



**COUNCIL OF  
THE EUROPEAN UNION**

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from:	General Secretariat
to:	Working Party on Competition
on:	31 October 2013
No. Cion prop.:	11381/13 RC 29 JUSTCIV 177 CODEC 1566
Subject:	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 - Presidency compromise text Articles 11-22

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In view of the Working Party on Competition on 31 October 2013, delegations will find in Annex a Presidency compromise text on Articles 11 to 22 of the above-mentioned Directive. For your convenience additions are marked in **bold/underlined** and deletions in ~~strikethrough~~.

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2013/0185 (COD)

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**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 103 and 114 thereof,

Having regard to the proposal from the European Commission<sup>1</sup>,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee<sup>2</sup>,

Acting in accordance with the ordinary legislative procedure,

Whereas:

*(omissis)*

(27) Where several undertakings infringe the competition rules jointly (as in the case of a cartel) it is appropriate to make provision for these joint infringers to be held jointly and severally liable for the entire harm caused by the infringement. Amongst themselves, the joint infringers should have the right to obtain contribution if one of the infringing undertakings has paid more than its share. The determination of that share as the relative responsibility of a given infringer and the relevant criteria, such as turnover, market share, or role in the cartel, is a matter for the applicable national law, while respecting the principles of effectiveness and equivalence.

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<sup>1</sup> OJ C , , p. .

<sup>2</sup> OJ C , , p. .

- (28) Undertakings which cooperate with competition authorities under a leniency programme play a key role in detecting ~~secret~~ cartel infringements and in bringing these infringements to an end, thereby often mitigating the harm which could have been caused had the infringement continued. It is therefore appropriate to make provision for ~~undertakings which have received immunity from fines from a competition authority under a leniency programme~~ **recipients** to be protected from undue exposure to damages claims, bearing in mind that the decision of the competition authority finding the infringement may become final for the immunity recipient before it becomes final for other undertakings which have not received immunity. It is therefore appropriate that the immunity recipient is relieved in principle from joint and several liability for the entire harm and that its contribution does not exceed the amount of harm caused to his own direct or indirect purchasers or, in case of a buying cartel, his direct or indirect providers. To the extent a cartel has caused harm to others than the customers/providers of the infringer~~sing undertakings~~, the contribution of the immunity recipient should not exceed his relative responsibility for the harm caused by the cartel. This share should be determined in accordance with the same rules used to determine the contributions among infringer~~sing undertakings~~ (recital (27) above). The immunity recipient should remain fully liable to the injured parties other than his direct or indirect purchasers or providers only where they are unable to obtain full compensation from the other infringer~~sing undertakings~~.
- (29) ~~Consumers and undertakings which have been harmed by an infringement of national or Union competition law are entitled to compensation for the actual loss and for loss of profit.~~ The **Harm in the form of** actual loss can result from the price difference between what was actually paid and what would have been paid in the absence of the infringement. When an injured party has reduced his actual loss by passing it on, entirely or in part, to his own purchasers, the loss which has been passed on no longer constitutes harm for which the party that passed it on has to be compensated. It is therefore in principle appropriate to allow an infringer~~ing undertaking~~ to invoke the passing-on of actual loss as a defence against a claim for damages. It is appropriate to provide that the infringer~~ing undertaking~~, insofar as it invokes the passing-on defence, must prove the existence and extent of pass-on of the overcharge. **In situations where the pass-on resulted in reduced sales and thus harm in the form of a loss of profit (recital (11) above), the right to claim compensation for such loss of profit should remain unaffected.**

~~(30) However, in a situation where the overcharge was passed on to persons who are legally unable to claim compensation, it is not appropriate to allow the infringing undertaking to invoke the passing-on defence, as this would render it free of liability for the harm which it has caused. The court seized of the action should therefore assess, when the passing-on defence is invoked in a specific case, whether the persons to whom the overcharge was allegedly passed on are legally able to claim compensation.~~ **(30) While indirect purchasers are entitled to claim compensation, national rules of causality (including rules on foreseeability and remoteness), applied in accordance with principles of Union law, may entail that certain persons (for instance at a level of the supply chain which is remote from the infringement) are legally unable to claim compensation in a given case. Only when the court finds **When a defendant alleges** that the person to whom the overcharge was allegedly passed on **to such persons**, is legally able to claim compensation will it assess the merits of the passing-on **his** defence **should be deemed inadmissible. Inadmissibility of the defence does not affect the rules regarding the burden of proving that the conditions of the liability of the defendant referred to in recital (11) are satisfied.****

(31) Consumers or undertakings to whom actual loss has been passed on have suffered harm that has been caused by an infringement of national or Union competition law. While such harm should be compensated by the infringing undertaking, it may be particularly difficult for consumers or undertakings that did not themselves make any purchase from the infringing undertaking to prove the scope of that harm. It is therefore appropriate to provide **for a rebuttable presumption that where the infringement resulted in an overcharge, this overcharge is presumed to have affected the price of the goods or services purchased by the indirect purchaser** that, where the existence of a claim for damages or the amount to be awarded depends on whether or to what degree an overcharge paid by the direct purchaser of the infringing undertaking has been passed on to the indirect purchaser, the latter is regarded as having brought the proof that an overcharge paid by that direct purchaser has been passed on to his level, where he is able to show *prima facie* that such passing-on has occurred. It is furthermore appropriate to define under what conditions the indirect purchaser is to be regarded as having established such *prima facie* proof. As regards the quantification of passing-on, the national court should have the power to estimate,

**rather than to calculate precisely,** which share of the overcharge has been passed on to the level of indirect purchasers in the dispute pending before it. The infringer~~ing undertaking~~ should be allowed to bring proof showing that the actual loss has not been passed on or has not been passed on entirely.

- (32) Infringements of competition law often concern the conditions and the price under which goods or services are sold and lead to an overcharge and other harm for the customers of the infringer~~sing undertakings~~. The infringement may also concern supplies to the infringer~~ing undertaking~~ (for example in the case of a buyer's cartel). The rules of this Directive and in particular the rules on pass-on should apply accordingly.
- (33) Actions for damages can be brought both by ~~injured parties that have~~**those who** purchased goods or services from the infringer~~ing undertaking~~ and by purchasers further down the supply chain. In the interest of consistency between judgments resulting from such related proceedings and hence to avoid the harm caused by the infringement of national or Union competition law not being fully compensated or the infringer~~ing undertaking~~ being required to pay damages to compensate for harm that has not been suffered, national courts should **be able to** take due account, as far as allowed under Union and national law, of any related action and of the resulting judgment, particularly where it finds that passing-on has been proven. This should be without prejudice to the fundamental rights of defence and to an effective remedy and a fair trial of those who were not parties to these judicial proceedings. Any such actions pending before the courts of different Member States may be considered as related within the meaning of Article 30 of Regulation No 1215/2012. Under this provision, national courts other than the one first seized may stay proceedings or, under certain circumstances, decline jurisdiction.
- (34) An injured party who has proven having suffered harm as a result of a competition law infringement still needs to prove the extent of the harm in order to obtain damages. Quantifying antitrust harm is a very fact-intensive process and may require the application of complex economic models. This is often very costly and causes difficulties for ~~injured parties~~**claimants** in terms of obtaining the necessary data to substantiate their claims. As such, the quantification of antitrust harm can constitute a substantial barrier preventing ~~injured parties from obtaining compensatory damages for harm suffered~~**effective claims for compensation.**

- (35) To remedy the information asymmetry and some of the difficulties associated with quantifying antitrust harm, and to ensure the effectiveness of claims for damages, it is appropriate to presume that in the case of a cartel infringement, ~~the~~such infringement ~~has caused harm,~~ resulted in particular via a price effect. Depending on the facts of the case this means that the cartel has ~~caused~~ resulted in a rise in price, or prevented a lowering of prices which would otherwise have occurred but for the infringement. The infringer~~ing undertaking~~ should be free to rebut such presumption. It is appropriate to limit this rebuttable presumption to cartels, given the secret nature of a cartel, which increases the said information asymmetry and makes it more difficult for ~~the injured party~~claimants to obtain the necessary evidence to prove the harm.
- (36) In the absence of Union rules on the quantification of harm caused by a competition law infringement, it is for the domestic legal system of each Member State and for the national courts to determine what requirements the ~~injured party~~claimant has to meet when proving the amount of the harm suffered, how precisely he has to prove that amount, the methods that can be used in quantifying the amount and the consequences of not being able to fully meet the set requirements. However, these domestic requirements should not be less favourable than those governing similar domestic actions (principle of equivalence), nor should they render the exercise of the Union right to damages practically impossible or excessively difficult (principle of effectiveness). Regard should be had in this respect to any information asymmetries between the parties and to the fact that quantifying the harm means assessing how the market in question would have evolved had there been no infringement. This assessment implies a comparison with a situation which is by definition hypothetical and can thus never be made with complete accuracy. It is therefore appropriate to give national courts the power to estimate, rather than to calculate precisely, the amount of the harm caused by the competition law infringement.
- (37) Injured parties and infringer~~ing undertakings~~ should be encouraged to agree on compensating the harm caused by a competition law infringement through consensual dispute resolution mechanisms, such as out-of-court settlements, (including those where a judge can declare a settlement binding), arbitration, ~~and~~ mediation or conciliation. Where possible, such consensual dispute resolution should cover as many injured parties and infringer~~ing undertakings~~ as possible. The provisions in this Directive on consensual dispute resolution are therefore meant to facilitate the use of such mechanisms and increase their effectiveness.

- (38) Limitation periods for bringing an action for damages could be such that they prevent injured parties and ~~infringers~~ ~~undertakings~~ from having sufficient time to come to an agreement on the compensation to be paid. In order to provide both with a genuine opportunity to engage in consensual dispute resolution before bringing proceedings before the national court, the limitation period thus needs to be suspended for the duration of the consensual dispute resolution process.
- (39) Furthermore, when parties decide to engage in consensual dispute resolution after an action for damages has been brought before the national court for the same claim, that court may suspend the proceedings before it for the duration of the consensual dispute resolution process. When considering whether to suspend the proceedings, the national court should take into account the interest in an expeditious procedure.
- (40) To encourage consensual settlements, an ~~infringer~~ ~~undertaking~~ that pays damages through consensual dispute resolution should not be placed in a worse position vis-à-vis its co-infringers than it would be in without the consensual settlement. This might happen if a settling infringer, even after a consensual settlement, continued to be fully jointly and severally liable for the harm caused by the infringement. A settling infringer should in principle therefore not contribute to his non-settling co-infringers when the latter have paid damages to the injured party with whom the first infringer had previously settled. The correlate to this non-contribution rule is that the claim of the injured party is reduced by the settling infringer's share of the harm caused to him, **regardless of whether the amount of the settlement equals or is different from the relative share of the harm that the settling co-infringer inflicted upon the settling injured party**. This share should be determined in accordance with the same rules used to determine the contributions among ~~infringers~~ ~~undertakings~~ (recital (27) above). Without such reduction, the non-settling infringers would be unduly affected by the settlement to which they were not a party. The settling co-infringer will still have to pay damages where that is the only possibility for the settling injured party to obtain **compensation for the remaining claim, that is the claim of the settling injured party reduced by the settling co-infringer's share of the harm that the infringement inflicted upon the settling injured party** full compensation.

- (41) **It should be avoided that by paying contribution to non-settling co-infringers for damages they paid to non-settling injured parties, the total amount of compensation paid by the settling co-infringers exceeds their relative responsibility for the harm caused by the infringement. Therefore,** ~~When~~ settling co-infringers are asked to contribute to damages subsequently paid by non-settling co-infringers **to non-settling injured parties**, the national court should take account of the damages already paid under the consensual settlement, ~~bearing in mind that not all co-infringers are necessarily equally involved in the full substantive, temporal and geographical scope of the infringement.~~
- (42) This Directive respects fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union.
- (43) As it would be impossible, with a disparity of policy choices and legal rules at national level concerning the Union right to compensation in actions for damages for infringement of the Union competition rules, to ensure the full effect of Articles 101 and 102 of the Treaty, and to ensure the proper functioning of the internal market for undertakings and consumers, these objectives cannot be sufficiently achieved by the Member States, and can therefore, by reason of the requisite effectiveness and consistency in the application of Articles 101 and 102 of the Treaty, be better achieved at Union level. The European Parliament and the Council therefore adopt this Directive, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (44) In accordance with the Joint Political Declaration of Member States and the Commission on explanatory documents of 28 September 2011<sup>3</sup>, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

HAVE ADOPTED THIS DIRECTIVE:

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<sup>3</sup> OJ C 369, 17.12.2011, p. 14.



*(omissis – Articles 1-3)*

*Article 4*  
**Definitions**

For the purposes of this Directive, the following definitions shall apply:

*(omissis – Paragraphs 1-17 of Article 4)*

18. **'immunity recipient' means an undertaking which has been granted immunity from fines by a competition authority under a leniency programme;**

~~16.~~ **19.** **'overcharge' means any positive difference between the price actually paid and the price that would have prevailed in the absence of an infringement of competition law;**

**20. 'consensual dispute resolution' means an out-of-court process which is aimed at resolving a dispute concerning the compensation of harm;**

~~17.~~ **21.** **'consensual settlement' means an agreement whereby damages are paid following on compensation of harm, which is reached through a consensual dispute resolution.**

*(omissis – Articles 5-10)*

*Article 11*  
**Joint and several liability**

1. Member States shall ensure that undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the ~~damage~~ **harm** caused by the infringement: each of the infringing undertakings is bound to compensate for the harm in full, and the injured party may require full compensation from any of them until he has been fully compensated.

2. **By way of exception to the preceding paragraph,** Member States shall ensure that an ~~undertaking which has been granted immunity~~ **recipient** ~~from fines by a competition authority under a leniency programme shall be liable to injured parties other than~~ **jointly and severally liable:**
- a) ~~to~~ its direct or indirect purchasers or providers; ~~and only when such~~
  - b) **to other** injured parties ~~show that~~ **if** they are unable to obtain full compensation from the other undertakings that were involved in the same infringement of competition law.
3. Member States shall ensure that an infringing ~~undertaking~~ may recover a contribution from any other infringing ~~undertaking~~, the amount of which shall be determined in the light of their relative responsibility for the harm caused by the infringement. **However, with regard to harm caused to the direct or indirect purchasers or providers of the cartel,** ~~the~~ amount of contribution of an **immunity recipient** ~~undertaking which has been granted immunity from fines by a competition authority under a leniency programme shall not exceed the amount of the harm it caused to its own direct or indirect purchasers or providers.~~
4. ~~Member States shall ensure that, to the extent the infringement caused harm to injured parties other than the direct or indirect purchasers or providers of the infringing undertakings, the amount of contribution of the immunity recipient shall be determined in the light of its relative responsibility for that harm.~~

## CHAPTER IV

### PASSING-ON OF OVERCHARGES

#### *Article 12* *Passing-on defence*

1. Member States shall ensure that the defendant in an action for damages can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement. The burden of proving that the overcharge was passed on shall rest with the defendant.

2. ~~Insofar as~~ **The defence referred to in the preceding paragraph shall be inadmissible if the defendant alleges that** the overcharge has been passed on to persons at the next level of the supply chain ~~for whom it is~~ **are** legally **unable** ~~impossible~~ to claim compensation **pursuant to national rules of causality** ~~for their harm, the defendant shall not be able to invoke the defence referred to in the preceding paragraph.~~ **This provision is without prejudice to the applicable rules regarding the burden of proving the conditions laid down in Article 2(1).**

*Article 13*  
*Indirect purchasers*

1. Member States shall ensure that, **where an indirect purchaser claims compensation in relation to an infringement which led to an overcharge, the passing-on of this overcharge in the price of the goods or services he purchased shall be deemed to have been proven, provided that these are the same goods or services that were subject to the infringement, or goods or services derived from or containing the goods or services that were the subject of the infringement.** ~~in an action for damages the existence of a claim for damages or the amount of compensation to be awarded depends on whether — or to what degree — an overcharge was passed on to the claimant, the burden of proving the existence and scope of such pass-on shall rest with the claimant.~~
2. ~~In the situation referred to in paragraph 1 of this Article, the indirect purchaser shall be deemed to have proven that a passing-on to him occurred where he has shown that:~~
- ~~(a) — the defendant has committed an infringement of competition law;~~
  - ~~(b) — the infringement resulted in an overcharge for the direct purchaser of the defendant; and~~
  - ~~(c) — he purchased the goods or services that were the subject of the infringement, or purchased goods or services derived from or containing the goods or services that were the subject of the infringement.~~

Member States shall ensure that the court has the power to estimate which share of the ~~entire~~ overcharge was passed on **to the indirect purchaser.**

This ~~Article paragraph~~ **Article** shall be without prejudice to the infringer's right to show that the overcharge was not, or not entirely, passed on to the indirect purchaser.

*Article 14*  
***Loss of profits and ~~i~~infringement at supply level***

- ~~1. The rules laid down in this Chapter shall be without prejudice to the right of an injured party to claim compensation for loss of profits.~~
2. Member States shall ensure that the rules laid down in this Chapter apply accordingly where the infringement of competition law relates to supply to the infringing undertaking.

*Article 15*  
***Actions for damages by claimants from different levels in the supply chain***

1. Member States shall ensure that, in assessing whether the burden of proof resulting from the application of Articles 12 and 13 is satisfied, national courts seized of an action for damages **are able, in accordance with Union and national law, to** take due account of
  - (a) actions for damages that are related to the same infringement of competition law, but are brought by claimants from other levels in the supply chain; or
  - (b) judgments resulting from such actions.
2. This Article shall be without prejudice to the rights and obligations of national courts under Article 30 of Regulation (EU) No 1215/2012.

## CHAPTER V

### QUANTIFICATION OF HARM

*Article 16*  
***Quantification of harm***

- ~~1. **[MOVED TO 16.2]** Member States shall ensure that, in the case of a cartel infringement, it shall be presumed that the infringement caused harm. The infringing undertaking shall have the right to rebut this presumption.~~

- ~~1.2.~~ Member States shall ensure that the burden and the ~~level~~**standard** of proof ~~and of fact-pleading~~ required for the quantification of harm does not render the exercise of the ~~injured party's~~ right to damages practically impossible or excessively difficult. Member States shall provide that the court be granted the power to estimate the amount of harm.
- ~~2.1.~~ [MOVED FROM 16.1] Member States shall ensure that, in the case of a cartel infringement, **an overcharge is presumed to have occurred.** ~~it shall be presumed that the infringement caused harm.~~ The infringing ~~undertaking~~ shall have the right to rebut this presumption.

## CHAPTER VI

### CONSENSUAL DISPUTE RESOLUTION

#### *Article 17*

#### *Suspensive effect of consensual dispute resolution*

1. Member States shall ensure that 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 **or represented** in the consensual dispute resolution.
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.

#### *Article 18*

#### *Effect of consensual settlements on subsequent actions for damages*

1. Member States shall ensure that, following a consensual settlement, the claim of the settling injured party is reduced by the settling co-infringer's share of the harm that the infringement inflicted upon the injured party. Non-settling co-infringers cannot recover contribution from the settling co-infringer for ~~that~~ remaining claim **of the settling injured party**. Only when the non-settling co-infringers are not able to pay the damages that correspond to the remaining claim **of the settling injured party** can the settling co-infringer be held to pay damages to the settling injured party.

2. When determining the contribution of each co-infringer, national courts shall take due account of any **damages paid pursuant to a** prior consensual settlement involving the relevant co-infringer.

## CHAPTER VII

### FINAL PROVISIONS

#### *Article 19* **Review**

The Commission shall review this Directive and report to the European Parliament and the Council by [...] at the latest [*to be calculated as 5 years after the date set as the deadline for transposition of this Directive.*]

#### *Article 20* **Transposition**

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [*to be calculated as 2 years after the date of adoption of this Directive*] at the latest. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

*Article 21*  
***Entry into force***

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

*Article 22*  
***Addressees***

This Directive is addressed to the Member States.

Done at Strasbourg,

*For the European Parliament*

*For the Council*

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