing the associated costs (such as litigation funds).

What are the key aspects of damages claims by public authorities?

- Basic requirement. In order to bring an action for damages for breach of competition law, there must be a prohibited concerted practice, such as price fixing or market sharing or an abuse of a dominant position, such as predatory pricing.

- Locus standi. Any natural or legal person, public or private, including entities in the public sector, that has suffered damage as a result of an infringement of competition law is entitled to bring an action (Article 72(1) LDC).

- Passive standing. The claim must be directed against the infringing party. Note that, as per our preceding capsule, "the claim may be directed against the parent company if the victim can prove that the subsidiary and the parent company constitute an economic unit".

- Burden of proof. The claimant must prove the existence of an infringement of competition law, the existence of pecuniary loss

(including consequential loss, loss of profits and accrued interest) and the existence of a causal link between the infringement and the loss. The infringement needs not to have been previously declared by a competition authority (as the judge is empowered to assess it). However, if there is a final decision from a competition authority, the injured party will have irrefutable evidence of the existence of unlawful conduct (Article 75(1) LDC).

- Sources of evidence and confidentiality of communications. To facilitate access to evidence, Article 283bis(a) of the Code of Civil Procedure provides the possibility of ordering the defendant to produce evidence or documents not only at the time of the claim or during the judicial proceedings, but also before their commencement (a mechanism similar to the Anglo-Saxon "Discovery" process). In this way, internal company documents or communications can be obtained. Confidentiality is applied in a very restrictive manner, with limited exceptions (such as privileged communications). On the other hand, the Spanish competition authority (CNMC), or equivalent regional authority, is invited to participate in the proceedings.

- Statute of Limitations. The time limit for bringing an action is 5 years. The period starts to run when the infringement of competition law has ceased and the claimant could reasonably have been aware of the existence of an infringement, of the damage caused and of the identity of the infringer (Article 74 LDC).

The importance of prevention

An ounce of prevention is worth a pound of cure. In this case, this could not be truer. Preventive training in competition law is a key tool for avoiding and mitigating the risks of engaging in anti-competitive practices and facing the serious inconveniences that may arise from them.

Given the specific procedural regime of these actions, especially concerning access to sources of evidence, it is highly advisable to entrust the defence of the case to an expert in the field from the very outset once a claim is received. Not only to define a good strategy, but also to ensure that the way in which information and communications are handled does not prejudice the legitimate right of defence of the defendant (note that the privilege covers communications with external lawyers, while its application to communications with in-house counsel has sparked some controversy). A poorly chosen remedy can prove to be quite costly.

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