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## **New rules to facilitate damage claims for antitrust law violations**

The Committee of Permanent Representatives<sup>1</sup> today endorsed an agreement between the Hellenic Presidency of the Council and European Parliament representatives laying down new rules aimed at facilitating damage claims by victims of antitrust violations.

The new directive will harmonise and ensure the effective enforcement of antitrust damages rules within the EU, thereby allowing the victims of a cartel<sup>2</sup> to receive full compensation for both the actual loss suffered and for lost profits.

While the right to full compensation is guaranteed by the EU treaty, the practical exercise of this right is often rendered difficult or practically impossible because of the applicable rules and procedures. Despite recent improvements in a few member states, to date most victims of infringements of EU competition rules in practice do not obtain compensation for the harm suffered.

The new measures also seek to improve the efficiency of leniency programmes, whereby an undertaking confesses its participation in a cartel in return for immunity from or a reduction of the fine.

Infringements of EU competition law such as cartels or abuses of dominant market positions cause serious harm, not only to the economy as a whole, but also to businesses and consumers.

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<sup>1</sup> The Committee of Permanent Representatives (COREPER) of the governments of the 28 EU member states is responsible for preparing the work of the Council.

<sup>2</sup> A cartel is an association of competitors aimed at coordinating their behaviour on the market through practices such as the fixing of prices or trading conditions, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or other unfair actions that distort markets.

# **P R E S S**

Member states will have two years to incorporate the new rules into national legislation following their entry into force.

The agreement ([8088/14](#)), which still has to be formalised by the European Parliament and the Council separately, includes the following main features:

### ***Disclosure of information***

Member states will have to ensure that national courts can order, under certain conditions, the disclosure of relevant evidence from parties involved in a case of violation of competition law.

National courts will also have at their disposal measures to protect confidential business information from being disclosed during the proceedings.

### ***Leniency programmes***

Leniency programmes and settlement procedures are key tools for the detection and prosecution of competition law infringements.

To ensure that undertakings are willing to produce voluntary statements acknowledging their participation in an infringement of Union or national competition law to a competition authority under a leniency programme or a settlement procedure, such self-incriminating statements (as well as settlement submissions) will be exempted from disclosure of evidence ("black list"). All the documents accompanying those statements will, however, be disclosable. Other types of documents will be subject to full or partial disclosure in accordance with their relevance, proportionality and the valid interest of enterprises to protect confidential information. Parties to whom a disclosure order is directed will have a right to be heard.

The reason for this decision of the co-legislators is that undertakings may be deterred from cooperating with the authorities in discovering cartels and other infringements if disclosure of documents they produce to this end were to expose them to civil liability under worse conditions than the co-infringers that do not cooperate with competition authorities.

Undertakings which cooperate with competition authorities play a key role in detecting cartel infringements and in bringing them to an end, thereby mitigating the harm which could have been caused had the infringement continued. More than 85% of all illegal cartels have been discovered in this way.

### ***Joint liability***

Where several undertakings infringe the competition rules jointly, as in the case of a cartel, these joint infringers will be held jointly and severally liable for the entire harm caused by the infringement. Amongst themselves, the joint infringers will have the right to obtain contribution if one of the infringers has paid more than its share. The determination of that share and the relevant criteria (such as turnover, market share or role in the cartel) will be decided by the court according to national law.

In cases where the infringer is a small or medium-sized enterprise with a reduced share in the relevant market, and subject to strict conditions, it will only be liable to its own direct and indirect purchasers. A similarly reduced burden will be granted to the leniency

recipient in order to somewhat reduce his vulnerability, as he is, for a considerable time, the only cartel member who has confessed as to his culpability and thus would be the automatic target for all claims for damages.

### ***Passing-on of overcharges***

The draft directive also establishes the principle that full compensation of harm can be claimed by anyone who suffered it, irrespective of whether they are direct or indirect purchasers.

The burden of proving the pass-on of overcharge rests with the claimant.

### ***Effect of national decisions***

It will be possible to present a final decision on an infringement of competition law by a national competition authority or a review court in a member state in another member state before their national courts at least as *prima facie* evidence, in accordance with the respective national legislations. This is somewhat less than establishing a fully binding effect, but considerably strengthens the position of the victims of cartels and other infringements when pressing their claims.

### ***Time limits and quantification of harm***

Victims of an infringement of competition law will have at least a period of five years to file a claim for damages. This period will be put on hold if a consensual dispute resolution process is engaged.

National courts will be empowered to estimate the amount of harm suffered by the victims in order for the quantification of harm does not render the exercise of the right to damages practically impossible or excessively difficult.

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