Rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the EU

2013/0185(COD) - 11/06/2013 - Legislative proposal

PURPOSE: to facilitate the introduction of damage and interest claims by victims of antitrust violations.

PROPOSED ACT: Directive of the European Parliament and of the Council.

ROLE OF THE EUROPEAN PARLIAMENT: the European Parliament decides in accordance with the ordinary legislative procedure and on an equal footing with the Council.

BACKGROUND: damages claims for breaches of Articles 101 or 102 of the Treaty on the Functioning of the European Union (TFEU) constitute an important area of private enforcement of EU competition law. It follows from the direct effect of the prohibitions laid down in Articles 101 and 102 of the Treaty that **any individual can claim compensation for the harm suffered, where there is a causal relationship between that harm and an infringement of the EU competition rules**. Injured parties must be able to seek compensation not only for the actual loss suffered but also for the gain of which they have been deprived plus interest.

The Court of Justice of the European Union has clarified that the full effectiveness of the EU competition rules and, in particular, the practical effect of the prohibitions they contain would be put at risk if it were not open to any person to claim damages for loss caused to him/her by a contract or conduct liable to restrict or distort competition. It considered that damages actions strengthen the working of the EU competition rules and can thus make a significant contribution to maintaining effective competition in the EU.

While the right to full compensation is guaranteed by the Treaty itself, the practical exercise of this right is often rendered difficult or almost impossible because of the applicable rules and procedures. Despite some recent signs of improvement in a few Member States, to date **most victims of infringements of the EU competition rules in practice do not obtain compensation for the harm suffered**. Besides these specific substantive obstacles to effective compensation (already identified in the Commission's 2005 Green Paper), there is **a wide diversity as regards the national legal rules** governing antitrust damages actions.

To remedy this situation, the Commission put forward concrete policy proposals in its 2008 White Paper. In the ensuing public consultation, civil society and institutional stakeholders, such as the European Parliament, largely welcomed these policy measures and called for specific EU legislation on antitrust damages actions.

IMPACT ASSESSMENT: the impact assessment report focused on four options which ranged from no action at the EU level, through a soft-law approach, to two options for legally binding EU action. The preferred option is considered to be the most cost-efficient way of achieving the set objectives.

LEGAL BASIS: Articles 103 and 114 of the Treaty on the Functioning of the European Union (TFEU).

CONTENT: this proposal seeks to ensure the effective enforcement of the EU competition rules in particular by ensuring that **victims of infringements of the EU competition rules can obtain full compensation for the harm they suffered**.

Scope: the proposed Directive would set out rules ensuring **equivalent protection throughout the Union** for all natural or legal persons for harm they they have suffered as a result of infringements of the EU competition rules and ensure that their right under EU law to full compensation can be effectively exercised in the national courts.

Disclosure of evidence: provision is made to ensure that, under certain conditions, **the national courts can order the defendant or a third party to disclose the evidence** a claimant will need to prove his his antitrust damages claim and/or a related defence.

National courts should have at their disposal effective measures to protect any **business secrets** or otherwise confidential information disclosed during the proceedings. Furthermore, disclosure should not be allowed where it would be contrary to certain rights and obligations such as the obligation of professional secrecy.

Probative effect of national decisions: pursuant to Council Regulation No 1/2003, a Commission decision relating to proceedings under Article 101 or 102 of the Treaty has a probative effect in subsequent actions for damages. It is proposed to give **final infringement decisions by national competition authorities (or by a national review court) similar effect**.

Limitation periods: the Commission proposes that the national rules on limitation periods for a damages action: (i) allow victims **sufficient time (at least five years)** to bring an action after they became aware of the infringement, the harm it caused and the identity of the infringer; (ii) prevent a limitation period from starting to run before the day on which a continuous or repeated infringement ceases.

Joint and several liability: where several undertakings infringe the competition rules jointly (typically in the case of a cartel), it is appropriate that they be jointly and severally liable for the entire harm caused by the infringement. The new proposal, however, introduces certain modifications with regard to the liability regime of immunity recipients.

Passing-on of overcharges: injured parties are entitled to compensation for actual loss (overcharge harm) and for loss of profit. To ensure that only the direct and indirect purchasers that actually suffered overcharge harm can effectively claim compensation, the proposed Directive explicitly recognises **the possibility for the infringing undertaking to invoke the passing-on defence**.

However, in situations where the overcharge was passed on to natural or legal persons at the next level of the supply chain for whom it is legally impossible to claim compensation, the passing-on defence cannot be invoked.

Quantification of harm: to assist victims of a cartel in quantifying the harm caused by the competition law infringement, the proposed Directive provides for a rebuttable presumption with regard to the existence of harm resulting from a cartel. The infringing undertaking could rebut this presumption and use the evidence at its disposal to prove that the cartel did not cause harm.

Consensual Dispute Resolution: to provide an incentive to parties to settle their dispute consensually, the proposed Directive aims at optimising the balance between out-of-court settlements and actions for damages.

BUDGETARY IMPLICATION: the proposed Directive would have no budgetary implications.