

EUROPEAN ECONOMIC AREA

STANDING COMMITTEE OF THE EFTA STATES

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SUBCOMMITTEE I ON THE FREE MOVEMENT OF GOODS

EEA EFTA Comment

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

1. EXECUTIVE SUMMARY

1. Without prejudice to the assessment of the EEA relevance of the proposed Directive, the EEA EFTA States fully support the objective of facilitating claims for damages in competition cases.
2. The EEA EFTA States support the right to full compensation for anyone who has suffered harm caused by an infringement of EU and EEA competition law, cf. Article 2. However, the compensation awarded should not go beyond what is necessary to restore the injured party to the position that would have existed had the infringement not taken place. The damage to be compensated should therefore be limited to the injured party's economic loss. Hence, the EEA EFTA States suggest that Article 12 (2) of the proposal should be deleted, in order to avoid the risk of overcompensation.
3. The EEA EFTA States do not support that final national infringement decisions should have the same binding effect as Commission Decisions in subsequent damage claims proceedings before national courts.
4. The EEA EFTA States have noted that the number of leniency applications is increasing in the EEA EFTA States despite the risk of claims for damages, and that the situation seems to be the same in the EU. The EEA EFTA States would therefore question the need for deviating from the principle of joint and several liability with regard to undertakings which have been granted immunity. In the view of the EEA EFTA States, leniency recipients should not be treated more leniently than their co-infringers in terms of liability for damages.

2. COMMENTS

2.1 General remarks

5. The EEA EFTA States fully support the objective of facilitating claims for damages in competition cases, and the purpose of the draft Directive to optimise the interaction between the public and private enforcement of competition law and to ensure that anyone who has suffered harm caused by an infringement of EU and EEA competition law can obtain full compensation under national law. The EEA EFTA States thus recognise the merits of ensuring that national law stipulates a minimum standard for the rules governing antitrust damage actions.
6. Incorporation of legal acts into the EEA Agreement requires the acts in question to be EEA relevant. The EEA EFTA States do not want to prejudge the conclusion of whether the draft Directive is considered to be EEA relevant or not. A final position on the issue of EEA relevance can only be taken after the adoption of the Directive in its final wording. The EEA EFTA States would, however, strongly underline that provisions on civil procedure are, in general, not EEA relevant and fall outside the scope of the EEA Agreement.
7. The EEA EFTA States do, however, have some *preliminary* comments to specific provisions of the proposal. The comments set out below do not have any bearing on whether the EEA EFTA States consider the draft Directive to be EEA relevant.

2.2 Article 2 and 12(2) – Right to full compensation

8. The EEA EFTA States support the right to full compensation for anyone who has suffered harm caused by an infringement of EU and EEA competition law, cf. Article 2. However, the compensation awarded should not go beyond what is necessary to restore the injured party to the position that would have existed had the infringement not taken place. The damage to be compensated should therefore be limited to the injured party's economic loss. Hence, the EEA EFTA States suggest that Article 12 (2) of the proposal be deleted, in order to avoid the risk of overcompensation.

2.3 Articles 6 and 7 – Limits on the disclosure of evidence from the file of a competition authority

9. The EEA EFTA States recognise the need to protect leniency documents from being used as evidence in claims for damages. The EEA EFTA States would, however, point out that it is not clear from the wording of Articles 6 and 7 whether the *information* contained in a leniency application as such would be protected. The EEA EFTA States would raise the question of whether through the examination of witnesses, such as the top management of the undertaking filing a leniency application, who would have approved the application, the information in a leniency application could be used by a claimant in a claim for damages procedures heard by national courts.

2.4 Article 9 – Effect of national decisions

10. The EEA EFTA States question the need for the provision proposed in Article 9. A well-reasoned infringement decision from a competition authority or a court of another EEA State will have strong evidentiary value in a subsequent claim for damages in the EEA EFTA States. Such decisions would create a strong rebuttable presumption in follow-on law suits. In the opinion of the EEA EFTA States, Article 9 is therefore not a necessary measure in order to safeguard the position of claimants in a follow-on law suit.
11. It is the understanding of the EEA EFTA States that Article 9 of the draft Directive mirrors Article 16 of Regulation 1/2003. However, the latter provision is based on the fact that the Commission is the guardian of the treaties, and of the enforcement of EU competition law. This provision regulates the supra-national relation between infringement decisions of the Commission and national courts of the Member States, whereas Article 9 regulates the effect of final infringement decisions adopted by national competition authorities in subsequent damages claims proceedings before national courts (decentralised enforcement). The current wording of Article 9 may therefore raise constitutional issues for the EEA EFTA States. Giving final infringement decisions of foreign competition authorities binding effect in subsequent damages actions before national courts would, in the view of the EEA EFTA States, diminish the competence and independence of national courts and the judges' right and duty to a free evaluation of evidence.
12. Having regard to the above, the EEA EFTA States do not support that final infringement decisions adopted by national competition authorities or review courts should have the same binding effect as Commission decisions in subsequent damages claims proceedings before national courts.

2.5 Article 11 – Joint and several liability

13. The EEA EFTA States have noted that the number of leniency applications is increasing in the EEA EFTA States despite of the risk of actions for damages, and that the situation seems to be the same in the EU. The EEA EFTA States would therefore question the need for any deviations from the principle of joint and several liability with regard to undertakings which have been granted immunity in order to safeguard the incentives to apply for leniency. In the view of the EEA EFTA States, leniency recipients should not be treated more leniently than their co-infringers in terms of liability for damages.
14. The EEA EFTA States are concerned that the proposed rules in Article 11 of the draft Directive might send an adverse signal to undertakings that infringements of competition law will not always imply liability for damages, and hold that the benefits granted to leniency applicants should be restricted to a reduction of fines. In the view of the EEA EFTA States, there should not be any deviations from the principle of joint and several liability for leniency recipients based on the need to enhance the leniency system.

15. Having regard to the above considerations, the EEA EFTA States suggest that Article 11 (2) of the proposed Directive should be deleted.

3. CONCLUDING REMARKS

16. The EEA EFTA States stress that these are *initial* comments based on the draft proposal of the Commission. These comments may be adjusted according to internal EU developments and amendments to the draft by the Council and the European Parliament. The EEA EFTA States reiterate that the views presented above are without prejudice to the assessment of the EEA-relevance of the proposed Directive. Furthermore, they do not pre-empt a final assessment of the Directive and possible EEA adaptations by the EEA Joint Committee.
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