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) - 17/04/2014 - Text adopted by Parliament, 1st reading/single reading

The European Parliament adopted by 541 to 25 votes with 12 abstentions, a legislative resolution on the proposal for a directive of the European 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.

Parliament adopted its position at first reading following the ordinary legislative procedure. The amendments adopted in plenary are the result of an agreement negotiated between the European Parliament and the Council. They modify the proposal as follows:

Scope of the directive: thanks to the new rules, any natural or legal person who has suffered harm caused by an infringement of competition law by an undertaking or by a group of undertakings could effectively exercise the right to claim full compensation for that harm from that undertaking or group.

Right to full compensation: the full compensation for the damage should be obtained. It should cover the right to compensation for actual loss and for loss of profit, plus payment of interest. It should not lead to overcompensation, whether by means of punitive, multiple or other types of damages.

Principles of effectiveness and equivalence: all national rules and procedures relating to the exercise of claims for damages should be designed and applied in such a way that they do not render practically impossible or excessively difficult the exercise of the right to full compensation.

Furthermore, the national rules and procedures relating to actions for damages resulting from infringements of Article 101 or 102 TFEU should not be less favourable to the alleged injured parties than those governing similar actions for damages resulting from infringements of national law.

Disclosure of evidence: national courts should be able to order the defendant or a third party to disclose relevant evidence which lies in their control in proceedings relating to an action for damages in the Union upon request of a claimant who has presented **a reasoned justification** containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages.

The court should be able under its strict control, especially as regards the necessity and proportionality of the disclosure measure, to order **disclosure of specified pieces of evidence or categories of evidence** upon request of a party.

The demand for disclosure should be proportionate. Provisions have been introduced **to prevent fishing expeditions**, that is, non-specific searches of information which are unlikely to be of relevance for the parties in the procedure.

National courts would have the power to order disclosure of evidence containing confidential information where they consider it relevant to the action for damages. In this case, they should have at their disposal **effective measures to protect** such information.

Those from whom disclosure is sought should have an **opportunity to be heard** before a national court orders disclosure.

It is stated that the interest of undertakings to avoid actions for damages following an infringement of competition law shall not constitute an interest that warrants protection.

Disclosure of evidence included in the file of a competition authority: to ensure the undertakings' continued willingness to voluntarily approach competition authorities with **leniency statements or settlement submissions**, disclosure of evidence should **in no case** apply to these documents.

The applicant may submit a reasoned request that a national court accesses the above-mentioned documents only to verify that their contents meet the Directive's definitions relating to the concepts of the 'statement made by a company with a view to getting leniency' and 'settlement submissions'.

During this evaluation, the national authorities could only request the assistance of a competent competition authority. The authors of the documents concerned could also be heard. In any event, the court would not allow access to these documents to the other parties or to third parties.

Penalties: national courts should be able to effectively impose penalties on parties, third parties and their legal representatives in the event of failure or refusal to comply with any national court's disclosure order.

Limitation periods: the limitation period shall not begin to run before the infringement has ceased and the claimant knows, or can reasonably be expected to know the behaviour and the fact that it constitutes an infringement of competition law, the fact that the infringement of competition law caused harm to him and the identity of the infringing undertaking.

Joint and several liability: where the undertaking is a **small or medium-sized enterprise**, it would be liable only to its own direct and indirect purchasers if: a) its market share in the relevant market was below 5% at any time during the infringement; and if b) the application of the normal rules of joint and several liability would irretrievably jeopardize the economic viability of the company concerned.

Suspensive effect of consensual dispute resolution: according to the amended text, the suspension should not be longer than two years.

As a result of consensual dispute resolution, a competition authority could consider that compensation paid as a result of a consensual settlement and prior to its decision imposing a fine to be a mitigating factor in the setting thereof.

Review of the Directive: the Commission should submit a report by four years after the date of entry into force. Where appropriate, that review would be accompanied by a legislative proposal.