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Committee on the Internal Market and Consumer Protection

2013/0185(COD)

2.10.2013

DRAFT OPINION

of the Committee on the Internal Market and Consumer Protection

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: Olle Schmidt

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SHORT JUSTIFICATION

After almost a decade of deliberation, your rapporteur fully welcomes that the Commission presents this Directive. Consumers as well as small and medium-sized enterprises are currently hampered in exercising their Community right to compensation for harm caused by competition law infringements.

With regard to private enforcement, your rapporteur would like to see representative and collective redress mechanisms. In its follow-up statement to the European Parliament's resolution (P6_TA(2009)0187), the Commission agrees that there should be an integrated approach to collective redress to ensure consistent treatment of damages claims in the area of union competition law. Binding horizontal measures for collective redress are still not reality. Collective actions would allow for genuine and qualified entities, such as consumer associations or trade organisations, to bring actions forward on behalf of the individual claimant. However, the rapporteur calls for only a clearly identified group of people to be able to act as a representative and to take part in the claim. This identification must be complete when the claim is brought, and the rapporteur suggests an opt-in model. Given that only 25 % of cartel cases leads to actions for damages within the European Union more has to be done to encourage consumers to claim their rights.

The rapporteur acknowledges that the application for leniency programme makes a major contribution to uncovering cartels, thus making claim for damage possible in the first place. The rapporteur does not agree with the Commission's proposal to introduce a grey list of limits on the disclosure of evidence after a competition authority has closed its proceedings. All evidence from leniency applicants should be covered by the rules in the first paragraph of article 6, irrespectively if they were received in the leniency application or after a request from the competition authority.

Even though competition cases are sometimes made possible through a whistle-blower, there is no specific reference to this in the proposed directive. The protection of whistle-blowers only concerns the identity of the whistle-blower, and not the information provided. The identity is of no importance to the damage or to the value of the damage. Today the identity of whistle-blowers is protected under Member State law. To ensure predictability and equivalent ruling personal data should be added to the directive.

The rapporteur welcomes the Commission's proposal that the defendant should bear the burden of proof. This makes it easier for claimants to establish their claims. Gaps in evidence will favour the claimant and will be a clear benefit for direct purchasers. In line with Court of Justice case-law indirect purchasers must also be entitled to bring actions. However, the proposed rules include both a presumption of absence and of existence of pass-on of overcharges to indirect purchasers. This will most likely lead to claims both from the direct and the indirect claimants. The rapporteur does not favour such a dual system and suggests that when there is not enough evidence to prove pass-on, the burden of proof lies on the indirect purchaser. By doing so a one-pillar system is created giving clear guidance to national courts.

The damage suffered must be compensated for. This is vital if cartels are to feel the real damage they caused markets and customers. To increase protection of the party injured from a competition law infringement it is important to ensure that it has a strong voice in the court

proceedings. Therefore, the rapporteur suggests that the injured party should have the upper hand in the estimation, and therefore like the estimation to be based on the injured party's estimation. In addition, it further disincentives cartel participation because the influence of infringers in court proceedings is reduced.

For a consumer, a consumer organisation or a small company the risk of having to pay court costs in case of a loss may severely deter them from raising claims. To enhance the possibility of raising claims your rapporteur suggests that a fund financed by fines paid by competition infringement cases could be set up. This fund would finance a first indicative verdict of a potential case based on evidence provided by a potential claimant. This would lower the threshold to claim damage and reduce the courts of unnecceray claims. It should be pointed out that the rule of 'losers pay' shall be kept.

AMENDMENTS

The Committee on the Internal Market and Consumer Protection calls on the Committee on Economic and Monetary Affairs, as the committee responsible, to incorporate the following amendments in its report:

Amendment 1

Proposal for a directive Recital 4 a (new)

Text proposed by the Commission

Amendment

(4 a) Private enforcement is a vital mechanism for effective enforcement of competition law. However only individual actions will not be satisfactory and it is therefore necessary to allow for collective actions in this Directive.

Or. en

Justification

There should be an integrated approach to collective redress to ensure consistent treatment of damages, such as consumer protection laws. Since such horizontal measures are still not reality, the rapporteur would like to introduce them in this Directive. Given the low number of actions for damages more has to be done to encourage consumers to claim their rights. Collective actions will lower the threshold for consumers to approach national courts.

Amendment 2

Proposal for a directive Recital 19 a (new)

Text proposed by the Commission

Amendment

(19 a) It is of importance that information given by leniency applicants is protected since this will enhance the incentive for cartelists to come forward and participate in leniency programmes. Therefore limitation on disclosure of evidence from a competition authority should be extended to include all information given from the leniency applicant, irrespective of if the information was given on the cartelists' own initiative or after a request from a competition authority.

Or. en

Justification

Applications for leniency programmes make a major contribution to uncovering cartels, thus making private prosecutions possible in the first place. All evidence from leniency applicants shall be covered by the rules in the first paragraph of article 6, irrespective of if they were received under the leniency statements or after a request from the competition authority.

Amendment 3

Proposal for a directive Recital 21 a (new)

Text proposed by the Commission

Amendment

(21 a) Even if the role of individual whistle-blowers in so far has been small, the protection of individuals coming forward with information must be explicitly included in the directive. Only personal data and information linking to personal data should be included in the information that national courts at any time cannot order a party or third party to disclose.

Justification

Even though there exist competition cases made possible through only a whistle-blower there is no specific reference to this in the proposed directive. The protection of whistle-blowers only concerns the identity of the whistle-blower, and not the information provided. To ensure predictability and equivalent ruling personal data should be added to the directive. Today the identity of whistle-blowers is protected under the Members State's law.

Amendment 4

Proposal for a directive

Recital 31

Text proposed by the Commission

(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 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 which share of the overcharge has been passed on to the level of indirect

Amendment

(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. As regards the quantification of passing-on the national court should have the power to estimate which share of the overcharge has been passed on to the level of indirect purchasers in the dispute pending before it. The infringing undertaking should be allowed to bring proof showing that the actual loss has not been passed on or has not been passed on entirely

purchasers in the dispute pending before it. The infringing undertaking should be allowed to bring proof showing that the actual loss has not been passed on or has not been passed on entirely.

Or. en

Justification

The proposed rules include both a presumption of absence and a presumption of existence of pass-on of overcharges to indirect purchasers. This will most likely lead to claims both from the direct and the indirect claimants. Such a dual system is not favourable. Instead, when there is not enough evidence to prove pass-on, the burden of proof lies on the indirect purchaser. By doing so a one-pillar system is created giving clear guidance to national courts.

Amendment 5

Proposal for a directive

Recital 34

Text proposed by the Commission

(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 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.

Amendment

(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 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. ***The process of quantifying harm may vary between different national jurisdictions. In order to ensure clear rules and predictability the Commission should provide further guidance at Community level.***

Or. en

Justification

To ensure efficient and harmonised ruling on actions for damages of competition law infringement by national courts the commission should provide further guidance at the Community level as regards the quantification of damages. This would simplify the difficult process of estimating the harm caused by a competition law infringement and enhance predictability and harmonisation of the process.

Amendment 6

Proposal for a directive

Recital 36

Text proposed by the Commission

(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 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 the amount of the harm caused by the competition law infringement.

Amendment

(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 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 the amount of the harm caused by the competition law infringement. ***In this estimation emphasis shall be given to the***

injured party's estimation of the harm.

Or. en

Justification

To increase protection of the party injured from a competition law infringement it is important to ensure that it has a strong voice in the court proceedings. By emphasising the injured party's estimation of the harm it is ensured that the weaker party is protected. In addition, it further disincentives cartel participation because the power of infringers in court proceedings is reduced.

Amendment 7

**Proposal for a directive
Recital 37**

Text proposed by the Commission

(37) **Injured** parties and infringing 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, arbitration and mediation. Where possible, such consensual dispute resolution should cover as many injured parties and infringing 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.**

Amendment

(37) **Points out that national courts are often overburdened and that actions for damages can be a time consuming process. Therefore, injured** parties and infringing 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, arbitration and mediation. Where possible, such consensual dispute resolution should cover as many injured parties and infringing undertakings as possible. **As individual actions may not suffice, collective actions brought by genuine and qualified entities, such as consumer associations or trade organisations acting on behalf of individual claimant should be explicitly included in this Directive.**

Or. en

Justification

Collective actions would allow for genuine and qualified entities, such as consumer associations or trade organisations, to bring actions forward on behalf of the individual

claimant. However, only a clearly identified group of people should be able to act as a representative and to take part in the claim. This identification must be complete when the claim is brought, and the rapporteur suggests an opt-in model.

Amendment 8

Proposal for a directive Recital 41 a (new)

Text proposed by the Commission

Amendment

(41 a) The costs of legal procedures should not deter claimants from bringing well-founded actions to court. Member States should take appropriate measures to provide injured parties with access to finance for a damage claim. This can be done through a fund which is financed with the fines paid by infringers.

Or. en

Justification

The risk of having to pay court costs may severely deter a consumer, a consumer organisation or a small company from raising claims. A fund, financed by fines paid by previous competition infringement cases, would enhance the possibility of raising claims. It would finance a first indicative verdict of a potential case based on evidence provided by a potential claimant. It should be pointed out that the rule of 'losers pay' shall be kept.

Amendment 9

Proposal for a directive Article 4 – paragraph 1 – point 3

Text proposed by the Commission

Amendment

3. 'action for damages' means an action under national law by which an injured party brings a claim for damages before a national court; it may also cover actions by which someone acting on behalf of one or more injured parties brings a claim for damages before a national court, ***where national law provides for this possibility;***

3. 'action for damages' means an action under national law by which an injured party brings a claim for damages before a national court; it may also cover actions by which someone acting on behalf of one or more injured parties brings a claim for damages before a national court;

Justification

There should be an integrated approach to representative and collective redress to ensure consistent treatment of damages claims in the area of union competition law and in other areas, such as consumer protection laws. Given the over all low number of actions for damages within the European Union more has to be done to encourage consumers to claim their rights. Representative and collective actions will lower the threshold for consumers to approach national courts.

Amendment 10**Proposal for a directive****Article 6 – paragraph 1 – point a**

Text proposed by the Commission

(a) *leniency corporate statements*; and

Amendment

(a) *all documents provided by a leniency applicant*; and

Or. en

Justification

Applications for leniency programmes make a major contribution to uncovering cartels, thus making private prosecutions possible in the first place. All evidence from leniency applicants shall be covered by the rules in the first paragraph of article 6, irrespective of if they were received under the leniency statements or after a request from the competition authority.

Amendment 11**Proposal for a directive****Article 7 a (new)**

Text proposed by the Commission

Amendment

Article 7 a

Whistleblowing

1. Any person who has reasonable grounds to believe that a person has committed or intends to commit an offence under this Directive, may notify a competition authority of the particulars of the matter and may request that his or her

identity be kept confidential with respect to the notification.

2. The competition authority shall keep confidential the identity of the person which notified the competition authority under article 7(1) and to whom an assurance of confidentiality has been given.

Or. en

Justification

In order to encourage members of the public to provide information to competition authorities this Directive should include explicit protection of the identity of the whistleblower. Even if the information given will not be sufficient as evidence in a cartel case, the competition authority will be able to art an investigation.

Amendment 12

Proposal for a directive

Article 13 – paragraph 2 – subparagraph 1

Text proposed by the Commission

Amendment

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:

deleted

(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.

Or. en

Justification

The proposed rules include both a presumption of absence and a presumption of existence of pass-on of overcharges to indirect purchasers. This will most likely lead to claims both from the direct and the indirect claimants. Avoiding inconsistent decisions by national jurisdictions in parallel cases will be up to the national courts. Such a dual system is not favourable. Instead, when there is not enough evidence to prove pass-on, the burden of proof lies on the indirect purchaser.

Amendment 13

Proposal for a directive Article 16 – paragraph 2

Text proposed by the Commission

2. Member States shall ensure that the burden and the level 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.

Amendment

2. Member States shall ensure that the burden and the level 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 ***on the basis of the injured party's estimation.***

Or. en

Justification

To increase protection of the party injured from a competition law infringement it is important to ensure that it has a strong voice in the court proceedings. By emphasising the injured party's estimation of the harm it is ensured that the weaker party is protected. In addition, it further disincentives cartel participation because the power of infringers in court proceedings is reduced.