

**Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union**

(Text with EEA relevance)

(2013/C 167/07)

**1. COMPENSATION FOR VICTIMS OF COMPETITION LAW INFRINGEMENTS: THE CHALLENGE OF QUANTIFYING THE HARM SUFFERED**

1. Infringements of Article 101 or 102 of the Treaty on the Functioning of the European Union ('TFEU'), hereafter the 'EU competition rules', cause great harm to the economy as a whole and hamper the proper functioning of the internal market. In order to prevent such harm, the Commission has the power to impose fines on undertakings and associations of undertakings for infringing EU competition rules<sup>(1)</sup>. The objective of the fines imposed by the Commission is deterrence, i.e. sanctioning the undertakings concerned (specific deterrence) and deterring other undertakings from engaging in, or continuing, behaviour that is contrary to Articles 101 and 102 TFEU (general deterrence)<sup>(2)</sup>.
  
2. Moreover, infringements of Article 101 or 102 TFEU cause great harm to consumers and undertakings. Anyone who has suffered harm through an infringement of EU competition rules has a right to compensation. This is guaranteed by EU law, as the Court of Justice has repeatedly emphasised<sup>(3)</sup>. While the objective of the fines is deterrence, the point of damages claims is to repair the harm suffered because of an infringement. More effective remedies for consumers and undertakings to obtain damages would, inherently, also produce beneficial effects in terms of deterring future infringements and ensuring greater compliance with those rules<sup>(4)</sup>.
  
3. A major difficulty encountered by courts, tribunals and parties in damages actions is how to quantify the harm suffered. Quantification is based on comparing the actual position of claimants with the position they would find themselves in had the infringement not occurred. In any hypothetical assessment of how market conditions and the interactions of market participants would have evolved without the infringement, complex and specific economic and competition law issues often arise. Courts and parties are increasingly confronted with these matters and with considering the methods and techniques available to address them.

**2. INTERPLAY OF RULES AND PRINCIPLES OF EU LAW AND NATIONAL LAW**

**2.1. *Acquis communautaire***

4. Articles 101 and 102 TFEU are a matter of public policy<sup>(5)</sup> and are central to the functioning of the internal market, which includes a system to ensure that competition is not distorted<sup>(6)</sup>. These Treaty provisions create rights and obligations for individuals, be they undertakings or consumers. Such rights

<sup>(1)</sup> See Article 23(2) of Council Regulation (EC) No 1/2003 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, p. 1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102 TFEU. Their substance has not been changed.

<sup>(2)</sup> Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2) of Regulation (EC) No 1/2003, OJ C 210, 1.9.2006, p. 2, at paragraph 4.

<sup>(3)</sup> Case C-453/99, *Courage and Crehan* [2001] ECR I-6297; Joined Cases C-295-298/04, *Manfredi* [2006] ECR I-6619; Case C-360/09, *Pfleiderer* [2011] ECR I-5161 and Case C-199/11, *European Community v Otis NV and others* [2012], not yet reported.

<sup>(4)</sup> Case C-453/99, *Courage and Crehan* [2001] ECR I-6297, 27; Joined Cases C-295-298/04, *Manfredi* [2006] ECR I-6619, 91.

<sup>(5)</sup> Joined Cases C-295-298/04, *Manfredi* [2006] ECR I-6619, 31.

<sup>(6)</sup> Protocol (No 27) to the Treaty on European Union, on the internal market and competition.

become part of the legal assets of these individuals <sup>(1)</sup> and are protected under the Charter of Fundamental Rights of the European Union <sup>(2)</sup>. National courts have a duty under EU law to enforce such rights and obligations fully and effectively in any proceedings brought before them.

5. Amongst the rights guaranteed by EU law is the right to compensation for harm suffered because of an infringement of Article 101 or 102 TFEU: the full effectiveness of EU competition rules would be put at risk if injured parties were not able to claim damages for losses caused to them by an infringement of these rules. Anyone can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited by the EU competition rules <sup>(3)</sup>.
6. Compensation for harm suffered means placing the injured parties in the position they would have been in had there been no infringement of Article 101 or 102 TFEU. Parties injured by an infringement of directly effective EU rules should therefore have the full real value of their losses restored: the entitlement to full compensation covers the actual loss (*damnum emergens*), as well as compensation for loss of profit (*lucrum cessans*) suffered as a result of the infringement <sup>(4)</sup>; and entitlement to interest from the time the damage occurred <sup>(5)</sup>.
7. In so far as there are no EU rules governing damages actions for breaches of Article 101 or 102 TFEU, it is for the domestic legal system of each Member State to lay down the detailed rules governing the exercise of the right to compensation guaranteed by EU law. Such rules must not, however, render the exercise of rights conferred by EU law excessively difficult or practically impossible (principle of effectiveness). Nor may they be less favourable than those governing damages actions for breaches of similar rights conferred by domestic law (principle of equivalence) <sup>(6)</sup>.

## 2.2. National law and its interaction with the principles of EU law

8. On the question of quantifying harm, to the extent that such exercise is not governed by EU law, the legal rules of the Member States determine the appropriate standard of proof and the required degree of precision in showing the amount of harm suffered. National rules will also assign the burden of proof and of the respective responsibilities of the parties to make factual submissions to the court. National law may provide for the burden of proof to shift once the claimant has proved a certain set of factors, and may provide for simplified rules of calculation and presumptions of a rebuttable or irrefutable nature. National law further determines to what extent and how courts are empowered to quantify the harm suffered on the basis of approximate best estimates or to make use of equitable considerations. All these national rules and procedures governing the quantification of harm should be laid down and applied in individual cases in a way that allows parties injured by EU competition law infringements to obtain full compensation for the harm suffered without any disproportionate difficulties; in no circumstances may they be less effective than in similar actions based on domestic law.
9. One consequence of the principle of effectiveness is that applicable national legal rules and their interpretation should reflect the difficulties and limits inherent to quantifying harm in competition cases. The quantification of such harm requires comparing the actual position of the injured party with the position this party would have been in without the infringement. This is something that cannot be observed in reality; it is impossible to know with certainty how market conditions and the interactions between market participants would have evolved in the absence of the infringement. All that is possible is an estimate of the scenario likely to have existed without the infringement. Quantification of harm in

<sup>(1)</sup> Case C-453/99, *Courage and Crehan* [2001] ECR I-6297, 19 and 23; Joined Cases C-295-298/04, *Manfredi* [2006] ECR I-6619, 39.

<sup>(2)</sup> See Article 17 of the Charter for the protection of an individual's assets; the right to an effective remedy for breaches of rights guaranteed by the law of the Union is set out in Article 47 of the Charter.

<sup>(3)</sup> Case C-360/09, *Pfleiderer* [2011] ECR I-5161, 28; Case C-199/11, *European Community v Otis NV and others* [2012], not yet reported, 43.

<sup>(4)</sup> Joined Cases C-295-298/04, *Manfredi* [2006] ECR I-6619, 95-96 and Joined Cases C-46/93 and C-48/93, *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, 87.

<sup>(5)</sup> Joined Cases C-295-298/04, *Manfredi* [2006] ECR I-6619, 97, referring to Case C-271/91, *Marshall* [1993] ECR I-4367, 31.

<sup>(6)</sup> Case C-453/99, *Courage and Crehan* [2001] ECR I-6297, 29; Joined Cases C-295-298/04, *Manfredi* [2006] ECR I-6619, 62.

competition cases has always, by its very nature, been characterised by considerable limits to the degree of certainty and precision that can be expected. Sometimes only approximate estimates are possible <sup>(1)</sup>.

### 3. GUIDANCE ON THE QUANTIFICATION OF HARM

10. Against this background, the Commission's services have drawn up a practical guide on the quantification of harm in actions for damages based on breaches of Article 101 or 102 TFEU (the 'practical guide').
11. The aim of the practical guide is to offer assistance to national courts and parties involved in actions for damages by making information on quantifying harm caused by infringements of the EU competition rules more widely available. It therefore provides insights into various forms of harm typically caused by anticompetitive practices and, in particular, sets out information on the methods and techniques available to quantify such harm. Giving such information wider circulation will enhance the effectiveness of actions for damages. It should also make such actions more foreseeable, thereby increasing legal certainty for all parties involved. The practical guide can also help parties find a consensual resolution of their disputes, be it within or outside the context of judicial or alternative dispute resolution proceedings.
12. This practical guide is purely informative and does not bind national courts or parties. It does not therefore alter the legal rules of the Member States governing actions for damages and does not affect the rights and obligations of Member States or of natural or legal persons under EU law.
13. In particular, the practical guide should not be seen as raising or lowering the standard of proof or the level of detail of the factual submissions required from the parties in the legal systems of the Member States. Nor should it be seen as affecting the rules and practices in the Member States regarding the burden of proof. National courts have often adopted, within their legal systems, pragmatic approaches to determining the amount of damages to be awarded, including the use of presumptions, shifts in the burden of proof, or the power of courts to make approximate best estimate assessments. The practical guide is intended to provide information that can be used within the framework of national legal rules and practices, not instead of them. Depending on the legal rules applicable and on the specific features of each case, it may therefore well be sufficient for the parties to provide facts and evidence on the damages quantum which are less detailed than those required by some of the methods and techniques mentioned in the practical guide.
14. The practical guide explains the particular features, including the strengths and weaknesses, of various methods and techniques available to quantify antitrust harm. It is up to the applicable law to determine which approach to quantification can be considered appropriate in the specific circumstances of a given case. Relevant considerations include — alongside the standard and burden of proof under applicable law — the availability of data, the costs and time involved and their proportionality in relation to the value of the damages claim.
15. The practical guide also presents and discusses a range of practical examples. These illustrate the typical effects that infringements of EU competition rules tend to have, and how the abovementioned methods and techniques for quantifying harm can be applied in practice.
16. Economic insights into the harm caused by antitrust infringements and methods and techniques for quantifying it can evolve over time in line with the theoretical and empirical economic research and judicial practice in this area. The practical guide should therefore not be seen as a comprehensive or definitive account of the insights, methods and techniques available.

---

<sup>(1)</sup> The limits of such assessments of a hypothetical situation have been recognised by the Court of Justice in the context of quantifying the loss of earnings in an action for damages against the European Community, see Joined Cases C-104/89 and C-37/90, *Mulder and others v Council* [2000] ECR I-203, 79.