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Actions for damages under national law: Achieving compensation through an appropriately balanced system

POSITION STATEMENT

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Introduction

The American Chamber of Commerce to the European Union (AmCham EU) generally welcomes the proposed Directive 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 ('the Directive') to the extent that it seeks to ensure that victims of infringements of competition rules can be appropriately compensated for the harm they have suffered.

However, any EU measures designed to facilitate litigation should be balanced and cautious, as any litigation system that lacks the necessary balance can quickly lead to abuses, disproportionately burdening business and draining the EU's economy.

While supporting the overall aims of the Directive, some provisions require clarification, amendment or reconsideration if the goal of achieving compensation through an appropriately balanced system is to be achieved. Certain of the provisions meriting further attention are described below. In particular, AmCham EU is concerned that the proposed Directive places inappropriate burdens on defendants and exposes them to the possibility of paying damages to compensate for loss that has not actually been suffered.

Passing-on and indirect purchasers

Article 12 of the Directive would establish a passing-on defence, which can be welcomed as AmCham EU supports the view that damages should be compensatory only (and therefore by definition should not be awarded unless there is actual loss).

However, the Directive provides that the burden of proving that the overcharge was passed on rests with the defendant. This is illogical and places an impossible burden on defendants.

Passing-on occurs in the relationship between the claimant and the claimant's customers. The Directive thus places the burden on the defendant to prove something about the claimants' private business relationships with its own customers. Proving pass-on is done by comparing an overcharge with the prices at which the claimants sold to their customers. By definition, defendants cannot know what sales were made to the claimants' customers, or on what terms or prices. Therefore the claimants are in the best position (and in the only position) to prove a

pass-on. As such – and consistent with the duty of claimants to establish their case – pass-on should be for claimants to prove.

In addition, AmCham EU points out that, under article 12(2) the defence is not available when indirect customers find it *legally impossible* to claim compensation for their harm. It is far from clear what legally impossible means. Does it refer to situations where the absence of a direct contractual relationship makes it impossible to claim? Or does it mean that harm cannot be shown because the claimant cannot prove its case or has missed the deadlines?

There is a significant risk that this provision may lead to unjust enrichment as it may allow claimants to be compensated for an overcharge that they have in fact passed on (and have therefore suffered no loss).

Finally, under article 12 there may be a presumption that overcharges were not passed on, even when they were (simply because the infringer can't satisfy the burden to prove otherwise), making the infringer liable to direct purchasers. At the same time, by operation of article 13, an indirect purchaser could be deemed to have proven that the very same overcharge was passed on to him. In other words, the stacked presumptions in articles 12 and 13 could make a defendant liable to both direct purchasers and indirect purchasers at the same time for the same loss. Article 15 partially addresses this issue, though merely suggests that other actions at different levels of the supply chain should be taken into account. There should instead be an absolute prohibition on 'double jeopardy' for defendants, through which they may be required to pay out twice for the same harm.

Presumption of harm

Article 16 provides that cartels shall be presumed to have caused harm. Economic data does not necessarily support this presumption but shows a wide variation in cartel overcharges – including a significant number of past cartels that led to no overcharge.

In any case it is questionable whether a rebuttable presumption is useful, as claimants still need to prove causation and quantify their loss.

The Directive includes a definition of the term 'cartel' (to which the presumption of overcharge will apply) that is far wider than classic 'hard-core' cartels. The definition would appear potentially to include

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information sharing. It does not seem appropriate to impose – and the Commission has produced no data to support – a presumption of overcharge in these cases.

Effect on leniency

The Commission's leniency programme is the principal source of cartel enforcement activity in the EU, and therefore is also the principal source of enforcement decisions upon which follow-on damages actions may also be based. For this reason, the leniency programme is today perhaps the single most important tool in securing compensation for victims of cartels.

If the Directive encourages litigation at the expense of disincentivising leniency applications, one of the Directive's key goals – of securing compensation for victims – might not be achieved as there will simply be fewer decisions upon which to base follow-on actions. In at least the following respects the draft Directive might cause fewer leniency applications to be filed.

Balance

A significant number of provisions in the Directive are designed to make it easier for claimants to sue successfully for damages. In many cases, this is achieved by making it harder for defendants to defend themselves in damages claims. If the Directive achieves its goal, almost by definition there will be more litigation against immunity/leniency applicants. AmCham EU therefore calls for a reconsideration of the degree of protection for leniency applicants envisaged by the Directive, with a view to *increasing* that protection in order to achieve an appropriate balance.

Joint and several liability

Article 11 provides that undertakings that have infringed competition law through joint behaviour are jointly and severally liable for the damage caused by the infringement.

Under article 11(2), where an undertaking has been granted immunity from fines by a competition authority under a leniency programme, it will in principle be liable in damages to its own customers only. However, if it turns out that an injured party cannot get 'full compensation' by suing other co-infringers, the liability of the undertaking granted immunity re-engages.

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This results in various problems. First, claimants seeking to sue parties to a cartel will likely be advised to include the immunity recipient in the litigation so as to avoid any future problems of limitation (as it is impossible to know at the outset of the proceedings whether the claimant will be able to recover from the cartelists other than the immunity recipient). Second, does the reference to 'full compensation' suggest that a claimant who has been awarded reduced damages in an action for damages may then turn to the immunity recipient to recover the shortfall?

As explained above, this provision does not avoid the risk of dis-incentivising immunity applications. Further, the likelihood that immunity recipients would be included in all legal proceedings relating to cartels arguably will discourage leniency applications in the future.

Disclosure of documents

The Directive (at article 6) seeks to offers different levels of protection to different documents. First, under article 6(1) leniency corporate statements and settlement submissions are protected from disclosure at all times. Second, under article 6(2) any information prepared by the parties or the relevant competition authority for the purposes of proceedings (such as responses to requests for information) may only be disclosed after the relevant competition authority has taken a decision. Third, under article 6(3) disclosure of any documents not falling within the two previous categories may be ordered at any time in actions for damages.

It follows from the narrowly drawn category of documents with 'full protection' that a large number of documents produced during the course of a leniency application may be disclosed at some stage.

Although the aim is to provide some certainty for leniency applicants that their corporate statement will never be disclosed, the practical effect may be that everything *other than* the corporate statements or settlement submissions is routinely made available in follow on cases. In other words, contrary to the Directive's aim, this potentially gives rises to *less* protection than is currently available under the *Pfleiderer* case-by-case weighing exercise in which the interests of all sides were considered. This could in turn result in fewer leniency applications.

The choice of whether to apply for leniency is heavily influenced by the risk of subsequent exposure to litigation. If applicants believe that a leniency application will single them out as a litigation target (as an entity that has admitted its involvement) they may be very reluctant to apply for leniency.

AmCham EU therefore recommends that the category of documents receiving full protection be expanded to include all documents created for the purposes of either an immunity or leniency application (leaving only pre-existing documents available for potential disclosure by national courts). In this way companies will not be deterred from engaging and cooperating with regulators.

Regardless of the extension of the list of documents set out in Article 6(1)), article 6(2) (stating that documents on an authority's file cannot be disclosed in litigation until the relevant authority has taken a decision) requires amendment because it is excessively broad. All disclosure provisions should be limited to the situation where a *final* decision has been taken. As drafted however, the Directive would allow disclosure after a final decision *or* an interim decision, because a 'decision' for the purposes of article 6(2) is a decision as referred to in article 5 of Regulation 1/2003 that includes an interim measures decision.

Effect of national decisions

Article 9 provides that a decision from the national competition authority (NCA) of any Member State would bind the courts of every other Member State. There are currently 16 Member States where NCA decisions do not bind even their own courts, let alone the Courts of other Member States. This is likely to be because the NCAs in question are organs of government and, for separation of powers purposes, cannot be vested with powers to bind national courts. Alternatively, respect for article 47 of the EU's Charter on Fundamental Rights requires that the work of government agencies be subject to review by the courts, not that such government agencies are capable of binding such courts.

In the explanatory memorandum, the Commission recognises that 'the proposed probative effect of final infringement decisions of national competition authorities does not entail any lessening of judicial protection for the undertakings concerned, as infringement decisions by national competition authorities are still subject to judicial review'. However, not all courts have the right to conduct a review of the merits. In those cases there is effectively a lessening of judicial protection.

In addition, there are serious questions about whether this provision is practically workable in circumstances where there is no system for national courts even to know whether an NCA in another jurisdiction has taken a decision that might be binding upon it. If there are differences in the standards of review applied by different NCAs, there is also a risk that claimants could potentially 'forum shop' to get a decision in

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whichever Member State appears most favourable, followed by litigation in whichever Member State courts appear most favourable. This would not be conducive to the sound administration of justice.

Settlement provisions

AmCham EU recommends that agreed settlements that satisfy both parties should not be undermined by operation of law. Settling parties should be entitled to end their involvement in a case definitively by settling.

Article 18 provides that in case of settlement, settling co-infringers would be liable to pay the damages that non-settling co-infringers are not able to pay. This would be a major deterrent to reaching settlements in the first place and would make the likelihood of settlement lower than is currently the case.

Direct/indirect actions

AmCham EU believes that the Directive should apply to follow on damages claims, but not stand alone claims.

The Directive seeks to make it easier to sue for damages by shifting many of the normal litigation burdens on to defendants. However, where no infringement has been established and no authority and no claimant has demonstrated any wrongdoing, it seems entirely inappropriate for defendants to be subjected to a regime which presumes wrongdoing and which shifts burdens on to defendants as a result. A system that favours the claimant party in litigation would represent an open invitation to file potentially frivolous claims in the hope of extracting settlements, safe in the knowledge that defendants will have a substantially harder time defending against even the most speculative or ill-founded claims, or claims which are plainly strategic in nature (e.g. the making of antitrust allegations in response to a demand for payment, thereby allowing access to the system of presumptions and the discovery mechanism foreseen by the Directive).

Limiting the operation of the Directive to follow-on claims will resolve this problem.

Missed opportunities?

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The Directive focuses almost exclusively on litigation as the means for claimants to be compensated for harm suffered as a result of cartels. This is a missed opportunity to emphasise and encourage the use of alternative mechanisms to achieve compensation for victims (particularly in light of the recent passage of the ADR and ODR Directives). The Directive is also an opportunity to codify certain minimum safeguards in the event a new EU order for competition damages actions is to be introduced. Litigation systems should ensure that the *loser pays* rule applies, that punitive damages be excluded, that contingency fee and other novel funding arrangements be prohibited and that other safeguards against abusive litigation are codified.

The Commission also perhaps has missed an opportunity to consider ways in which the Commission and national competition authorities can play a role in ensuring that victims are compensated, without the need for litigation. For example, in its recent settlement decision in *Deutsche Bahn*, the Commission accepted measures to compensate those harmed as part of a package of measures leading to the closure of its case. AmCham EU would support the exploration of means other than costly and slow litigation to ensure victims are compensated appropriately.

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AmCham EU speaks for American companies committed to Europe on trade, investment and competitiveness issues. It aims to ensure a growth-orientated business and investment climate in Europe. AmCham EU facilitates the resolution of transatlantic issues that impact business and plays a role in creating better understanding of EU and US positions on business matters. Aggregate US investment in Europe totalled €1.9 trillion in 2012 and directly supports more than 4.2 million jobs in Europe.

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