

CONSULTATION DOCUMENT

DRAFT LEGAL NOTICE TO TRANSPOSE THE ANTITRUST DAMAGES DIRECTIVE (ADD) (PROMULGATING SUBSIDIARY LEGISLATION 379.09)

COMPETITION LAW INFRINGEMENTS (ACTIONS FOR DAMAGES) REGULATIONS

Preliminary

1. The title of these Regulations is the Competition Law Infringements (Actions For Damages) Regulations.
2. These Regulations implement the provisions of Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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.

Interpretation

3. In these Regulations, unless the context otherwise requires -

“Act” means the Competition Act;

“action for damages” means an action pursuant to these Regulations by which a claim for damages is brought before a national court by an alleged injured party, or by someone acting on behalf of one or more alleged injured parties, or by a natural or legal person that succeeded in the right of the alleged injured party, including the person that acquired the claim;

“cartel” means an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors;

“claim for damages” means a claim for compensation for harm caused by an infringement of competition law;

“competition authority” means the European Commission, the Office or any national competition authority, as the context may require;

“competition law” means Articles 101 and 102 TFEU and / or Articles 5 and 9 of the Act or any equivalent provision of the national laws of another Member State, excluding provisions of national law which impose criminal penalties on natural persons, except to the extent that such criminal penalties are the means whereby competition rules applying to undertakings are enforced, as may be applicable in a particular case;

“consensual dispute resolution” means any mechanism enabling parties to reach the out-of-court resolution of a dispute concerning a claim for damages;

“consensual settlement” means an agreement reached through consensual dispute resolution;

‘court’ means a court of civil jurisdiction in Malta as established under the Code of Organisation and Civil Procedure;

“direct purchaser” means a natural or legal person who acquired, directly from an infringer, products or services that were the object of an infringement of competition law;

“evidence” means all types of means of proof admissible before the court , in particular documents and all other objects containing information, irrespective of the medium on which the information is stored;

“final infringement decision” means an infringement decision that cannot be, or that can no longer be, appealed and which has accordingly become a *res judicata*;

“infringement decision” means a decision of a competition authority or a review court that finds an infringement of competition law;

“infringement of competition law” means an infringement of Article 101 or 102 TFEU and, or of Article 5 or 9 of the Act or any equivalent provision of the national law of another Member State;

“infringer” means an undertaking or association of undertakings which has committed an infringement of competition law;

“immunity recipient” means an undertaking which, or a natural person who, has been granted immunity from fines by a competition authority under a leniency programme;

“indirect purchaser” means a natural or legal person who acquired, not directly from an infringer, but from a direct purchaser or a subsequent purchaser, products or services that were the object of an infringement of competition law, or products or services containing them or derived therefrom;

“injured party” means a person that has suffered harm caused by an infringement of competition law;

“leniency programme” means a programme concerning the application of Article 101 TFEU or Article 5 of the Act, or equivalent provisions of another Member State, on the basis of which a participant in a secret cartel, independently of the other undertakings involved in the cartel, cooperates with an investigation of the competition authority, by voluntarily providing presentations regarding that participant's knowledge of, and role in, the cartel in return for which that participant receives, by decision or by a discontinuation of proceedings, immunity from, or a reduction in, fines for its involvement in the cartel;

“leniency statement” means an oral or written presentation voluntarily provided by, or on behalf of, an undertaking or a natural person to a competition authority or a record thereof, describing the knowledge of that undertaking or natural person of a cartel and describing its role therein, which presentation was drawn up specifically for submission to the competition authority with a view to obtaining immunity or a reduction of fines under a leniency programme, not including pre-existing information;

“national competition authority” means an authority designated by a Member State pursuant to Article 35 of Regulation (EC) No 1/2003, as being responsible for the application of Articles 101 and 102 TFEU, or the Office;

“Office” means the Office for Competition established by Article 13 of the Malta Competition and Consumer Affairs Authority Act;

“overcharge” means the difference between the price actually paid and the price that would otherwise have prevailed in the absence of an infringement of competition Law;

“pre-existing information” means evidence that exists irrespective of the proceedings of a competition authority, whether or not such information is in the file of a competition authority;

“review court” means a national court that is empowered by ordinary means of appeal to review decisions of a national competition authority or to review judgments pronouncing on those decisions, irrespective of whether that court itself has the power to find an infringement of competition law;

“settlement submission” means a voluntary presentation by, or on behalf of, an undertaking to a competition authority describing the undertaking's acknowledgement of, or its renunciation to dispute, its participation in an infringement of competition law and its responsibility for that infringement of competition law, which was drawn up specifically to enable the competition authority to apply a simplified or expedited procedure;

“TFEU” means the Treaty on the Functioning of the European Union.

Right to full compensation

4. (1) Any natural or legal person who has suffered damage caused by an infringement of competition law shall be entitled to claim and to obtain full compensation for that damage, which action shall be instituted in accordance with the provisions the Code of Organisation and Civil Procedure.

(2) For the purposes of these Regulations, a person shall be deemed to have suffered damage even where that person is not the immediate customer or provider of the defendant.

(3) Full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed. It shall therefore cover the right to compensation for actual loss and for loss of profit as well as the payment of interest from the time the damage occurred until the capital sum awarded is actually paid:

Provided that full compensation under these Regulations shall not lead to over-compensation, whether by means of punitive, multiple or other types of damages.

Disclosure of evidence

5. (1) In proceedings relating to an action for damages pursuant to the preceding regulation, the claimant shall present a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of the claim for damages.

(2) The court shall have the power, upon request of the claimant, to order the disclosure of relevant evidence by the defendant or a third party where such evidence lies in their control, in accordance with the provisions of the Code of Organisation and Civil Procedure, subject to the conditions set out in these Regulations. It shall also have the power, upon request of the defendant, to order the claimant or a third party to disclose relevant evidence. This sub-regulation is without prejudice to the rights and obligations of the court under Council Regulation (EC) No 1206/2001;

Provided that the court may, where it so deems appropriate in the circumstances, order the disclosure of specified items of evidence or relevant categories of evidence circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts in the reasoned justification presented by the claimant.

(3) The court shall limit the disclosure of evidence to that which is proportionate. In determining whether any disclosure requested by a party is proportionate, the court shall consider the legitimate interests of all parties and third parties concerned and it shall, in particular, consider:

- (a) the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence;
- (b) the scope and cost of disclosure, especially for any third parties concerned, including preventing non-specific searches for information which is unlikely to be of relevance for the parties in the procedure;
- (c) whether the evidence the disclosure of which is sought contains confidential information, especially concerning any third parties, and what arrangements are in place for protecting such confidential information.

(4) The court shall have the power to order the disclosure of evidence containing confidential information where it considers it relevant to the action for damages. When ordering the disclosure of such information the Court shall adopt any effective measures, pursuant to the provisions of the Code of Organisation and Civil Procedure, which it deems necessary or appropriate in the circumstances to protect such information in accordance with the applicable legislation:

Provided that this sub-regulation shall be without prejudice to the applicability of the duty of professional secrecy pursuant to the provisions of the Professional Secrecy Act (Cap 377), the Data Protection Act (Cap 440), the Official Secrets Act (Cap 50) and any other professional secret as classified under the law of any Member State or of the European Union.

(5) The interest of undertakings to avoid actions for damages following an infringement of competition law shall not constitute an interest capable of protection.

(6) Prior to ordering the disclosure of any evidence the court shall, upon request of the person from whom disclosure is sought, give that person the opportunity to present any submissions or objections concerning such disclosure.

(7) Without prejudice to sub-regulations 4 and 6 and to regulation 6, this regulation shall not prejudice the applicability of any provision of the Code of Organisation and Civil Procedure which would lead to wider disclosure of evidence.

Disclosure of evidence included in the file of a competition authority

6. (1) For the purpose of actions for damages pursuant to these Regulations, the court shall have the power to order the disclosure of evidence included in the file of a competition authority as the case may be, subject to the conditions set forth hereunder. In such cases, the provisions of the preceding regulation shall apply in addition to this regulation.

(2) This regulation is without prejudice to the rules and practices on public access to documents pursuant to Regulation (EC) No 1049/2001; and to the rules and practices on the protection of internal documents of the Office, including its correspondence with other competition authorities, pursuant to Article 28 of the Malta Competition and Consumer Affairs Authority Act or to the rules and practices on the protection of internal documents of the Commission pursuant to any applicable provision of European Union law.

(3) When assessing, in accordance with sub-regulation 3 of the preceding regulation, the proportionality of an order to disclose information the court shall, in addition, consider the following:

(a) whether the request has been formulated specifically with regard to the nature, subject matter or contents of documents submitted to a competition authority or held in the file thereof, rather than by a non-specific application concerning documents submitted to a competition authority;

(b) whether the party requesting disclosure is doing so in relation to an action for damages pending before it; and

(c) In relation to sub-regulations 4 and 9, or upon request of a competition authority pursuant to sub-regulation 10, the need to safeguard the effectiveness of the public enforcement of competition law.

(4) The court may order the disclosure of the following categories of evidence only after a competition authority, by adopting a decision or otherwise, has closed its proceedings:

(a) information that was prepared by a natural or legal person specifically for the proceedings of that competition authority;

- (b) information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and
- (c) settlement submissions that have been withdrawn.

(5) The following categories of evidence cannot, at any time, be the subject of an order for disclosure:

- (a) leniency statements; and
- (b) settlement submissions.

(6) A claimant may present a reasoned request that the court access the evidence referred to in point (a) or (b) of the preceding sub-regulation for the sole purpose of ensuring that their contents correspond to the definitions of “leniency statement” or “settlement submission”, as the case may be, in regulation 3. In making that assessment, the court may request assistance exclusively from the competent competition authority:

Provided that, in cases referred to in this sub-regulation, the authors of the evidence in question shall also have the possibility to be heard;

Provided further that in no case shall the court permit other parties or third parties to access the evidence in question.

(7) If only parts of the evidence requested are covered by sub-regulation 5, the remaining parts thereof shall, depending on the category under which they fall, be released in accordance with the relevant provisions of this regulation.

(8) The disclosure of evidence in the file of a competition authority that does not fall into any of the categories listed in this regulation may be ordered in actions for damages at any time, without prejudice to the provisions of this regulation.

(9) The court shall only request the disclosure of evidence included in the file of a competition authority where no party or third party is reasonably able to provide that evidence.

(10) To the extent that a competition authority is willing to state its views on the proportionality of a request for disclosure, it may, acting on its own initiative, submit observations to the court before which that disclosure order is sought.

Limits on the use of evidence solely through competition authority

7. (1) Any evidence in the categories listed in sub-regulation 5 of the previous regulation, which is obtained by a natural or legal person solely through access to the file of a competition authority, shall be deemed inadmissible in actions for damages pursuant to these Regulations.

(2) Until the competent competition authority has closed its proceedings by adopting a decision or otherwise, evidence in the categories listed in sub-regulation 4 of the previous

regulation, which is obtained by a natural or legal person solely through access to the file of that competition authority, shall also be deemed inadmissible in actions for damages pursuant to these Regulations.

(3) Any evidence which is obtained by a natural or legal person solely through access to the file of a competition authority, and which does not fall under sub-regulation 1 or 2, can be used in an action for damages only by that person or by a natural or legal person that succeeded to that person's rights, including a person that acquired that person's claim.

Fines

8. (1) A court seized of an action for damages pursuant to these Regulations shall have the power to impose fines on any party, third party and, or their legal representatives in the event of any of the following:

- (a) their failure or refusal to comply with a disclosure order of the court;
- (b) their destruction of relevant evidence;
- (c) their failure or refusal to comply with the obligations imposed by an order of the court protecting confidential information;
- (d) their breach of the limits on the use of evidence provided for in these Regulations;

Provided that for the purposes of this sub-regulation, the court may impose any measure envisaged in the Code of Organisation and Civil Procedure which it deems appropriate in the circumstances. The court shall ensure that any fine so imposed is effective, proportionate and dissuasive, having regard to the seriousness of the offence.

(2) The fines imposed pursuant to this regulation may also, at the discretion of the court, include the following with regard to the behaviour of a party to the proceedings:

- (a) the possibility to draw adverse inferences, such as presuming the relevant issue to be proven or dismissing claims and defences in whole or in part;
- (b) the possibility to order the payment of costs.

Effect of decisions

9. (1) An infringement of competition law found by a final decision of the Office and, or of the European Commission, shall be deemed to be irrefutably established for the purposes of an action for damages brought pursuant to these Regulations.

(2) Where a final decision as referred to in the preceding sub-regulation is taken by a national competition authority of another Member State, that final decision may be presented before the court seized of an action for damages pursuant to these Regulations as *prima facie* evidence that an infringement of competition law has occurred, and may, at the discretion of the court, be assessed along with any other evidence adduced by the parties.

(3) This regulation is without prejudice to the rights and obligations of the court under Article 267 TFEU.

Prescription

10. (1) Notwithstanding the provisions of the Civil Code or of any other law, an action for damages pursuant to these Regulations is prescribed by the lapse of five years.

(2) The period of prescription referred to in the preceding sub-regulation shall begin to run from the date when the infringement of competition law has ceased and the claimant became aware, or can reasonably be expected to have become aware:

(a) of the behaviour and the fact that it constitutes an infringement of competition law;

(b) of the fact that the infringement of competition law caused harm to it; and

(c) the identity of the infringer.

(3) The period of prescription referred to in sub-regulation 1 shall be suspended where a competition authority takes action for the purpose of the investigation or its proceedings in respect of an infringement of competition law to which the action for damages relates. The suspension shall end one year after the infringement decision has become *res judicata* or after the proceedings before the competition authority are otherwise terminated.

Joint and several liability

11. (1) Undertakings which are found to have infringed competition law through joint behaviour shall be jointly and severally liable for the harm caused by the infringement, with the effect that each of those undertakings is bound to compensate for the harm caused in full, and the injured party has the right to require full compensation from any of them until he has been fully compensated.

(2) Notwithstanding the provisions of sub-regulation 1 but without prejudice to the right of full compensation as laid down in regulation 4, where the infringer is a small or medium-sized enterprise (SME) as defined in Commission Recommendation 2003/361/EC, the infringer is liable only to its own direct and indirect purchasers or providers where:

(a) its market share in the relevant market was below 5 % at any time during the infringement of competition law; and

(b) the application of the normal rules of joint and several liability would irretrievably jeopardise its economic viability and cause its assets to lose all their value.

(3) The exceptions laid down in sub-regulation 2 shall not apply where:

(a) the SME has led the infringement of competition law or has coerced other undertakings to participate therein; or

(b) the SME has previously been found to have infringed competition law.

(4) Notwithstanding the provisions of sub-regulation 1, an immunity recipient shall be jointly and severally liable as follows:

- (a) to its direct or indirect purchasers or providers; and
- (b) to other injured parties only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law.

(5) Actions under this sub-regulation shall be prescribed by the same period as in regulation 10 of these Regulations.

(6) An infringer in terms of these regulations may, by a separate action, recover a contribution from any other infringer, the amount of which shall be determined in the light of their relative responsibility for the harm caused by the infringement of competition law. The amount of contribution of an infringer which has been granted immunity from fines under a leniency programme shall not exceed the amount of the harm it caused to its own direct or indirect purchasers or providers.

(7) To the extent that an infringement of competition law is found to have caused harm to injured parties other than the direct or indirect purchasers or providers of the infringers, the amount of any contribution from an immunity recipient to other infringers shall be determined in the light of its relative responsibility for that harm.

Passing-on of overcharges and the right to full compensation

12. (1) In accordance with the provisions of these Regulations, any person who has suffered harm caused by an infringement of competition law may claim compensation therefor, irrespective of whether such claimant is a direct or indirect purchaser from the infringer;

Provided, however, that the compensation for actual loss caused by the infringement of competition law to the claimant which may be recovered in accordance with these Regulations shall not in any case exceed the overcharge harm suffered at the level of the supply chain in which the claimant operates.

(2) These Regulations shall be without prejudice to the right of an injured party to claim and obtain compensation for loss of profits due to a full or partial passing-on of the overcharge.

(3) In estimating the amount of harm suffered by the claimant or the share of any overcharge that was passed on to the claimant, the court may, without prejudice to the right of the parties to produce *ex parte* expert witnesses, appoint one or more referees to assist it in accordance with the provisions of the Code of Organisation and Civil Procedure. It shall take due account of any Guidelines issued by the European Commission in this regard.

(4) These Regulations shall apply *mutatis mutandis* where the infringement of competition law relates to a supply to the infringer.

Passing-on defence

13. (1) The defendant in an action for damages pursuant to these regulations may raise as a defence the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law.

(2) The burden of proving that the overcharge was passed on shall be on the defendant, who may reasonably require disclosure from the claimant or from third parties.

Indirect purchasers

14. (1) Where in an action for damages the existence of a claim for damages or the amount of compensation to be awarded depends on whether, or to what degree, an overcharge was passed on to the claimant, taking into account the commercial practice that price increases are passed on down the supply chain, the burden of proving the existence and scope of such a passing-on shall rest with the claimant, who may reasonably require disclosure from the defendant or from third parties.

(2) In the situation referred to in sub-regulation 1, the indirect purchaser shall be deemed to have proven that a passing-on to that indirect purchaser occurred where that indirect purchaser has shown that:

(a) the defendant has committed an infringement of competition law;

(b) the infringement of competition law has resulted in an overcharge for the direct purchaser of the defendant; and

(c) the indirect purchaser has purchased the goods or services that were the object of the infringement of competition law, or has purchased goods or services derived from or containing them

(3) The preceding sub-regulation shall not apply where the defendant can demonstrate credibly to the satisfaction of the court that the overcharge was not, or was not entirely, passed on to the indirect purchaser.

Actions for damages by claimants from different levels in the supply chain

15. (1) With a view to avoiding that actions for damages by claimants from different levels in the supply chain lead to a multiple liability or to an absence of liability of the infringer, in assessing whether the burden of proof resulting from the application of regulations 13 and 14 is satisfied, the court may take due account of any of the following:

(a) actions for damages that are related to the same infringement of competition law, but that are brought by claimants from other levels in the supply chain;

(b) judgments resulting from actions for damages as referred to in point (a);

(c) relevant information in the public domain resulting from the public enforcement of competition law.

(2) This regulation shall be without prejudice to the rights and obligations of the court pursuant to Article 30 of Regulation (EU) No 1215/2012.

Quantification of Harm

16. (1) The burden of proving claims regarding the extent of the harm suffered shall rest on the claimant

Provided that where it is established that the claimant suffered harm, but it is impossible or excessively difficult to quantify precisely the harm suffered on the basis of the evidence available, the court may appoint one or more referees to assist it in accordance with the provisions of the Code of Organisation and Civil Procedure.

(2) It shall in any case be presumed that cartel infringements cause harm;

Provided that the infringer shall have the right to bring forward evidence to rebut that presumption.

(3) A competition authority may, at the request of a court seized of an action for damages pursuant to these Regulations, assist that court with respect to the determination of the quantum of damages where the competition authority considers such assistance to be appropriate.

(4) In establishing the quantum of damages the court shall take into account the factual scenario that would have prevailed had the infringement not taken place.

Suspensive and other effects of consensual dispute resolution

17. (1) The prescriptive period referred to in regulation 10 shall be suspended for the duration of any consensual dispute resolution process, exclusively with regard to those parties that are or that were involved or represented in the consensual dispute resolution.

(2) Without prejudice to the provisions of the Arbitration Act, the court seized of an action for damages pursuant to these Regulations may, as it deems fit in the circumstances, suspend its proceedings for a period of no longer than two years where the parties thereto are involved in consensual dispute resolution concerning the claim covered by that action for damages.

(3) The Office may consider compensation paid as a result of a consensual settlement, and prior to its decision imposing a fine, to be a mitigating factor.

Effect of consensual settlements on subsequent actions for damages

18. (1) Following a consensual settlement, the claim of the settling injured party shall be reduced by the settling co-infringer's share of the harm that the infringement inflicted upon the injured party.

(2) Any remaining claim of the settling injured party shall be exercised only against non-settling co-infringers, who shall not be permitted to recover contribution for the remaining claim from the settling co-infringer;

Provided, however, that where the non-settling co-infringers cannot pay the damages that correspond to the remaining claim of the settling injured party, the settling injured party may exercise the remaining claim against the settling co-infringer, unless such a derogation has been expressly excluded under the terms of the consensual settlement.

(3) When determining the amount of contribution that a co-infringer may recover from any other co-infringer in accordance with their relative responsibility for the harm caused by the infringement of competition law, the court shall take due account of any damages paid pursuant to a prior consensual settlement involving the relevant co-infringer.

Transitory Provision

19. The provisions of these Regulations, insofar as they relate to the procedure for claiming damages in terms of these Regulations, shall apply to actions instituted on or after the date of the entry into force of these Regulations.