



POSITION PAPER

CONCERNING 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

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I. Introduction

Markenverband (the German Brands Association) is the leading association representing the brands industry in Germany. It currently represents the interests at national and European level of approximately 400 member companies. It advocates a positive consumer climate, transparent competition, empowered consumers, the protection of intellectual property and sustainable economic development. It is a registered interest representative at the EU Commission (No. 2157421414-31).

The German brands industry is explicitly committed to the effective enforcement of the competition regulations of the European Union in the context of the interaction between the public and private enforcement of rights. This includes the obligation of Member States, which already exists on the basis of primary law, to ensure that parties affected by restrictions of competition are in fact able to enforce their rights based on the TFEU to compensation for harm suffered. European antitrust law contains clear requirements for the public enforcement of claims. The requirements for the private enforcement of claims must observe the key principles of legislation governing compensation and must be rooted from a procedural point of view in the legal tradition of the Member States of the European Union. The German brands industry doubts whether the draft Directive – at least in its current version – is necessary and capable of preparing the way for such effective and appropriate compensation.

II. Legislative powers are necessary for the proposed Directive

Neither Article 103 nor Article 114 TFEU provides a sufficient enabling provision for the draft Directive which has been presented. Neither is the necessity of such a Europe-wide regulation sufficiently justified, nor are there any general reasons which would advocate such. The proposal

deals with the procedural enforcement of a damages claim based on European law, whilst the Commission itself in the questions and answers regarding the proposed Directive emphasizes that initiating action against infringements of competition regulations and deterring such infringements will remain the task of the competition authorities.

It therefore does not serve the implementation of competition regulations, but regulates the procedure for follow-on claims. Although Article 103 TFEU forms the basis for the regulation of antitrust law and the law governing antitrust proceedings, it does not regulate civil procedure law, which is the most important aspect here.

In the opinion of the German Brands Association, sufficient regulations are also in place in the Member States for the enforcement of damages claims which are based on European law. Should deficits in this respect exist in individual national cases, these are to be remedied at national level. Only in this way can it be ensured that the national damages and procedural regimes, which on the one hand cover claims based on European law, but on the other hand also go far beyond these, can be shaped and maintained in their respective legal tradition and application without any frictional losses. Such singular intervention in the national legal systems of Member States in the interest of harmonizing antitrust damages and procedural law considerably jeopardizes the uniformity of these national legal systems. There is a risk that the proposed Directive will lead to contradictions in the national civil (procedure) legal systems, which cannot yet be foreseen in detail. Similar intervention is not otherwise known, and also not in other regulatory areas which recognize the direct justification of a claim in favour of the party concerned on the basis of European law. There is no reason to support any different approach only in view of regulations governing antitrust damages.

It is likewise not apparent how the Directive should serve the implementation of the internal market (Article 114 TFEU). Private international law provides sufficient possibilities with respect to the enforcement of claims based on torts due to infringements of competition regulations for determining the Member State in which the claims can be asserted in order to facilitate effective enforcement. A comparison with Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights cannot lead to any other conclusion here because the regulations governing the form and content of damages claims are not a prerequisite for the smooth functioning of the internal market, whilst a harmonized level of protection and a direct level of enforcement for intellectual property rights are a direct condition for the movement of goods and services in the internal market. The mere existence of different national substantive and procedural law regulations is unable to justify any need for European legislation, at least not in the form proposed.

In view of the regulatory details provided for in the Directive in particular, it is not apparent from where any corresponding legislative powers of the European Union are to be derived.

The European legislator does not in any event have any jurisdiction for purely national cases, in which damages claims are to be enforced on the basis of an infringement of national competition laws. The definition of the scope of Articles 1 and 2 of the draft which also covers purely national cases is therefore too broad.

In accordance with the explanations of the Commission, the regulatory scope of the Directive can logically only refer to cases involving follow-on actions. This should be explicitly codified.

III. Compensation principle defines the scope and limits of private enforcement

1) No damages in the event of purely strict liability without the contingency occurring

The antitrust law regulations cover strict-liability torts; it is already sufficient for the execution of the offence if the risk of harm being caused exists. This competition law approach is necessary because the occurrence of harm cannot be geared to due to the unforeseeable outcome of competition: this is because the "right" outcome cannot be conclusively established without impairing the competitive process. It is accordingly to be established for the issue of damages claims based on antitrust infringements that harm is not caused across the board for customers and other third parties and this may not accordingly be assumed. This becomes particularly clear in cases involving vertical agreements, in which it is not clear whether exemption prerequisites pursuant to Article 101(3) have been met. It is also hardly conceivable how harm should have been incurred in cases of the "mere" anticompetitive exchange of information. The definition of a cartel in Article 4(12) is so broad that it covers any and all anticompetitive behaviour.

With a general, albeit refutable assumption that individual harm would occur due to an anticompetitive practice, there is the risk that actions for damages would, contrary to the intentions of the Commission, lead to further sanctioning instead of performing compensatory tasks. Such a damages claim would itself lead to the distortion of competition and would not serve the enforcement of competition regulations. Evidence of negative facts, i.e. that harm has not occurred, is regularly and for epistemological reasons not to be furnished. For this reason, in such cases German case law does not work with burdens of proof, but with secondary burdens to produce evidence: "Due to the difficulties associated with evidencing negative facts, the substantiated contesting of the negative fact subject to the presentation of the facts and circumstances which advocate the positive can in accordance with the principles of the secondary burden to produce evidence (*sekundäre Darlegungslast*) be demanded of the opposing party (BGH (German Federal Court of Justice, ruling of 08.10.1992 I ZR 220/90). The party obliged to furnish evidence then only needs to refute these facts presented by the opponent" (BGH (German Federal Court of Justice), ruling of 19.4.2005 X ZR 15/04). Such a differentiated approach also appears appropriate for Article 13(2) and Article 16 of the draft Directive.

The aforesaid applies all the more if actions for damages due to the infringement of competition regulations are not only possible against undertakings, but also against private individuals. If claims for damages are asserted against often former employees, neither the alleged information asymmetry exists, nor is there any comprehensible necessity on the basis of general "equity issues outside general legislation governing damages claims", to impose a comprehensive burden of proof on these persons in the meaning of Article 13 or Article 16, since the Commission rightly assumes in point 4.5 of the Explanatory Memorandum that "proving and quantifying antitrust harm is generally very fact-intensive and costly" and "may require the application of complex economic models."

Another argument against the presumption contained in Article 16(1) is the fact that to date empirical studies have only dealt with harm caused by real cartels (in the strict sense), but not with the issues of the abuse of market power or even cases of the exchange of information which infringes competition regulations. In particular in the case of the broad definition of a cartel infringement, appropriate empirical evidence for this presumption is lacking.

German law offers sufficient mechanisms to solve the problem of the de facto difficult evidence situations stated by the Commission. It is sufficient for a coherent action to acceptably substantiate that harm has been suffered.

This obligation to substantiate harm is also not unreasonable for the party which has suffered harm because it fundamentally has to credibly argue why it believes it is a party which has suffered harm. Only in this way can abusive actions be prevented.

The compensatory function of damages must, as in all other economic sectors in which difficulties in furnishing evidence exist, remain the central issue. If a situation is not created which comes as close as possible to the reality with the infringement of competition regulations, one distortion of competition is merely replaced by another.

2) Fault is required for damages

Article 2 of the draft Directive regulates the general principle that the party which has suffered harm can demand full compensation for such. On the other hand, the necessary restriction that only a party which has illegally and culpably infringed competition regulations can be obliged to pay damages is lacking. The specific establishment of fault is also necessary for follow-on actions because the binding implications of the decision by the competition authority for civil administration agencies do not refer specifically to fault. The fault requirement should therefore be explicitly included in the Directive.

Fault must be excluded if the party concerned within the scope of self-assessment has relied on thoroughly well-founded professional expertise, also from lawyers providing legal advice, which is ultimately inaccurate.

3) Passing-on defence (Article 12 - Article 15)

It must be ensured that the interaction between the provisions cannot lead to multiple claims being made on the defendant. In the draft Directive which has been presented, the rules regarding evidence entail the risk of overcompensation. This in particular appears possible within the scope of Article 12.2, which in cases in which the enforcement of harm at the next level of the supply chain is not possible for legal reasons (it is not clear to the German Brands Association which cases this should be) rules out the "passing-on defence", even if the harm has not occurred at the higher supply chain level. Article 12.2 should therefore be deleted.

We would in this context point out the problematic consequence that irrespective of the provision in Article 15, a court decision on a "passing-on defence" does not have any binding implications for civil administration authorities and therefore there is a risk here of contradictory court decisions.

As already explained (III.1), the provision regarding the reversal of the burden of proof in Article 13(2) is inappropriate and should therefore be deleted. This is because the defendant will also as a rule not be familiar with the business relationships in the supply chain. It is therefore to be ensured that defendants have the same access to documents as plaintiffs, as correctly provided for in the second sentence of Article 5(1) of the draft Directive.

4) Joint and several liability (Article 11)

Article 11 of the draft Directive assumes the joint and several liability of the “undertakings” involved. The German Brands Association understands this formulation to the effect that a joint and several liability of private individuals is to be excluded; this is to be welcomed and also to be clarified. The German Brands Association also welcomes the fact that the first undertaking to take part in a leniency programme is also granted immunity from fines within the scope of this joint and several liability to provide an incentive to participate in leniency programmes.

In terms of practical implementation, it is to be ensured that the limitation period for claims against the undertaking granted immunity from fines under a leniency programme is appropriately suspended until has unsuccessfully attempted compulsory enforcement against the other joint and several debtors, and burden of proof for its limited liability, in particular the amount of its limited share in the compensation, is imposed on the undertaking granted immunity from fines under a leniency programme.

The legislative content of Article 11(4) remains unclear. This paragraph should be deleted.

5) Scope of damages

Article 2(2) of the draft Directive provides under the heading right to full compensation for an interest claim of the party which has suffered harm from the time of the infringement until the time of full compensation of the harm suffered. The proposal therefore goes beyond what is otherwise usually the case for torts. The party which has suffered harm may be at liberty to argue and substantiate a loss of interest. They can, however, as is otherwise the case only be a specific claim to interest which is independent of any loss following default or the action becoming pending. The draft Directive also encroaches in this area upon national legal systems, without there being any recognizable justification for the singular treatment of cartel damages.

IV. Role of procedural law: effecting lawful and correct, but also equitable decisions

Procedural law serves a purpose. It has to aim to achieve lawful and correct, but also equitable decisions and is the prerequisite for the enforcement of substantive law. Procedural law may not unreasonably or inappropriately influence substantive law. As already explained in III.1, the presumptions contained in Article 13(2) and Article 16(1) are such an inappropriate distortion of substantive law by procedural law. The German Brands Association would also draw attention to the following points:

1) Disclosure of evidence (Articles 5 to 7)

Regulations regarding compensation and court rules of procedure must always be structured on the basis of the (continental) European legal tradition. Structuring these in the direction of typical common law elements such as “pre-trial discovery” or “disclosure” is not in line with the (continental) European systems of civil law and leads to considerable system inconsistencies, in particular if, as here, an individual area, i.e. cartel damages, is regulated and general requirements for damages are not covered.

In German law, balanced and appropriate procedural law exists on the basis of the principle of party presentation, the regulations regarding burden of proof, including secondary burden of proof, with the possibility of actions to obtain information and orders that documents or records are produced pursuant to Sec. 142 German Code of Civil Procedure (ZPO) and files are transmitted pursuant to Sec. 143 German Code of Civil Procedure (ZPO). This already today provides the possibility of access to documents beyond “fishing expeditions” and can serve as a model to overcome difficulties in accessing information. The obligation in the draft Directive to disclose documents is at any rate too general and needs to be limited. General “discovery” must be excluded and the question of the type of disclosure itself must be linked to a principle of proportionality which is to be defined in detail.

An obligation of the plaintiff to substantiate claims is not inequitable and prevents abusive actions. The German Brands Association also otherwise sees the risk of a false incentive being established by the interaction of Articles 5 to 7 and Article 16 for actions for damages with the purpose of imposing an annoyance factor on the undertakings concerned, putting these under pressure, for example to extort settlement payments or to obtain access to confidential documents. The vague provisions regarding confidentiality and the large number of clearly undefined legal terms add to the impression of the German brands industry, which sees considerable risk potential in these vague provisions. The risk of the abusive discovery therefore has to be included as a minimum restriction of these provisions and as an explicit basis for an application for disclosure by the court. Global disclosure applications are to be excluded and it must be ensured that decisions on access to documents and records are made on an individual basis. Cartel damages regulations otherwise serve as a medium for the impermissible exchange of information.

Existing comprehensive disclosure obligations, such as those contained in Directive 2004/48/EC for example, cannot refute the need for comprehensive improvement of these provisions. In these cases, the comprehensive disclosure obligation for example serves the determination of the calculation basis for the damages to which a party which has suffered harm is entitled. This is because the harm suffered by the holder of the rights which gives rise to compensation is calculated here according to any of the following:

- the harm which has actually been suffered by the rights holder or
- the royalties the rights holder has lost or
- the profit generated by the infringing party.

These calculation alternatives are based on the realisation that infringed intellectual property rights are not only designed to protect against harm, but also to allocate revenue opportunities to the rights holder. If the rights holder wants to choose between the alternatives on an informed basis, the rights holder will in some cases be forced to rely on information which is exclusively in the sphere of the infringing party. This is not, however, the case here. Cartel damages regulations exclusively concern the issue of what position the party which has suffered harm would have been in if completion regulations had not been infringed. This is not, however, determined from the sphere of the infringing party.

2) Special provisions relating to leniency programmes (Articles 6 to 7)

The protection of leniency programmes is an important element for an effective enforcement of competition law. This protection must in the opinion of the German Brands Association logically be more comprehensive. The restriction of disclosure in Article 6 must at any rate cover documents which have been drafted as preparation or otherwise in connection with the leniency corporate statements and settlement submissions listed in Article 6(1). It would also in our opinion make sense to protect all documents drafted for the purpose of the fine proceedings from disclosure, i.e. all documents in accordance with Article 6(2).

If under national laws private individuals as (former) employees are also included in public proceedings, they must in order to obtain immunity if necessary submit separate leniency statements and can if necessary provide separate settlement submissions. It must be guaranteed to ensure effective leniency programmes that these statements enjoy the same protection as the corporate statements themselves. This should be clarified in the Directive.

3) Sanctions (Art. 8)

The comprehensive sanctions regulated in Article 8 in cases in which disclosure obligations are also unable to be met by third parties, constitute inappropriate intervention in national procedural law. They even cover cases of negligence (Article 8(1) (b) (ii)) and disregard the fact that undertakings are obliged to regularly destroy documents without checking their contents. This destruction of documents or failure to continue to store documents regularly takes place without any connection to or awareness of their possible suitability as evidence for actions for damages which have been filed or may be filed in future.

This provision should be deleted. The court can take a lack of cooperation within the scope of proceedings into consideration with the scope free assessment of evidence.

4) Binding effect (Article 9)

Article 16 of Regulation 1/2003/EC and Article 33(4) German Act Against Restraints of Competition already require that the courts seized in damages proceedings are bound to the final and conclusive decisions of competition authorities. Article 9 should, however, take into consideration that in the case of a follow-on action against an undertaking or a person with immunity from fines under a leniency programme binding effect in favour of the plaintiff only exists in accordance with a decision of the EU Commission and not in accordance with a decision of the Federal Cartel

Office; the Federal Cartel Office does not conclude proceedings within the scope of full immunity from a fine with a final and conclusive decision.

It also needs to be clarified that the binding effect covers the findings of the cartel infringement and accountability for such, but not causality and accountability in relation to the amount of compensation or the fault of cartel participants. It must be ensured that these questions are left to the legal assessment of the civil courts with the scope of the free assessment of evidence.

5) Limitation periods (Article 10)

In the spirit of legal clarity, actions for damages must also become abstractly time-barred irrespective of competition authorities taking action or claimants knowing that they may be entitled to compensation. Insofar as the Directive only refers to cases of follow-on actions, appropriate European provisions regarding when claims become statute-barred in the spirit of legal clarity are to be welcomed. Irrespective of this, a limitation period irrespective of claimants knowing that they may be entitled to compensation must also exist in the spirit of legal certainty. In Germany this limitation period is ten years pursuant to Sec. 199(3) No.1 German Civil Code (BGB).

It is also, however, not apparent why here compared to the general provisions of Sec. 199 German Civil Code (BGB) a different limitation period of five years in the Directive compared to three years in the German Civil Code (BGB) should be equitable. With the effect of the suspension pursuant to Article 10(5), ongoing proceedings are taken sufficiently into consideration without a longer limitation period. In addition, measures which interrupt the limitation period can be expected within three years of claimants knowing that they may be entitled to compensation.

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[signed] Dr. Andreas Gayk