The EU's New Competition Damages Directive – a cautious welcome

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The European Union is on the verge of adopting legislation establishing for the first time an EU-wide litigation mechanism comprising its own procedural rules and substantive legal principles.

The EU's Competition Damages Directive[1] was approved by the European Parliament in April 2014 and is due for formal approval and adoption by the Council before the end of 2014. The Directive will align a number of important aspects of how claims arising from infringements of EU competition law may be pursued before the EU's national courts, including with regard to such critical areas as limitation periods, disclosure rules, the availability of particular defences, and the measurement of harm.

Although limited to competition law, the importance of the Directive cannot be underestimated, as it is likely to serve as a model for other legislation to facilitate private enforcement and compensation in other sectors.

ILR's principal concern is for the development of balanced and efficient dispute resolution mechanisms around the world. In particular, ILR is concerned with preventing the spread of litigation mechanisms which have proved to be vulnerable to significant abuse in other jurisdictions, notably the United States.

ILR offers a cautious welcome to the new Directive, and notes with approval that in a number of important respects the Directive has sought to create mechanisms and safeguards to limit the potential for abuse. In some areas, however, the Directive is not as robust as it might have been, and it will require careful monitoring at implementation phase to ensure that opportunities for inefficiency or abuse are not permitted to develop within the new system.

As a threshold matter, ILR strongly endorses that the Directive does not require Member States to introduce a collective redress mechanism for competition cases (although ILR notes that the Commission has separately recommended that such mechanisms be introduced at national level, subject to certain key safeguards). Experience in other jurisdictions has shown that collective or "class" actions are inherently prone to abuse, as the

[1] Directive of the Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union – available here: http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+AMD+A7-2014-0089+002-002+DOC+PDF+V0//EN

mere fact of aggregation of claims creates opportunities for exploitation and for "blackmail settlements". While the risk of abuse can be mitigated with safeguards, it can never be entirely eliminated.

As to the substance of the Directive, ILR has set out below a selection of its key observations on particular provisions.

Scope of compensation - Article 2 permits an injured party to claim "full compensation" for harm suffered, permitting restitution of the claimant to the position it would have held had the infringement not taken place. ILR welcomes this clarification and notes with particular approval the provisions of Article 2(3) which specify that full compensation "*shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages*". The availability of multiple or punitive damages in other jurisdictions is an important incentive to potential abusers.

Disclosure - Article 5 of the Directive introduces rules of disclosure which are likely to be highly novel in some Member States. In the United States and other jurisdictions, the availability of very wide discovery is a key contributor to the high cost of litigation, which costs often cannot be recovered by Defendants even if the claims underlying the litigation prove baseless. The time and expense involved in satisfying excessive discovery requests can contribute significantly to the possibility of "blackmail settlements". ILR welcomes the recognition in the Directive that discovery should be limited, justified, narrow, proportionate and that the potential costs of compliance should be considered. However, ILR also notes that many of the benefits of adopting these harmonised safeguards might be undermined by Article 5(8) which permits Member States to maintain or introduce more permissive discovery rules. The implementation of these discovery rules in practice requires careful monitoring because the possibility of uneven implementation of these essential safeguards may lead to forum shopping by claimants seeking the most favourable disclosure regimes.

Protection of Leniency Documents - Article 6 provides that a limited category of documents submitted to competition authorities in the context of leniency applications shall be protected from discovery in litigation. ILR supports this measure as no barriers should exist to those companies who may have discovered a legal problem and who wish to cooperate with regulators. If cooperation with regulators risks exacerbating possible civil liabilities, responsible cooperation may be deterred. On the other hand, ILR regrets that such narrow categories of documents will be protected from disclosure. In ILR's view it would have been far preferable to protect all documents prepared solely for the purpose of cooperating with competition authorities. Whether leniency applications are deterred in practice by the limited protections offered should be kept under close review.

Claims acquisition? - Article 7 introduces some welcome clarifications that documents disclosed to persons in litigation should be used only for the purposes of that litigation. However, Article 7(3) provides that the same rule should also apply to *"the natural or legal person that succeeded in his rights, including the person that acquired his claim*". ILR strongly hopes that this seemingly offhand reference will not be understood as an endorsement of the growing and highly problematic practice of third parties (including private equity funds, hedge funds, plaintiff law firms, third party litigation funders and others) purchasing or otherwise seizing control of claims and turning them into a profit-

motivated investment opportunity. The negative consequences of this practice are all to visible in some jurisdictions.[2]

Joint & Several Liability – As above, ILR supports measures which encourage responsible cooperation with regulators, and it therefore endorses the possibility of immunity recipients being exempted from the normal rule that co-infringers will be jointly and severally liable for all of the harm caused by their infringement (per Article 11). However, Article 11(3) unnecessarily dilutes this possibility by adding the unworkable condition that joint and several liability will nonetheless apply to immunity recipients when full compensation cannot be obtained from other infringers. Whether or not full compensation is available from other infringers will not be known until all possible litigation is exhausted, and therefore immunity recipients will face long-term uncertainty about whether they are potentially liable under the joint and several rule or not. Whether this deters immunity applications will be difficult to measure in practice, though it will be important to monitor the effects of this provision.

Passing-on Defence - Article 12 specifies that the defence of "passing on" will be available, and ILR welcomes this provision as it will prevent those that have not suffered harm (because they have passed it on to others) from being unduly compensated. It is regrettable, though, that Defendants will bear the burden of proving whether a claimant passed-on overcharges or not. By definition this is not something within the knowledge of Defendants and they will require extensive discovery from claimants to satisfy this burden, which may greatly drive up litigation cost.

Quantification of harm - Article 17 introduces rules regarding how harm may be quantified by the Courts. While fully supporting measures which add to the achievement of a speedy and fair outcome, ILR has some concerns that the Directive appears to encourage estimation – rather than calculation – of harm, and that Member States are required to ensure that Courts will "presume" that cartels cause harm. Even with genuine cartels, there is no basis for such an assumption and ILR would maintain that it should always be for claimants to prove their claim in every case. More worryingly, the definition of "cartel" used in the Directive (Article 4(14)) is excessively broad and the presumption of harm could be applied to a range of infringements which are not typically thought of as cartels. The way that this presumption operates in practice will need to be carefully monitored.

In conclusion, ILR broadly – though cautiously - welcomes the Directive. Many of its provisions contain helpful safeguards against abuse. However, there remains a need for vigilance and monitoring (including through the implementation phase of the Directive) as in a number of places the Directive contains provisions which risk having unintended effects.

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[2] For an overview of the problems associated with third party litigation funding in Australia, see here: http://www.instituteforlegalreform.com/resource/an-oversight-regime-for-litigation-funding-in-australia/

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