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MEMO

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Frequently Asked Questions: Commission proposes legislation to facilitate damage claims by victims of antitrust violations

Why is the Commission introducing this draft Directive?

Infringements of EU competition law such as cartels or abuses of dominant market positions cause very serious harm, not only to the economy as a whole but also to particular businesses and consumers. They may suffer harm, for example, because of higher prices or lost profits due to foreclosure from a market.

These victims are entitled to compensation for this harm. They can obtain such compensation by bringing an action for damages before a national court. The EU Court of Justice put an emphasis on this right as one of the means of achieving effective application of the EU antitrust rules. However, few claims are brought before national courts as it is still difficult for consumers and businesses to obtain redress.

This is due to shortcomings in the applicable legal frameworks in most Member States that make it excessively costly and difficult to bring actions. In particular, victims may have difficulties in obtaining relevant evidence. There may also be legal uncertainty concerning the time limit within which they can bring an action and in some Member States. Decisions of national competition authorities establishing an infringement sometimes have no final value as evidence of the infringement.

This situation particularly affects consumers and SMEs, who rarely can face the cost of legal action. Moreover, the few actions that were introduced have been brought in a minority of Member States, where the rules are perceived to be more favourable. For instance, only 25% of antitrust infringements found by the Commission in the last 7 years have been followed by civil actions from victims. Most of these actions were brought by large businesses, and most actions were introduced in either the UK, Germany or the Netherlands. National rules are widely diverging and as a result, victims are more or less likely to obtain compensation depending of the Member State they live in.

What is private enforcement? Will it change the role of the Commission in finding antitrust infringements?

The private enforcement of EU competition rules consists in legal actions brought before a national court to enforce the rights derived from those rules. It particularly concerns the right to be compensated for the harm suffered from an infringement of the competition rules, e.g. through higher prices or lost profits.

The Commission's proposal is aimed at bringing compensation to those who suffered harm and not, as in some other jurisdictions, as a tool for punishment and deterrence of those who breach the antitrust rules. The latter is the role of competition authorities, be it at EU or at national level, which find and sanction infringements (public enforcement).

Private and public enforcement are complementary tools: the Commission's proposal for facilitating civil redress for victims does not change the role of the Commission and the national competition authorities as public enforcers of EU competition rules through antitrust investigations.

What are the main measures put forward in the proposal?

The proposal for a Directive puts forward a number of measures which will facilitate antitrust damages actions in Member States:

- Parties will have **easier access to evidence** necessary in actions for damages. In particular, if a party needs specific documents that are in the hands of other parties or third parties to prove a claim or a defence, it may obtain a court order for the disclosure of those documents. The judge will have to ensure that disclosure orders are proportionate and that confidential information is duly protected.
- **Decisions of national competition authorities**, like Commission's decisions, will constitute **full proof** before civil courts that the infringement occurred;
- Clear **rules on limitation periods** are established, so that parties have sufficient time to bring an action. In particular, from the moment a victim has the possibility to discover that it suffered harm from an infringement, that victim should have a period of at least five years to bring a claim. This period is suspended if a competition authority starts proceedings, so that victims can decide to wait until the public proceedings are over before they bring a claim.
- Victims should obtain **full compensation** for the actual loss suffered but also for lost profits.
- The proposal clarifies the legal consequences of **the 'passing on' of harm**. Direct customers of an infringer sometime offset the increased price they paid by raising the prices they charge to their own customers (indirect customers). When this occurs, the infringer can reduce compensation to direct customers by the amount they passed on to indirect customers. Compensation for that amount is in fact owed to indirect customers, who in the end suffered of the price increase. However, since it is difficult for indirect customers to prove that they suffered this pass-on, the proposed Directive facilitates their claims by establishing a rebuttable presumption that they suffered a part of the price increase, to be estimated by the judge.
- The proposal establishes a rebuttable **presumption that cartels cause harm**. This will facilitate compensation given that victims often have difficulties in quantifying the harm they have suffered. In the extremely rare cases where a cartel does not cause price increases, infringers can still prove that their cartel did not cause harm.
- Any participant to an infringement should be **responsible** towards the victims **for the whole harm** caused by the infringement, with the possibility to obtain a contribution from other infringers for their share of responsibility. However, this should not apply to infringers who cooperated with an investigation and obtained immunity from fines before a competition authority; these companies should compensate only their own purchasers (see below on the need to preserve incentives for cooperation with competition authorities).

What is the relationship between the antitrust damages Directive and the recommendation on Collective Redress?

The harm caused by antitrust infringements is often spread across a large number of victims, each single one having a low-value damage. This is often the case for consumers and SMEs, who are thus less likely to face single-handedly the costs of bringing legal action. Collective action may improve the chance to get effective compensation for consumers and SMEs in these cases.

Since consumers and SMEs may face the same difficulties when enforcing their rights also in other fields of EU law, the Commission recommends that some form of collective redress should be available in all EU Member States to act against breaches of whatever EU rule, including breaches of the EU antitrust rules. This non-binding recommendation is thus a useful complement of the proposed Directive.

The Directive applies to actions for damages *available* in the Member States, whether individual (available in all Member States) or collective (currently available only in some Member States). However, the Directive does not oblige Member States to introduce collective actions if they are not available.

What is the relationship between the compensation of victims and antitrust fines?

Civil redress for victims obtained through private enforcement (i.e. actions for damages) is meant to compensate those victims for the harm they suffered.

Fines imposed by a competition authority after an investigation in the public interest (public enforcement) are instead a means of sanctioning infringers for their illegal conduct, and discourage them, and other potential infringers, to commit further infringements.

Compensation and antitrust fines pursue different, yet complementary, objectives. Therefore, fines should not be lower if compensation is paid, nor should they be higher if compensation is not paid.

Will actions for damages discourage companies from cooperating with the Commission or national competition authorities?

Under their leniency programmes, competition authorities offer a reduction or immunity from fines, under certain conditions, to those infringers who co-operate by enabling an authority to discover an infringement and bringing it to an end. Certain competition authorities also have settlement procedures that reward, under certain circumstances, companies that acknowledge their liability with a reduction of the fine. These tools have become essential instruments to enforce competition rules at both EU and national level.

To obtain these fine reductions, companies make statements concerning their participation to the infringement. Under the proposed Directive, these statements should not be used in civil actions against the companies who made them. This is because companies that cooperate with competition authorities in the detection and prosecution of an infringement should not be disadvantaged in subsequent civil claims over companies that did not cooperate.

For the same reason, the Commission also proposes to exempt, in subsequent actions for damages, companies that obtained immunity from fines from the rules under which an infringer can be held liable also for the harm caused by its co-infringers.

Are lawsuits before national courts the only way to obtain compensation?

No. The right to compensation can be enforced before national courts. The Commission's proposal aims at making it easier for victims to enforce their rights by reducing costs and uncertainties.

However, consensual dispute resolution can be an as efficient and even less costly and time consuming way to settle controversies and obtain compensation. The Commission's proposal encourages willing parties to use means of consensual dispute resolution.

Why has the Commission adopted a Communication on quantifying antitrust harm?

Quantification is the often difficult exercise through which the exact amount of harm suffered by a victim is established. The complex legal and economic issues to take into account make this exercise particularly costly and difficult, especially in cases where economic expertise is required. Thus, quantifying antitrust harm has resulted to be one of the major obstacles to compensation of injured parties.

Legal requirements for quantifying antitrust harm should not make it impossible or excessively difficult for victims to be compensated. The Commission has adopted a Communication that recalls this and other relevant existing legal principles for an action for damages.

The Commission services have also drawn up a Practical Guide that offers economic and legal insights into the harm typically caused by antitrust infringements and some methods for quantifying it. This Practical Guide may be of assistance to parties and judges in damages actions.

The Communication and the Practical Guide on quantification are non-binding documents, which the Commission offers as assistance in cases where it is deemed necessary and relevant.

Why has the Commission decided to propose a Directive rather than another legal instrument?

The Commission wants to remove the obstacles that currently impede effective compensation for victims of antitrust infringements. These obstacles most often lie in national rules governing actions for damages. A Directive is the most appropriate instrument to put forward measures to remove these obstacles: it respects the legal tradition of each Member State by leaving room to decide how to modify the relevant national provisions in order to implement those measures.

When will the Directive enter into force?

The proposal for a Directive will now be discussed by the European Parliament and the Council. Once these institutions adopt a final text according to the ordinary legislative procedure, Member States will have two years to implement its provisions in their legal systems.