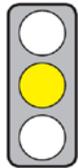


KEY ISSUES

Objective of the Directive: The Commission wants to improve the enforcement of competition law.

Affected parties: Consumers and companies.



Pro: Facilitating the enforcement of claims for damages in the case of infringements of competition law discourages potential wrongdoers, strengthens society's confidence in the legal system and increases the incentive for victims to uncover potential cartels.

Contra: (1) The rules on disclosure orders are too imprecise and can therefore lead to unjustified claims.

(2) The rule that a leniency recipient, who has been granted immunity from fines, is only liable to its victims makes private actions more difficult and is not necessary to maintain the incentive for leniency recipients to report cartels to the competition authority.

CONTENT

Title

Proposal COM(2013) 404 of 11 June 2013 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

Brief Summary

► Context and objective

- EU competition law prohibits companies
 - from concluding agreements particularly on prices and/or quantities (Art. 101 TFEU) and
 - from abusing a dominant position within the market in particular by imposing unfair trading conditions (Art. 102 TFEU).
- EU competition law is enforced
 - by the Commission or national competition authorities who find infringements of competition law and, where applicable, punish them by way of fines (public enforcement) and
 - by victims by way of actions for damages before national courts (private enforcement).
- The Commission wants to create uniform rules on private enforcement in order to ensure that
 - victims of an infringement of competition law throughout the EU are able to enforce their right to full damages and
 - private enforcement and public enforcement are coordinated with each other.

► Right to compensation

- Any person or company that has suffered harm because another company has infringed national or EU competition law is entitled to claim compensation (Art. 2 (1)).
- Compensation covers (Art. 2 (2))
 - actual loss and/or
 - loss of profit and
 - interest from the time the harm occurred until the compensation has been paid.
- The Court may estimate the amount of harm (Art. 16 (2)).

► Direct and indirect victims

- Direct victims are
 - customers of the wrongdoer who have to accept higher purchase prices and
 - suppliers of the wrongdoer who are paid lower sale prices.
- Indirect victims as a result of “passing-on” (Art. 12 et seq.) are
 - indirect purchasers of the wrongdoer, i.e. purchasers of a direct purchaser because the latter passes on its higher purchase price to them, and
 - indirect suppliers of the wrongdoer, i.e. suppliers of a direct supplier, because the latter passes on its lower sale price to them.

► Burden of proof in an action for damages

- Where, as part of public enforcement, a national competition authority or a national review court – that has judicially examined the findings of the competition authority – declares an infringement of competition law, the court involved in the private enforcement cannot deviate from the decision (Art. 9).

- The victim must, in principle, prove that the infringement of competition law has caused harm.
- In the case of an infringement of competition law in the form of a cartel, it is presumed, by way of an exception, that the infringement caused the harm. The wrongdoer may rebut this presumption (Art. 16 (1)).
A cartel is an agreement between competitors aimed at coordinating their competitive behaviour on the market (Art. 4 No. 12).
- The wrongdoer can invoke as a defence that the victim suffered no harm, or a smaller amount of harm, because it passed on the higher purchase price or lower sale price to indirect victims (Art. 12 (1)).
 - The wrongdoer must prove that the harm was passed on (Art. 12 (1)).
 - This defence cannot be invoked if it is "legally impossible" for the indirect victim to claim compensation from the wrongdoer (Art. 12 (2)).
- Where an indirect victim claims compensation, in addition to proving the harm incurred, he must also prove that the harm was passed on (Art. 13 (1)). There is a presumption that the indirect victim has proven passing-on where he has shown that (Art. 13 (2))
 - the wrongdoer has committed an infringement of competition law,
 - the infringement of competition law resulted in a higher purchase price or lower sale price for the direct victim, and
 - the indirect victim purchased or sold goods or services that were connected to the infringement.
 The wrongdoer can rebut the presumption.

► **Access and handling of evidence in an action for damages**

- The court may, at the request of either the victim or the wrongdoer, order the other respective party or a third party, e.g. a competition authority, to disclose evidence if (Art. 5)
 - disclosure takes account of the interests of the victim and of the wrongdoer – particularly the protection of confidential information – and is proportionate, and
 - the requesting party
 - proves that the other party or the third party has relevant evidence,
 - specifies either pieces of this evidence or "categories" of this evidence defined as precisely and narrowly as possible "on the basis of reasonably available facts" and
 - has presented reasonably available facts and evidence showing "plausible grounds" for a right to claim compensation; this does not apply if the wrongdoer makes the request because he has no right to claim compensation.
- The court cannot order disclosure of the following evidence from the files of a competition authority (Art. 6(1) and (2)):
 - leniency corporate statements; in these a wrongdoer ("leniency recipient") admits its involvement in a cartel in order to gain immunity from, or reduction of, a fine (Art. 4 No. 14);
 - settlement submissions; in these a wrongdoer admits to a competition authority its involvement in a cartel infringement and requests an expedited procedure (Art. 4 No. 15).
 - evidence provided by a competition authority, or by a party, for proceedings by a competition authority which are still ongoing.
- Member States must impose sanctions, particularly in the case of breaches of the duty of disclosure and in the case of the destruction of evidence. In particular, by way of sanction a relevant issue may be deemed to be proven (Art. 8).

► **Liability of the wrongdoer**

- Several wrongdoers who have infringed competition law through joint behaviour are, in principle, jointly and severally liable for the harm caused. This means (Art. 11 (1) and (3)):
 - each wrongdoer is liable to the victim both for its own contribution to the harm caused and for the contribution of all the other wrongdoers.
 - A wrongdoer that has paid for more than its own contribution can claim compensation from the other wrongdoers.
- The size of each wrongdoer's contribution depends on his "relative responsibility" for the infringement of competition law (Art. 11 (3)). The "relative responsibility" is determined according to the turnover, market share, or role in the cartel (Recital 27).
- Leniency recipients who have been granted immunity from fines are not jointly and severally liable (Art. 11 (2) and (3)).
 - Leniency recipients only have to pay compensation to their direct and indirect victims unless the other victims can prove that the other wrongdoers are unable to pay their contribution to compensation.
 - With respect to the other wrongdoers, the leniency recipient's contribution is limited to the amount of harm that he has to pay to his direct and indirect victims.

Statement on Subsidiarity by the Commission

Varying national legislation on private enforcement in the Member States obstructs the internal market and the effectiveness of EU competition law (Recital 43).

Policy Context

In 2005, the Commission submitted a Green Paper and in 2008 a White Paper (see [cepPolicyBrief](#)) on actions for damages under competition law. Along with this Directive, it has published a Communication on quantifying harm in actions for damages (2013/C 167/07), a Practical Guide for courts on quantifying harm [SWD(2013) 205] and a recommendation on collective redress (2013/396/EU).

Legislative Procedure

11 June 2013 Adoption by the Commission
Open Adoption by the European Parliament and the Council, publication in the Official Journal of the European Union, entry into force

Options for Influencing the Political Process

Leading Directorates General: DG Competition (leading)
Committees of the European Parliament: Economic and Monetary Affairs (leading), Rapporteur Andreas Schwab (EPP Group, Germany)
Federal Ministries: Economy (leading)
Decision mode in the Council: Qualified majority (Adoption by a majority of the Member States and with 260 of 352 votes; Germany: 29 votes)

Formalities:

Legislative competence: Art. 103 TFEU (Competition) and Art. 114 TFEU (Internal Market)
Form of legislative competence: Exclusive competence (Art. 103 in conjunction with Art. 3 (1) TFEU) and shared competence (Art. 114 in conjunction with Art. 4 (2) TFEU)
Procedure: Art. 294 TFEU (Ordinary legislative procedure)

ASSESSMENT

Economic Impact Assessment

The Directive's aims of **facilitating the private enforcement of claims for damages in the case of infringements of competition law**, and allowing for better coordination with public enforcement, enhances legal certainty: each of these **discourages potential wrongdoers, strengthens society's confidence in the legal system and increases the incentive for victims to uncover potential cartels**.

This applies in particular to the statutory presumption that a cartel has caused harm: it facilitates private actions and thereby the private enforcement of competition law. When a cartel is uncovered, companies therefore have to expect not only a fine but also claims for compensation. The presumption that a cartel has caused harm is also justified in substance because specific cartel agreements between competitors would not be concluded if they did not allow for the imposition of higher sale prices or lower purchase prices, i.e. if no harm was caused. Even in cases where a cartel agreement has not been implemented or prices have not been successfully influenced, the statutory presumption is appropriate because, on the one hand, such cases are rare, and on the other, the wrongdoer may have evidence allowing it to rebut the presumption.

The statutory presumption that an indirect victim has suffered harm as a result of passing-on works fast – at least in the case of a cartel infringement. The first requirement, that the wrongdoer must be in breach of the ban on cartels, is generally met due to the binding effect of the decision by the competition authority. The second requirement, that the infringement must have resulted in a higher purchase price or lower sale price for the direct victim, is always met in the case of a cartel because the victim does not have to prove harm. In order for the presumption of harm to take effect in the case of passing-on, the victim therefore only has to prove that it bought or sold the goods or services which are connected to the infringement of competition law. This rule facilitates private claims to such an extent that it could lead to unjustified claims. This danger is increased by the fact that it is difficult for the wrongdoer to rebut the presumption. For this he needs evidence which only the direct or indirect victim possesses because the passing-on only relates to their contractual relationship.

The rules on disclosure orders can also lead to unjustified claims because the term "category" of evidence is too imprecise. If this term is interpreted widely, the victim will be able to bring a claim and only then, by making an application for disclosure of a general category of evidence - e.g. "bookkeeping documents" – "fish" for an infringement of competition law (fishing expedition). In order to prevent the disclosure of their business secrets, companies more readily agree to a settlement. Claimants can speculate on this in order to obtain compensation to which they are not entitled. The danger of unjustified claims is reduced by the fact that the judge has to check whether disclosure is proportionate and, in so doing, must take account of the protection of confidential information. It is questionable, however, whether that is sufficient to prevent unjustified claims.

Granting immunity from fines for leniency recipients in the context of public enforcement is very important in order to uncover cartels. Easier private enforcement may reduce the effectiveness of this leniency programme because, when a cartel is uncovered, leniency recipients, although they are further on immune from fines, still

have to face increased compensation payments. Rather than improving private enforcement, this could have a detrimental effect as fewer infringements of competition law will be reported by leniency recipients.

Since leniency corporate statements are good evidence on which to base a claim and leniency recipients are known before all other wrongdoers, **excluding the leniency corporate statement from disclosure of evidence** protects leniency recipients from being the first to be sued for compensation by victims. This exclusion **contributes, on the one hand, to maintaining the incentive for leniency recipients to uncover cartels. On the other hand, it makes private actions** against leniency recipients, and other wrongdoers, **more difficult** because an important piece of evidence is not available.

The rule that a leniency recipient, who has been granted immunity from fines, is only liable to its direct and indirect victims, makes private actions more difficult because, particularly where the leniency recipient is a large company and the rest are small, many victims are no longer able to assert their compensation claims directly against the large wrongdoer but must first claim against the small companies. Only when these are all insolvent can the victims turn to the large company. **This rule is not necessary to maintain the incentive for leniency recipients to report a cartel to the competition authority.** It is sufficient in this regard to limit the leniency recipient's liability only with respect to other wrongdoers – rather than, as the Commission provides, to both wrongdoers and victims - to the amount of compensation payable to its direct and indirect victims. This would not result in the leniency recipient having to pay more than if its liability were also limited with respect to the victims since he could recoup the overpayment from the other wrongdoers provided they were not insolvent. But even then the leniency recipient would not have to pay more than he would under the Commission's proposal because, in the event of the insolvency of the other wrongdoers, the proposal also provides that the leniency recipient must compensate the victims for the other wrongdoers' contribution.

Legal Assessment

Legislative Competency

The EU can pass legislation in order to give effect to EU competition law and thereby ensure that it can be better implemented (Art. 103 TFEU). It is not clear whether this will be achieved with the proposed measures because public and private enforcement could be made more difficult if the wrongdoers no longer report as leniency recipients and thus fewer infringements of competition law are uncovered.

The Directive can, however, be based on the competence to harmonise laws in the internal market (Art. 114 TFEU): The aim and content of the Directive constitutes the harmonisation of national competition law. The functioning of the internal market is detrimentally affected because wrongdoers are able to gain a competitive advantage if, in their Member State, they have to fear fewer actions for damages.

Proportionality

The rules on the imposition of sanctions, particularly in the case of breaches of the duty of disclosure and in the case of the destruction of evidence, are too detailed and therefore disproportionate. The form of these sanctions should be left to the Member States.

Impact on German Law

The exemption from joint and several liability applicable to leniency recipients who – under national ruling – have been granted immunity from fines, is, in Germany, problematic from the rule of law perspective because the requirements for granting immunity from fines are regulated in a Communication from the Federal Cartel Authority ("Bonusregelung" (Leniency Programme) No. 09/2006) and not in a provision under civil or administrative law. The victims and the other wrongdoers cannot therefore take action against the decision by the Federal Cartel Authority to grant immunity from fines even though they may be disadvantaged in the assertion of their claims for damages or compensation. If Germany issues a ruling under which victims and wrongdoers are able to take action against the granting of immunity from fines, although the rule of law concerns will be dispelled, the leniency programme will be weakened because there is a danger that granting immunity from fines will become more difficult and fewer wrongdoers will report as leniency recipients.

Conclusion

Facilitating the private enforcement of claims for damages in the case of infringements of competition law discourages potential wrongdoers, strengthens society's confidence in the legal system and increases the incentive for victims to uncover potential cartels. The rules on disclosure orders can, however, lead to unjustified claims because the term "category" of evidence is too imprecise. Excluding the leniency corporate statement from the disclosure of evidence contributes, on the one hand, to maintaining the incentive for leniency recipients to uncover cartels. On the other hand, it makes private actions more difficult. The rule that a leniency recipient, who has been granted immunity from fines, is only liable to its victims makes private actions more difficult and is not necessary to maintain the incentive for leniency recipients to report a cartel to the competition authority. The rules on the imposition of sanctions in the case of breaches of the duty of disclosure and in the case of the destruction of evidence are disproportionate.