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Committee on Legal Affairs

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DRAFT OPINION

of the Committee on Legal Affairs

for the Committee on Economic and Monetary Affairs

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
(COM(2013)0404 – C7-0170/2013 – 2013/0185(COD))

Rapporteur: Bernhard Rapkay

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SHORT JUSTIFICATION

The possible introduction of common rules on actions for damages for competition infringements has been under deliberation for almost a decade. The Commission's proposal for this Directive is therefore welcome, as it can help consumers and small and medium-sized enterprises to exercise their right to compensation for harm caused by competition law infringements. The absence of national rules that adequately govern actions for damages or, on the other hand, the disparity between national legislations places not only victims, but also the perpetrators of competition law infringements in a position of inequality. This may also give a competitive advantage to undertakings that have breached Articles 101 or 102 of the Treaty on the Functioning of the European Union, but which do not have their headquarters or do not conduct business in a Member State whose legislation is favourable for claimants. These differences in the liability rules may damage competition and hinder the proper functioning of the internal market. The rapporteur therefore welcomes the Commission's proposal to facilitate access to justice and enable victims to obtain compensation.

In principle the rapporteur supports leniency programmes, as these can make it possible to identify infringements and feels that undertakings should not be discouraged from cooperating. However, such programmes should not protect undertakings more than is necessary. In particular, they should not absolve infringing parties from paying damages to victims, nor lead to excessive protection of information needed by claimants as evidence in order to bring an action for damages.

Similarly, the rapporteur supports the encouraging of consensual settlements, while emphasising that these must be of a genuinely voluntary nature. In order to facilitate equitable settlements claimants should have the possibility of obtaining pre-litigation information from national or European competition authorities concerning the volume of damages or loss incurred.

Obtaining evidence is a crucial factor for exercising the rights of appeal. Therefore the rapporteur considers it essential to further strengthen the provisions proposed by the Commission to allow proportionate access, under judicial supervision, to the information that is relevant and necessary for the action. While certain types of documents, or certain kinds of information contained in these can merit confidentiality, the rapporteur considers that no categories of documents should be excluded, as such, from an evaluation of whether or not they should be disclosed.

During previous deliberations of how to reinforce the position of the claimants collective redress has been presented as a way to improve the equality of arms of the parties to disputes over damages. While considering that the maintaining or introduction of such mechanisms should be encouraged, even if not made obligatory for the Member States, the rapporteur considers that it would be important to avoid certain practices, such as requiring victims to explicitly opt-out from a collective action or allowing for contingency fees or punitive damages.

AMENDMENTS

The Committee on Legal Affairs calls on the Committee on Economic and Monetary Affairs, as the committee responsible, to take into account the following amendments:

Amendment 1

Proposal for a directive

Recital 4

Text proposed by the Commission

(4) The Union right to compensation for antitrust harm requires each Member State to have procedural rules ensuring the effective exercise of that right. The need for effective procedural remedies also follows from the right to effective judicial protection as laid down in Article 47, first paragraph, of the Charter of Fundamental Rights of the European Union⁵³ and in Article 19(1), second subparagraph of the Treaty on European Union.

⁵³ OJ C 326, 26.10.2012, p. 391.

Amendment

(4) The Union right to compensation for antitrust harm requires each Member State to have procedural rules ensuring the effective exercise of that right. The need for effective procedural remedies also follows from the right to effective judicial protection as laid down in Article 47, first paragraph, of the Charter of Fundamental Rights of the European Union⁵³ and in Article 19(1), second subparagraph of the Treaty on European Union, ***pursuant to which Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. Procedural rules under national law should not only comply with the principles of effectiveness and equivalence but should also be harmonised to the extent necessary to ensure legal certainty, a level playing field and minimum standards throughout the internal market.***

⁵³ OJ C 326, 26.10.2012, p. 391.

Or. en

Justification

While it is important to stress that procedural rules remain an essential element of national law it is also important that these are not only effective, as required by the principle of effectiveness referred to in recital 10 but that they are made more similar across the Member States in specific respects when this is needed in order to ensure and improve the functioning of the internal market.

Amendment 2

Proposal for a directive Recital 4 a (new)

Text proposed by the Commission

Amendment

(4a) Whereas Member States should be encouraged to maintain or introduce collective redress schemes for the purpose of strengthening the claimants' possibilities to bring action for damages for infringement of competition law, some basic rules would be required on the Union level in order to allow consumers in all Member States to avail themselves of such schemes for the purpose of greater equality of arms between the parties to the dispute. In order to preserve consumers' right of choice and avoid abusive use, such schemes on an EU level should be based on an opt-in system and should not allow the use of a contingency fees or the possibility to award punitive damages.

Or. en

Justification

Collective redress procedures exist in 15 Member States. In particular, in respect to cross-border situations clearer rules would be desirable as the present situation often presents consumers and businesses affected by competition infringements with complex requirements. In principle, collective redress should be accessible for all EU citizens and businesses, wherefore Member States should be encouraged to introduce this possibility, while certain practices, such as contingency fees and punitive damages preferably should not form part of collective redress schemes in the EU.

Amendment 3

Proposal for a directive Recital 7

Text proposed by the Commission

(7) Undertakings established and operating in different Member States are subject to procedural rules that significantly affect the extent to which they can be held liable for infringements of competition law. This uneven enforcement of the Union right to compensation may result in a competitive advantage for some undertakings which have breached Articles 101 or 102 of the Treaty, and a disincentive to the exercise of the rights of establishment and provision of goods or services in those Member States where the right to compensation is more effectively enforced. *As such*, the differences in the liability regimes applicable in the Member States may negatively affect both competition and the proper functioning of the internal market.

Amendment

(7) Undertakings established and operating in different Member States are subject to procedural rules that significantly affect the extent to which they can be held liable for infringements of competition law. This uneven enforcement of the Union right to compensation may result in a competitive advantage for some undertakings which have breached Articles 101 or 102 of the Treaty, and a disincentive to the exercise of the rights of establishment and provision of goods or services in those Member States where the right to compensation is more effectively enforced. *Therefore, as* the differences in the liability regimes applicable in the Member States may negatively affect both competition and the proper functioning of the internal market, *it is appropriate to base the Directive on the dual legal basis of Articles 103 and 114 TFEU.*

Or. en

Justification

The arguments presented in the recital logically lead to the conclusion of the need to base the Directive on the dual legal basis of Articles 103 and 114 TFEU, which conclusion should also be spelled out for the sake of clarity.

Amendment 4

Proposal for a directive
Recital 8

Text proposed by the Commission

(8) It is therefore necessary to ensure a more level playing field for undertakings operating in the internal market and to improve the conditions for consumers to exercise the rights they derive from the internal market. It is also appropriate to

Amendment

(8) It is therefore necessary, *bearing in mind also the often cross-border nature of large scale infringements of competition law*, to ensure a more level playing field for undertakings operating in the internal market and to improve the conditions for

increase legal certainty and to reduce the differences between the Member States as to the national rules governing actions for damages for infringements of European competition law and, when applied in parallel to the latter, national competition law. An approximation of these rules will also help to prevent the emergence of wider differences between the Member States' rules governing actions for damages in competition cases.

consumers to exercise the rights they derive from the internal market. It is also appropriate to increase legal certainty and to reduce the differences between the Member States as to the national rules governing actions for damages for infringements of European competition law and, when applied in parallel to the latter, national competition law. An approximation of these rules will also help to prevent the emergence of wider differences between the Member States' rules governing actions for damages in competition cases.

Or. en

Justification

Large infringements of competition law will typically not be restricted to only one member State but have cross-border effects, which affect trade between the Member States and thereby the functioning of the internal market.

Amendment 5

Proposal for a directive

Recital 11

Text proposed by the Commission

(11) This Directive reaffirms the *acquis communautaire* on the Union right to compensation for harm caused by infringements of Union competition law, particularly regarding standing and the definition of damage, as it has been stated in the case-law of the Court of Justice of the European Union, and does not pre-empt any further development thereof. Anyone who has suffered harm caused by an infringement can claim compensation for the actual loss (*damnum emergens*), for the gain of which he has been deprived (loss of profit or *lucrum cessans*) and payment of interest accruing from the time the harm occurred until compensation is paid. This

Amendment

(11) This Directive reaffirms the *acquis communautaire* on the Union right to compensation for harm caused by infringements of Union competition law, particularly regarding standing and the definition of damage, as it has been stated in the case-law of the Court of Justice of the European Union, and does not pre-empt any further development thereof. Anyone who has suffered harm caused by an infringement can claim compensation for the actual loss (*damnum emergens*), for the gain of which he has been deprived (loss of profit or *lucrum cessans*) and payment of interest accruing from the time the harm occurred until compensation is paid. This

right is recognised for any natural or legal person — consumers, undertakings and public authorities alike — irrespective of the existence of a direct contractual relationship with the infringing undertaking, and regardless of whether or not there has been a prior finding of an infringement by a competition authority.

This Directive should not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 of the Treaty.

right is recognised for any natural or legal person — consumers, undertakings and public authorities alike — irrespective of the existence of a direct contractual relationship with the infringing undertaking, and regardless of whether or not there has been a prior finding of an infringement by a competition authority.

Or. en

Justification

It is not necessary to explicitly exclude the introduction of an obligation to introduce collective redress.

Amendment 6

Proposal for a directive Recital 15

Text proposed by the Commission

(15) The requirement of proportionality should also be carefully assessed when disclosure risks unravelling the investigation strategy of a competition authority by revealing which documents are part of the file or causing a negative bearing on the way in which companies cooperate with the competition authority. The disclosure request should therefore not be deemed proportionate when it refers to the generic disclosure of documents in the file of a competition authority relating to a certain case, ***or of documents submitted by a party in the context of a certain case.*** ***Such*** wide disclosure ***requests*** would also not be compatible with the requesting party's duty to specify categories of evidence as precisely and narrowly as possible.

Amendment

(15) The requirement of proportionality should also be carefully assessed when disclosure risks unravelling the investigation strategy of a competition authority by revealing which documents are part of the file or causing a negative bearing on the way in which companies cooperate with the competition authority. The disclosure request should therefore not be deemed proportionate when it refers to the generic disclosure of documents in the file of a competition authority relating to a certain case ***as this*** would not be compatible with the requesting party's duty to specify categories of evidence as precisely and narrowly as possible.

Special attention should be paid to prevent any types of requests which are aimed at fishing expeditions.

Or. en

Justification

Self-explanatory.

Amendment 7

**Proposal for a directive
Recital 17**

Text proposed by the Commission

(17) While relevant evidence containing business secrets or otherwise confidential information should in principle be available in actions for damages, such confidential information needs to be appropriately protected. National courts should therefore have at their disposal a range of measures to protect such confidential information from being disclosed during the proceedings. These may include the possibility of hearings *in private*, restricting the circle of persons entitled to see the evidence, and instruction of experts to produce summaries of the information in an aggregated or otherwise non-confidential form. Measures protecting business secrets and other confidential information should not *practically* impede the exercise of the right to compensation.

Amendment

(17) While relevant evidence containing business secrets or otherwise confidential information should in principle be available in actions for damages, such confidential information needs to be appropriately protected. National courts should therefore have at their disposal a range of measures to protect such confidential information from being disclosed during the proceedings. These may include the possibility of ***blanking out sensitive parts of a document***, hearings *in camera*, restricting the circle of persons entitled to see the evidence, and instruction of experts to produce summaries of the information in an aggregated or otherwise non-confidential form. Measures protecting business secrets and other confidential information should, ***nevertheless***, not impede the exercise of the right to compensation.

Or. en

Justification

If documents contain sensitive details, such as the data on third parties not relevant for the procedure these can be blanked out. If necessary proceedings can be held in camera in order to protect particularly sensitive information.

Amendment 8

Proposal for a directive Article 2 – paragraph 3

Text proposed by the Commission

3. Member States shall ensure that injured parties can effectively exercise their claims for damages.

Amendment

3. Member States shall ensure that injured parties can effectively exercise their claims for damages **and shall make collective redress procedures available for private damages claims for infringements of competition law. Such collective redress schemes shall be based on the principle of opt-in and may not include the availability of contingency fees or the possibility to award punitive damages.**

Or. en

Justification

Different forms of collective redress already exist in 15 Member States and the Directive should encourage other Member States to introduce such mechanisms. However, it is important to avoid creating a market for abusive use of collective redress through features such as the opt-out principle, contingency fees and punitive damages.

Amendment 9

Proposal for a directive Article 4 – paragraph 1 – point 17 a (new)

Text proposed by the Commission

Amendment

(17a) 'injunctive collective redress' means a procedural possibility to claim cessation of infringing behaviour collectively by two or more natural or legal persons or by a representative entity entitled to bring such actions and 'compensatory collective redress' means a procedural possibility to claim compensation for damages caused by an infringement collectively by two or more natural or legal persons or by a

representative entity entitled to bring such actions;

Or. en

Justification

Article 2(3), as amended, refers to 'collective redress', wherefore there is a need to define the concept.

Amendment 10

Proposal for a directive
Article 4 – paragraph 1 – point 17 b (new)

Text proposed by the Commission

Amendment

(17b) 'contingency fee' means a lawyers fee for services provided where the fee is payable only if there is a favourable result for the client and where the lawyer will be entitled to a success fee in addition to the normal fee based on hourly billing if the case is won.

Or. en

Justification

Article 2(3), as amended, refers to 'contingency fees, wherefore there is a need to define the concept.

Amendment 11

Proposal for a directive
Article 4 – paragraph 1 – point 17 c (new)

Text proposed by the Commission

Amendment

(17c) 'punitive damages' are damages awarded which are not limited to the compensation of damaged actually incurred and, thus, constitute a sanction imposed on the defendant.

Justification

Article 2(3), as amended, refers to 'punitive damages', wherefore there is a need to define the concept.

Amendment 12

Proposal for a directive

Article 4 – paragraph 1 – point 17 d (new)

Text proposed by the Commission

Amendment

(17d) the 'opt-in' principle means that only those individuals or legal persons who actively opt in become part of the represented group pursuing a collective action for damages and are bound by the judgment, while all other individuals potentially harmed by the infringement remain free to pursue their damages claims individually.

Justification

Article 2(3), as amended, refers to the 'op-in' principle, wherefore there is a need to define the concept.

Amendment 13

Proposal for a directive

Article 5 – paragraph 3 – point b

Text proposed by the Commission

Amendment

(b) the scope and cost of disclosure, especially for any third parties concerned;

(b) the scope and cost of disclosure, especially for any third parties concerned ***and with view to prevent fishing expeditions;***

Justification

Disclosure should always be proportionate and it should be made sure that fishing expeditions are effectively prevented.

Amendment 14

Proposal for a directive Article 5 – paragraph 6

Text proposed by the Commission

6. Member States shall ensure that, to the extent that their courts have powers to order disclosure without hearing the person from whom disclosure is sought, no penalty for non-compliance with such an order may be imposed until the addressee of such an order has been heard by the court.

Amendment

6. Member States shall ensure that, to the extent that their courts have powers to order disclosure without hearing the person from whom disclosure is sought, no penalty for non-compliance with such an order may be imposed until the addressee of such an order has been ***provided with the possibility to be*** heard by the court.

Or. en

Justification

While respect for due process requires that the anyone threatened by sanctions be to provide the possibility to be heard, it should not be possible to avoid both disclosure and sanctions for not obeying a court order by avoidance.

Amendment 15

Proposal for a directive Article 5 – paragraph 7

Text proposed by the Commission

7. Evidence shall include all types of evidence admissible before the national court ***seized***, in particular documents and all other objects containing information, irrespective of the medium on which the information is stored.

Amendment

7. Evidence shall include all types of evidence admissible before the national court ***seized***, in particular documents, ***including, when necessary, documents related to leniency procedures and consensual settlements*** and all other objects containing information, irrespective of the medium on which the information is

stored.

Or. en

Justification

The Directive should not exclude any categories of documents as such from disclosure.

Amendment 16

**Proposal for a directive
Article 5 – paragraph 7 a (new)**

Text proposed by the Commission

Amendment

7a. Member States shall ensure that potential claimants have the possibility to obtain evidence concerning the volume of damage or loss from the competition authority and the defendant in order to facilitate consensual settlements, without any obligation to take judicial action.

Or. en

Justification

The Directive seeks to encourage consensual settlements of disputes. However, due to the imbalance in respect to information the claimant is often unable to quantify the amount of damages or loss suffered, which makes consensual settlements more difficult to achieve. Therefore pre-litigation disclosure by national authorities, the Commission or the alleged infringers are needed so that the claimants can have at least an approximate idea of the damage or loss without needing to go to court.

Amendment 17

**Proposal for a directive
Article 10 – paragraph 3**

Text proposed by the Commission

Amendment

3. Member States shall ensure that the limitation period does not begin to run before the day on which ***a continuous or***

3. Member States shall ensure that the limitation period does not begin to run before the day on which ***the*** infringement

repeated infringement ceases.

ceases.

Or. en

Justification

This provision should be valid for all infringements as it is not appropriate that a limitation period starts to run before an infringement is brought to an end.

Amendment 18

**Proposal for a directive
Article 10 – paragraph 5**

Text proposed by the Commission

5. Member States shall ensure that the limitation period is suspended if a competition authority takes action for the purpose of the investigation or proceedings in respect of an infringement to which the action for damages relates. The suspension shall end at the earliest **one year** after the ***infringement*** decision has become final **or the proceedings are otherwise terminated**.

Amendment

5. Member States shall ensure that the limitation period is suspended if a competition authority takes action for the purpose of the investigation or proceedings in respect of an infringement to which the action for damages relates. The suspension shall end at the earliest **two years** after the decision, ***through which the procedure concerning the infringement or alleged infringement has been closed***, has become final.

Or. en

Justification

The limitation period should be sufficiently long so as to allow for genuine access to justice.

Amendment 19

**Proposal for a directive
Article 17 – paragraph 1**

Text proposed by the Commission

1. Member States shall ensure that the limitation period for bringing an action for damages is suspended for the duration of

Amendment

1. Member States shall ensure that ***when the parties voluntarily try to resolve their dispute through consensual dispute***

the consensual dispute resolution process. The suspension of the limitation period shall apply only with regard to those parties that are or were involved in the consensual dispute resolution.

resolution the limitation period for bringing an action for damages is suspended for the duration of the consensual dispute resolution process. The suspension of the limitation period shall apply only with regard to those parties that are or were involved in the consensual dispute resolution.

Or. en

Justification

It is important to underline that consensual settlements should be voluntary.

Amendment 20

**Proposal for a directive
Article 17 – paragraph 2**

Text proposed by the Commission

2. Member States shall ensure that national courts seized of an action for damages may suspend proceedings where the parties to those proceedings are involved in consensual dispute resolution concerning the claim covered by that action for damages.

Amendment

2. Member States shall ensure that national courts seized of an action for damages may suspend proceedings where the parties to those proceedings are involved in **voluntary** consensual dispute resolution concerning the claim covered by that action for damages.

Or. en

Justification

It is important to underline that consensual settlements should be voluntary.

Amendment 21

**Proposal for a directive
Article 17 a (new)**

Text proposed by the Commission

Amendment

Article 17a

***Disclosure of evidence in the framework
of consensual dispute resolution***

1. Member States shall ensure that parties engaged in consensual dispute resolution have access to national courts for the purpose of the exercise of the rights provide for in Article 5, regardless of whether or not an action for damages between such parties is pending before a national court.

2. The limits on the disclosure of evidence provided for in Article 6 shall be applicable in proceedings referred to in paragraph 1.

Or. en

Justification

Claimants are empowered in consensual dispute resolution if they have access to relevant evidence. If the information asymmetry between claimants and defendants can be reduced a more fair settlement can therefore be expected.

Amendment 22

Proposal for a directive

Article 18 – paragraph - 3 (new)

Text proposed by the Commission

Amendment

-3. Member States shall ensure that national courts can, upon request of either of the parties or on its own initiative apply, in part or in whole, the terms of a fair consensual settlement concerning the same infringement to the dispute pending before it.

Or. en

Justification

Such a possibility would facilitate actions for damages in cases of partial settlements, which would save time and costly procedures.

