



STATUTORY INSTRUMENTS.

S.I. No. 43 of 2017

EUROPEAN UNION (ACTIONS FOR DAMAGES FOR
INFRINGEMENTS OF COMPETITION LAW) REGULATIONS 2017

EUROPEAN UNION (ACTIONS FOR DAMAGES FOR
INFRINGEMENTS OF COMPETITION LAW) REGULATIONS 2017

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EUROPEAN UNION (ACTIONS FOR DAMAGES FOR
INFRINGEMENTS OF COMPETITION LAW) REGULATIONS 2017

I, MARY MITCHELL O'CONNOR, Minister for Jobs, Enterprise and Innovation, in exercise of the powers conferred on me by section 3 of the European Communities Act 1972 (No. 27 of 1972) and for the purpose of giving effect to Directive No. 2014/104 EU of the European Parliament and of the Council of 26 November 2014¹, hereby make the following regulations:

Part 1

PRELIMINARY

Citation and commencement

1. (1) These Regulations may be cited as the European Union (Actions for Damages for Infringements of Competition Law) Regulations 2017.

(2) These Regulations shall be deemed to have come into operation on 27 December 2016.

Interpretation

2. (1) In these Regulations—

“action for damages” means an action under law by which a claim for damages is brought before a court by an alleged injured party, or by someone acting on behalf of one or more alleged injured parties where law provides for that possibility, or by a 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 Commission of the European Union, a national competition authority or a foreign competition authority;

¹OJ No. L 349, 5.12.2014, p.1

*Notice of the making of this Statutory Instrument was published in
“Iris Oifigiúil” of 17th February, 2017.*

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

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

“direct purchaser” means a 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 seized and, in particular, documents and all other objects containing information, irrespective of the medium on which the information is stored;

“foreign competition authority” means an authority designated by another Member State pursuant to Article 35 of Regulation (EC) No. 1/2003 of 16 December 2002², as being responsible for the application of Articles 101 and 102 of the Treaty of the Functioning of the European Union;

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

“indirect purchaser” means a 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;

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

“infringement of competition law” means an infringement of Article 101 or 102 of the Treaty on the Functioning of the European Union or of section 4 or 5 of the Competition Act 2002 (No. 14 of 2002);

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

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

“leniency programme” means a programme, known in the State as the Cartel Immunity Programme, concerning the application of Article 101 of the Treaty on the Functioning of the European Union 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 a 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;

²OJ No. L 1, 4.1.2003, p.1

“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 a 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 a body designated under the European Communities (Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty) Regulations 2004 (S.I. No. 195 of 2004) (as amended by the European Communities (Implementation of the Rules on Competition Laid Down in Articles 81 and 82 of the Treaty) (Amendment) Regulations 2007 (S.I. No. 525 of 2007));

“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 court that is empowered by ordinary means of appeal to review decisions of a national competition authority or to review judgements 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 a competition authority to apply a simplified or expedited procedure.

(2) A word or expression which is used in these Regulations and which is also used in Directive 2014/104 EU of the European Parliament and of the Council of 26 November 2014¹ has, unless the context otherwise requires, the same meaning in these Regulations as it has in that Directive.

Application

3. These Regulations do not apply to infringements of competition law that occurred before 27 December 2016.

Right to full compensation

4. (1) Where a person has suffered harm caused by an infringement of competition law, the person shall be able to claim and obtain, in any action for damages under section 14 of the Competition Act 2002, full compensation for that harm.

(2) Full compensation shall place a person who has suffered harm caused by an infringement of competition law 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, plus the payment of interest.

(3) Full compensation under these Regulations shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages.

(4) Section 14 of the Competition Act 2002 is amended—

(a) in subsection (4), by deleting “, including exemplary damages,”, and

(b) in subsection (5)(b), by deleting “, including exemplary damages”.

Part 2

DISCLOSURE OF EVIDENCE

Disclosure of evidence

5. (1) A court shall limit the disclosure of evidence to that which is proportionate. In determining whether any disclosure requested by a party is proportionate, a court shall consider the legitimate interests of all parties and third parties concerned. 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.

(2) A court may order the disclosure of evidence containing confidential information where it considers it relevant to an action for damages.

Disclosure of evidence included in file of competition authority

6. (1) This Regulation applies, in addition to Regulation 5, where a court orders the disclosure of evidence included in the file of a competition authority and is without prejudice to section 25 of the Competition and Consumer Protection Act 2014 (No. 29 of 2014).

(2) When assessing, in accordance with Regulation 5(1), the proportionality of an order to disclose information, a 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 a party requesting disclosure is doing so in relation to an action for damages before a court;
 - (c) in relation to paragraphs (3) and (8), or upon request of a competition authority pursuant to paragraph (9), the need to safeguard the effectiveness of the public enforcement of an infringement of competition law.
- (3) A court may, only after a competition authority by adopting a decision or otherwise, has closed its proceedings, order the disclosure of the following categories of evidence—
- (a) information that was prepared by a person specifically for the proceedings of a 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.
- (4) For the purpose of actions for damages, a court cannot at any time order a party or a third party, involved in an action for damages, to disclose any of the following categories of evidence:
- (a) leniency statements;
 - (b) settlement submissions.
- (5) A claimant may present a reasoned request that a court access the evidence referred to in subparagraph (a) or (b) of paragraph (4) for the sole purpose of ensuring that their contents correspond to the definitions of “leniency statement” and “settlement submission” in Regulation 2. In that assessment, a court may request assistance only from the competent competition authority concerned. The authors of the evidence in question may also have the possibility to be heard. In no case shall the court permit other parties or third parties access to that evidence.
- (6) If only parts of the evidence requested are covered by paragraph (4), the remaining parts thereof shall, depending on the category under which they fall, be released in accordance with the relevant paragraphs of this Regulation.
- (7) 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 this Regulation.

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

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

(10) Where a court orders the disclosure of information under this Regulation a party or third party to whom the order applies and their legal representatives—

- (a) shall comply with the disclosure order,
- (b) shall not destroy any relevant information,
- (c) shall comply with any obligation imposed by the court or the order protecting confidential information, and
- (d) shall not breach the limits of the use of evidence provided under this Part.

Limits on use of evidence obtained solely through access to file of competition authority

7. (1) Evidence in the categories listed in Regulation 6(4) which is obtained by a person solely through access to the file of a competition authority is deemed to be inadmissible in an action for damages to ensure the full effect of the limits on the disclosure of evidence set out in Regulation 6.

(2) Until a competition authority has closed its proceedings by adopting a decision or otherwise, evidence in the categories listed in Regulation 6(3) which is obtained by a person solely through access to the file of that competition authority is deemed to be inadmissible in an action for damages to ensure the full effect of the limits on the disclosure of evidence set out in Regulation 6.

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

Part 3

EFFECT OF NATIONAL DECISIONS, LIMITATION PERIOD, JOINT AND SEVERAL LIABILITY

Effect of national decisions

8. (1) An infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established for the purposes of an action for damages brought before a court for an infringement of competition law.

(2) Where a final decision referred to in paragraph (1) is taken in another Member State, that final decision may be presented before a court as at least *prima facie* evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other evidence adduced by the parties.

(3) In this Regulation “final decision” in relation to an infringement of competition law, means a decision which cannot, or that can no longer, be appealed.

Limitation period

9. The Statute of Limitations 1957 (No. 6 of 1957) is amended by the insertion after section 11 of the following section:

“Limitation of actions for damages for infringements of competition law

11A. (1) An action for damages under subsection (1) of section 14 of the Act of 2002 shall not be brought after the expiration of 6 years from the latest occurring of the following dates:

- (a) the date on which the infringement of competition law to which the cause of action relates ceased;
- (b) the date on which the person in whom the cause of action vests came to know or could reasonably be expected to have come to know of the acts or omissions that constituted such infringement;
- (c) the date on which that person came to know or could reasonably be expected to have come to know that those acts or omissions constituted such an infringement;
- (d) the date on which that person came to know or could reasonably be expected to have come to know that the infringement caused harm (within the meaning of the Directive) to that person;
- (e) the date on which that person came to know or could reasonably be expected to have come to know the identity of the infringer concerned.

(2) Any period during which—

(a) an investigation under—

- (i) Part 4A (inserted by section 31 of the Communications Regulation (Amendment) Act 2007) of the Act of 2002, or
- (ii) paragraph (c) of subsection (1) of section 10 of the Competition and Consumer Protection Act 2014,

in relation to an infringement of competition law, or

- (b) an investigation by the Commission of the European Union or a foreign competition authority in relation to an infringement of competition law,

is being conducted, shall not, as respects a cause of action relating to that infringement, be reckonable for the purpose of determining the period of 6 years referred to in subsection (1).

(3) Any period during which—

- (a) proceedings for an offence consisting of an infringement of competition law,
- (b) an action under section 14A (inserted by section 4 of the Competition (Amendment) Act 2012) of the Act of 2002 in relation to an infringement of competition law, or
- (c) any other proceedings in relation to an infringement of competition law to which the competent authority (within the meaning of the Act of 2002) is a party,

is or are pending, shall not, as respects a cause of action relating to that infringement, be reckonable for the purpose of determining the period of 6 years referred to in subsection (1).

(4) Any period during which—

- (a) proceedings before the General Court or the Court of Justice of the European Union in relation to an infringement of competition law,
- (b) proceedings for an offence under the law of a Member State (other than the State) in relation to an infringement of competition law, or
- (c) any other proceedings in such a Member State in relation to an infringement of competition law to which a foreign competition authority is a party,

is or are pending, shall not, as respects a cause of action relating to that infringement, be reckonable for the purpose of determining the period of 6 years referred to in subsection (1).

(5) Any period during which a consensual dispute resolution process (within the meaning of the Directive) relating to an infringement of competition law is being conducted shall not, as respects a cause of action relating to that infringement, be reckonable for the purpose of determining the period of 6 years referred to in subsection (1), provided that the parties to that consensual dispute resolution process are the person in whom the cause of action vests and the person against whom the cause of action lies.

(6) The period of one year from—

- (a) the conclusion or discontinuance of an investigation referred to in subsection (2),
- (b) the giving of final judgment in, or the discontinuance of, proceedings referred to in subsection (3) or (4),
- (c) the giving of final judgment in, or the discontinuance of, the action referred to in paragraph (b) of subsection (3),

shall not be reckonable for the purpose of determining the period of 6 years referred to in subsection (1).

(7) This section does not apply to an infringement of competition law that occurred before 27 December 2016.

(8) In this section—

‘Act of 2002’ means the Competition Act 2002;

‘Directive’ means Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014¹ 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;

‘foreign competition authority’ has the meaning assigned to it by the Regulations of 2017;

‘infringement of competition law’ has the meaning assigned to it by the Regulations of 2017;

‘infringer’ has the meaning assigned to it by the Regulations of 2017;

‘Regulations of 2017’ means the European Union (Actions for Damages for Infringements of Competition Law) Regulations 2017 (S.I. No. 43 of 2017).”.

Joint and several liability

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

(2) Without prejudice to the right to full compensation as laid down in Regulation 4, where a SME engages in joint behaviour referred to in paragraph (1) to infringe competition law the SME is liable only to its own direct and indirect purchasers or providers where—

- (a) its market share in the relevant market was below 5 per cent 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) Paragraph (2) does 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) Where an immunity recipient engages in joint behaviour to infringe competition law referred to in paragraph (1) the immunity recipient is 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) In an action for damages, an infringer may 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 who 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.
- (6) In an action for damages, to the extent that the infringement of competition law 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.
- (7) In this Regulation, “SME” means an enterprise in the category of micro, small and medium-sized enterprises made up of enterprises which employ fewer than 250 persons and which have an annual turnover not exceeding €50 million, or an annual balance sheet total not exceeding €43 million or both. Within the SME category—
- (a) a small enterprise is defined as an enterprise which employs fewer than 50 persons and whose annual turnover or annual balance sheet total does not exceed €10 million or both, and
 - (b) a microenterprise is defined as an enterprise which employs fewer than 10 persons and whose annual turnover or annual balance sheet total does not exceed €2 million or both.

(8) This Regulation is in addition to and not in substitution of the Civil Liability Act 1961 (No. 41 of 1961) in respect of concurrent wrongdoers.

Part 4

PASSING-ON OF OVERCHARGES

Passing-on of overcharges and right to full compensation

11. (1) In order to ensure the full protection of the rights laid out in Regulation 4 compensation of harm can be claimed by anyone who suffered it, irrespective of whether they are direct or indirect purchasers from an infringer.

(2) The compensation of harm referred to in paragraph (1) shall not exceed that caused by the infringement of competition law to the claimant.

(3) Paragraph (1) does not imply an absence of liability of an infringer of competition law.

(4) In order to avoid overcompensation, the compensation for actual loss at any level of the supply chain shall not exceed the overcharge harm suffered at that level.

(5) This Part is 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.

(6) This Part applies accordingly where the infringement of competition law relates to a supply to the infringer.

(7) A court shall decide the share of any overcharge that was passed on.

Passing-on defence

12. (1) A defendant in an action for damages can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law.

(2) The defendant referred to in paragraph (1) shall have the burden of proving that the overcharge was passed on.

(3) The defendant referred to in paragraph (1) may reasonably require disclosure from the claimant or from third parties.

Indirect purchasers

13. (1) Where the existence of a claim for damages in an action for damages or the amount of compensation to be awarded resulting from an action for damages depends on whether, or to what degree, an overcharge was passed on to a claimant, the burden of proving the existence and scope of such a passing-on shall rest with the claimant.

(2) A claimant referred to in paragraph (1) may reasonably require disclosure from the defendant or from third parties.

(3) A claim for damages or the amount of compensation to be awarded under paragraph (1) shall take into account the commercial practice that price increases are passed on down the supply chain.

(4) For the purposes of paragraph (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.

(5) Paragraph (4) does not apply where the defendant can demonstrate credibly to the satisfaction of a court that the overcharge was not, or was not entirely, passed on to the claimant.

Actions for damages by claimants from different levels in supply chain

14. (1) An action for damages by claimants from different levels of the supply chain shall not lead to—

- (a) a multiple liability, or
- (b) an absence of liability of the infringer.

(2) When assessing whether the burden of proof resulting from the application of Regulations 12 and 13 is satisfied, a court seized of an action for damages 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 subparagraph (a);
- (c) relevant information in the public domain resulting from the public enforcement of an infringement of competition law.

Part 5

QUANTIFICATION OF HARM

Quantification of harm

15. (1) A claimant's right to damages resulting from an action for damages should not be made practically impossible or excessively difficult due to the burden or standard of proof required for the quantification of harm.

(2) Where it is established that a claimant in an action for damages suffered harm but it is practically impossible or excessively difficult precisely to quantify the harm suffered on the basis of the evidence available, a court may estimate the amount of such harm.

(3) For the purpose of an action for damages it shall be presumed that cartel infringements cause harm. An infringer shall have the right to rebut that presumption.

(4) In proceedings relating to an action for damages, a national competition authority may, upon request of a court, assist that court with respect to the determination of the quantum of damages where that national competition authority considers such assistance to be appropriate.

Part 6

CONSENSUAL DISPUTE RESOLUTION

Suspensive and other effects of consensual dispute resolution

16. (1) A court seized of an action for damages may suspend its proceedings for up to two years where the parties thereto are involved in consensual dispute resolution concerning the claim covered by that action for damages. This paragraph is without prejudice to provisions in law in matters of arbitration.

(2) A national competition authority 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

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

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

(3) Notwithstanding paragraph (2), 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. This paragraph may be expressly excluded under the terms of the consensual settlement.

(4) 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, a court shall take due account of any damages paid pursuant to a prior consensual settlement involving the relevant co-infringer.



GIVEN under my Official Seal,
13 February 2017.

MARY MITCHELL O'CONNOR,
Minister for Jobs, Enterprise and Innovation.

EXPLANATORY NOTE

(This note is not part of the Instrument and does not purport to be a legal interpretation.)

These Regulations give effect to 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. The Directive sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of competition law can effectively exercise the right to claim full compensation for that harm from the infringer.

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