

Representation of Consumer Interests in Competition Cases – The Role of Consumer Associations

Consumer interests are presumably central to competition law, but as always, it is difficult to know who or what processes supply the concrete mechanism of such interests representation.¹

Although the promulgation of a Competition Law in Vietnam in 2004 has created new instruments for consumer protection in the country, and thus should be considered as an important milestone, the Law and its subordinate implementation regulations have not been able to address the difficulties inherent in the redemption of damages suffered by consumers and the representation of their interests in competition cases.

Why the Role of Consumer Associations?

The greater impact that an individual's producing activity (work) has over his life than that of consumption activity, together with the fact that production activity demands time and energy, explains consumers' greater involvement in their role as producers (of income), and the subsequent fact that consumers are unable to fully devote themselves to consumption activity or to seek redress when their rights have been impaired.

Accordingly, in the overall balance of the damage incurred by each individual consumer as a result of anticompetitive behaviour when compared with the costs of seeking redress (including time and money), consumers will most likely conclude that the cost of seeking redress is higher than its likely benefits. Indeed, this problem was recognised nearly forty years ago by the US Supreme Court in the case of *Hanover Shoe* case:

ultimate consumers, in today's case the buyers of single pairs of shoes, would have only a tiny stake in lawsuit and little interest in attempting a class action.²

In view of the above, there has been an increasing recognition of the role consumer associations can play in the representation of consumer interest in the competition arena. This derives from the fact that consumer associations are likely to be better placed than individual consumers in respect to resources, access to evidence and expertise in competition matters. Consumer associations can also provide individual consumers with information and advice and represent consumer interest *ex ante* (prior to an infringement) in front of the legislators and the administrative authorities, or *ex post* (at the enforcement level after the damage has been incurred) by seeking collective redress. Furthermore, the fact that consumer activists, unlike individual consumers, are paid professionals also contributes to consumer activists' incentive to gain expertise and to devote time to this mission.

How Consumer Associations Can Represent Consumer Interests in Competition Cases?

Competition laws in the world provide various avenues for consumer associations to represent and/or protect consumer interests in the incidence of anticompetitive behaviours. This, as mentioned above, can happen before or after an actual competition lawsuit is initiated.

The easiest way is to make it possible for a consumer association to file a complaint, on behalf of individual consumers, against anticompetitive behaviours that have been inflicted

¹ Doern & Wilks, 'Conclusions: International Convergence and National Contrasts', in Doern & Wilks (eds), *Comparative Competition Policy National Institutions in a Global Market*, Oxford, Clarendon Press, 1996, p 336.

² *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S.481, 494 (1968), p 494

on the individuals and cause them harms. However, this is more often stipulated by the consumer protection statutes rather than the competition laws. For example, the Consumer Protection Act ('COPRA') 1986 of India provides for an action to be brought by a consumer organisation on behalf of a consumer - a complaint regarding any goods sold or delivered, or any service provided, may be filed with the relevant consumer redress agencies amongst others by "any recognised consumer association, whether the consumer to whom the goods sold or delivered or service provided is a member of such association or not" (section 12(b) - COPRA). And included in the purview of such complains are unfair trade practices, that are also regulated by the competition laws. In the UK, 'specified bodies' (such as consumer associations) can bring proceedings, comprising consumer claims for damages, made or continued on behalf of at least two specified individuals, before the Competition Appeal Tribunal ('CAT') (section 47(b) of the UK Competition Act 1998 – 'CA 98').

Alternatively, class actions can also be filed where there are numerous consumers having the same interests, as it happened in a very famous case in the US, involving the software giant Microsoft. The federal class action consumer suits, also known as multi-district litigation, were a consolidation of a number of class action cases that originally included potentially hundreds of millions of licensees of Microsoft's very popular operating system for personal computer - Windows. These cases (more than 100) were consolidated before Judge Motz of the US District Court for the District of Maryland in Baltimore, where through the pre-trial process, he narrowed the claims significantly – throwing out the claims of indirect purchasers, foreign purchasers and refusing to certify a class of volume license customers – to include only those who purchased directly from the Website or through direct marketing initiatives.

Another alternative, which is well praised and much recommended is the 'super-complaint' mechanism in the UK, which was created with a view to providing a formal route of communication between the Office of Fair Trading ('OFT'), sectoral regulators and consumer associations. Under this mechanism, designated consumer associations are given the right to make a competition or a consumer protection related complaint to the OFT or the appropriate relevant sectoral regulator. This complaint is different from the ordinary ones, which should be made against specific breaches of the competition rules. The super-complaint widens consumers' participation via consumer associations by granting these bodies a statutory role in setting the authorities' agenda and in making markets work well for consumers, e.g., by enabling consumer associations to complain about general detrimental features or practices in the market beyond the scope of specific infringements including market features that are on the borderline of competition and consumer protection law.

Also in the UK, according to Section 47 of the CA 98, an interested third party has the right to appeal to the CAT in respect of the OFT decisions, provided that the interested third party has sufficient interest in the underlying decision. Besides, according to Rule 16 of the UK Competition Appeal Tribunal Rules 2003, consumer associations, that consider themselves as having sufficient interest in the outcome of the proceedings, also have the right to intervene in the proceedings. Consumer associations wishing to intervene are not required to satisfy any designation/specification criteria. In contrast to representative actions, consumer associations are not required to name the individuals they represent and can operate without their prior consent.

The Vietnam Scenario

The Competition Law 2004 of Vietnam does not specifically provide for any role to be played by consumer associations with respect to competition proceedings, except for a reference at Article 71 that "Persons with related interests, obligations may file independent

claims or participate in competition procedures on the side of the complainants or investigated parties.”

The Ordinance 1999 on the Protection of Consumer Interests provides that consumers have the right to redeem their damages (article 9), lodge complaints (article 22), and protect their legitimate rights and interests (article 11) by themselves or through their representatives. However, all through the Ordinance, there is no specific indication of the role to be played by consumer associations, and neither is there any in the Decree No. 69/2001 for detailed guidelines on the Ordinance.

This ignorance is rectified by the Decree No.55/2008/ND-CP, which has superseding power over the Decree No. 69/2001. The Decree No. 55/2008 provides for the right of consumer associations to make complaints directly to businesses and manufacturers, service providers, or denounce to relevant State authorities and initiate lawsuits before a court of law, when being authorised by the individual consumers to do so (article 12(1)). However, this provision remains general in nature and has come into life only very recently to be able to create any impact.

In the law on consumer protection which is being drafted for promulgation in the year 2010 in Vietnam, policy-makers should pay attention to this issue so that the benefits, which can be accrued to consumers when their legitimate rights and interests are protected and represented by consumer associations and other civil society organisations, do not become lost, especially with regards to restrictive business practices and unfair trade practices. This is very relevant to the transitional stage of the Vietnamese economy, which is quite conducive to instability and lawlessness in the market, harming the vulnerable and un-protected consumers.