



REPUBLIC OF ALBANIA
COMPETITION AUTHORITY

GUIDELINE¹

No. 3, date 26.06.2019

“On damages caused and actions undertaken for infringements of the provisions of Law no. 9121, dated 28.07.2003 “On Competition Protection”, as amended.”

1. General

- 1) Law 9121/2003 “On Competition Protection” (hereafter referred to as the Law), as amended, should be applied:
 - On undertakings and associations of undertakings which, directly or indirectly affect or may affect the market;
 - On all entities operating in the territory of the Republic of Albania as well as on those entities operating outside the territory, if the consequences of this activity affect the domestic market;
 - On public undertakings and on undertakings trusted with special or exclusive rights;
 - On undertakings that have been granted the right to exercise their activity in the field of services with general economic interest or those that have the nature of income-oriented monopolies, for as long and as far as the Law and the facts do not prevent their activity.
- 2) Article 65 of the Law provides the right of any person impeded in its activity by a prohibited agreement, as referred in article 4 of this Law, or by an abusive practice as referred in article 9 of this Law, may challenge this action in court and claim the elimination or prevention of the restriction of competition that may have been committed or has been committed in breach of this and to claim remuneration, payment or compensation under the provisions of the Civil Code for the damage caused.
- 3) Based on the provisions of the Civil Code and the Civil Procedure Code, courts play an important role in the enforcement of competition rules. The full effectiveness of Articles 4 and 9 of the Law and in particular the practical effect of the prohibitions defined in these articles, requires that any individual including consumers and undertakings or a public authority, may seek indemnification in front of the court for the damage caused to them from an infringement of these provisions. The right of compensation is equally applied for infringements of Articles

¹ 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”. (32014L0104)

- 4 and 9 of the Law by public undertakings and by undertakings entrusted with special or exclusive rights by Albanian Public Institutions as referred in letter c) of Article 1 of the Law.
- 4) Actions for damages are only one element of an effective system of private enforcement of infringements of competition law and are complemented by alternative regulatory means, such as consensual dispute resolution and public enforcement decisions that give parties an incentive to provide compensation.
 - 5) In order to ensure effective private enforcement actions under the civil law and effective public enforcement by competition authorities, both tools are required to interact to ensure maximum effectiveness of the competition rules. It is necessary to regulate the coordination of those two forms of enforcement in a coherent way.
 - 6) The Albanian Competition Authority applies the competition Law regarding agreements, decisions of associations of undertakings or coordinated practices within the meaning of Article 4 of the Law which may affect the market. When the Albanian Competition Authority or the court applies the Law to any abuses prohibited by Article 9 of the Law, they must also enforce Article 9 of the Law. In a proper market functioning, greater legal certainty and a more equal scope for undertakings and consumers, it is appropriate to extend to actions for damages based on infringement of the provisions of the Law in the scope of this Guideline. The enforcement of various rules on civil liability related to infringement referred to Article 4 or 9 of the Law would negatively affect the claimant's position in the same subject and scope of their request and would prevent its proper functioning in the market.
 - 7) Any person can claim compensation for damage suffered where there is a causal relationship between that damage and an infringement of competition law. All national rules governing the exercise of the right to compensation for damage resulting from an infringement of Article 4 or 9 of the Law should not be formulated or applied in a way that makes it excessively difficult or practically impossible to exercise the right to guaranteed compensation.
 - 8) Anyone who has suffered damage caused by such an infringement can claim compensation for actual loss (*damnum emergens*), for gain of which that person has been deprived (loss of profit or *lucrum cessans*), plus interest payments.
 - 9) The right to compensation is recognized for any natural or legal person — consumers, undertakings and public authorities alike — irrespective of the existence of a direct contractual relationship with the infringing undertaking, and regardless of whether or not there has been a prior finding of an infringement by the Competition Authority.
 - 10) Actions for damages for infringements of EU or national competition law typically require a complex factual and economic analysis. The evidence necessary to prove a claim for damages is often held exclusively by the responding party or by third parties, and is not sufficiently known by, or accessible to the claimant. In such circumstances, strict legal requirements for claimants to assert in detail all the facts of their case at the beginning of an action and to proffer precisely specified items of supporting evidence, can unduly impede the effective exercise of the right to compensation guaranteed by the TFEU.

- 11) Evidence is an important element for bringing actions for damages for infringement of EU or national competition law. However, as competition law litigation is characterized by an asymmetry of information, it is appropriate to ensure that claimants are guaranteed the right to obtain the disclosure of evidence relevant to their claim, without it being necessary for them to specify individual items of evidence. In order to ensure equality of arms, those means should also be available to defendants in actions for damages, so that they can request the disclosure of evidence by those claimants.
- 12) While relevant evidence containing business secrets or otherwise confidential information should, in principle, be available in actions for damages, such confidential information needs to be protected appropriately. National courts should therefore have at their disposal a range of measures to protect such confidential information from being disclosed during the proceedings. Those measures could include the possibility of editing sensitive passages in documents, conducting hearings in camera, restricting the persons allowed to see the evidence, and instructing experts to produce summaries of the information in an aggregated or otherwise non-confidential form. Measures protecting business secrets and other confidential information should, nevertheless, not impede the exercise of the right to compensation.
- 13) The requirement of proportionality should be carefully assessed when there is a risk of unravelling the information and the investigative strategy of the Competition Authority by revealing which documents are part of the file and bear the risk of having a negative effect on the way in which undertakings cooperate with the Competition Authority. Particular attention should be paid to preventing '*fishing expeditions*', i.e. non-specific or overly broad searches for information that is unlikely to be of relevance for the parties to the proceedings. Disclosure requests should therefore not be considered proportionate where they refer to the generic disclosure of documents in the file of a competition authority relating to a certain case, or the generic disclosure of documents submitted by a party in the context of a particular case. Such wide disclosure requests would not be compatible with the requesting party's duty to specify the items of evidence or the categories of evidence as precisely and narrowly as possible.
- 14) The leniency program for the settlement procedures is an important tool for the public enforcement of competition law as it contributes to the detection and efficient prosecution of, and the imposition of penalties for, the most serious infringements of competition law. Furthermore, as many decisions of competition authorities in cartel cases are based on a leniency application, and damages actions in cartel cases generally follow on from those decisions, leniency programs are also important for the effectiveness of actions for damages in cartel cases. Undertakings might be deterred from cooperating with the Competition Authority under leniency programs and settlement procedures if self-incriminating statements such as declaration for leniency and transaction proposals, which are drafted/compiled for the sole purpose of cooperating with the competition authority. Such disclosure would pose a risk of exposing the cooperating undertakings or their managing staff to civil or criminal liability under conditions worse than those of co-infringers not cooperating with the Competition Authority. To ensure the continuous willingness of the undertakings to approach the Competition Authority voluntarily with leniency program, such documents should be exempted from the disclosure of evidence. This exemption should also apply to verbal

quotations/verbal declaration from the declaration for leniency. In order to ensure that this exemption does not unduly interfere with damaged parties' rights to compensation, it should be limited to those voluntary and self-incriminating statements such as declaration for leniency and transaction proposals.

- 15) Any natural or legal person that obtains evidence through access to the file of the Competition Authority should be able to use that evidence for the purposes of an action for damages to which it is a party. Such use should also be allowed on the part of any natural or legal person that succeeded in its rights and obligations, including through the acquisition of its claim. Where the evidence was obtained by a legal person forming part of a corporate group constituting one undertaking for the application of Articles 4 and 9 of the Law, other legal persons belonging to the same undertaking should also be able to use that evidence.
- 16) The use of evidence obtained through access to the file of the Competition Authority should not unduly detract from the effective enforcement of competition law by a competition authority. In order to ensure that the limitations on disclosure laid down in this Guideline are not undermined, the use of evidence of the types referred to in point 15 which is obtained solely through access to the file of the Competition Authority, should be limited under the same circumstances. The limitation should take the form of inadmissibility in actions for damages or the form of any other protection under applicable national rules capable of ensuring the full effect of the limits on the disclosure of those types of evidence. Moreover, evidence obtained from the Competition Authority should not become an object of trade. The possibility of using evidence that was obtained solely through access to the file of a competition authority should therefore be limited to the natural or legal person that was originally granted access and to its legal successors.
- 17) National rules on the beginning, duration, suspension or interruption of limitation periods should not unduly hamper the bringing of actions for damages. This is particularly important in respect of actions that build upon a finding by the Competition Authority or a review court of an infringement. To that end, it should be possible to bring an action for damages after proceedings by a competition authority, with a view to enforcing competition law. The limitation period should not begin to function before the infringement ceases and before a claimant knows, or can reasonably be expected to know, the behavior constituting the infringement, the fact that the infringement caused damage on the claimant, and the identity of the infringer.
- 18) Where several undertakings jointly infringe the competition rules, as in the case of a cartel, it is appropriate to make provision for them to be held jointly and individually liable for the entire damage caused by the infringement. A co-infringer should have the right to obtain a compensation from other co-infringers if it has paid more than its share. The determination of that share as the relative responsibility of a given infringer, and the relevant criteria such as turnover, market share, or role in the cartel, is a matter for law enforcement, while respecting the principles of effectiveness and equivalence.

- 19) Undertakings cooperating with the Competition Authority in the framework of the leniency program play an important role in presenting evidence proving violations of a prohibited agreement and making a decision to ban these agreements. This will reduce the damage that would have been caused if the offense had followed. It is appropriate to provide that undertakings which benefit from immunity from fines by the Competition Authority under a leniency program shall be protected from unnecessary exposure to the claim for damages, having regard to the fact that the Competition Authority's decision finding the violation may take the form cut to the recipient of immunity before it becomes final for other enterprises that have not received immunity. Thus the immunity recipient will be a preferential subject of this process. It is appropriate that the recipient of immunity be relieved in principle of the joint responsibility for all the damage and that any contribution they have to make to the offenders does not exceed the amount of damage caused to the direct and indirect purchasers or in the case of a bail-out agreement to the bidders directly or indirectly. When a prohibited agreement has caused damage to other parties other than to customers or providers, the benefit of the immune recipient shall not exceed its liability for the damage caused by the prohibited agreement. This part must be determined in accordance with the same rules that are used to determine the contributions between infringers. The immunity recipient should remain fully liable to the injured parties other than its direct or indirect purchasers or providers only where they are unable to obtain full compensation from the other infringers.
- 20) Damage in the form of actual loss can result from the price difference between what was actually paid and what would otherwise have been paid in the absence of the infringement. When an injured party has reduced its actual loss by passing it on, entirely or in part, to its own purchasers, the loss which has been passed on no longer constitutes damage for which the party that passed it on needs to be compensated.
- 21) In situations where the passing-on resulted in reduced sales and thus damage in the form of a loss of profit, the right to claim compensation for such loss of profit should remain unaffected.
- 22) Depending on the conditions under which undertakings are operating, it may be a commercial practice to pass on price increases down the supply chain. Consumers or undertakings to whom actual loss has thus been passed on have suffered damage caused by an infringement of Union or national competition law. While such damage should be compensated for by the infringer, it may be particularly difficult for consumers or undertakings that did not themselves make any purchase from the infringer to prove the extent of that damage. It is therefore appropriate to provide that, where the existence of a claim for damages or the amount of damages to be awarded depends on whether or to what degree an overcharge paid by a direct purchaser from the infringer has been passed on to an indirect purchaser, the latter is regarded as having proven that an overcharge paid by that direct purchaser has been passed on to its level where it is able to show *prima facie* that such passing-on has occurred. This rebuttable presumption applies unless the infringer can credibly demonstrate to the satisfaction of the court that the actual loss has not or not entirely been passed on to the indirect purchaser. It is furthermore appropriate to define under what conditions the indirect purchaser is to be regarded as having established such *prima facie* proof. As regards the quantification of passing-on, national courts should

have the power to estimate which share of the overcharge has been passed on to the level of indirect purchasers in disputes pending before them.

- 23) Infringements of competition law often concern the conditions and the price under which goods or services are sold, and lead to an overcharge and other damage for the customers of the infringers. The infringement may also concern supplies to the infringer (for example in the case of a buyers' cartel). In such cases, the actual loss could result from a lower price paid by infringers to their suppliers. This Directive and in particular the rules on passing-on should apply accordingly to those cases.
- 24) Actions for damages can be brought both by those who purchased goods or services from the infringer and by purchasers further down the supply chain.
- 25) An injured party who has proven having suffered damage as a result of a competition law infringement still needs to prove the extent of the damage in order to obtain damages. Quantifying damage in competition law cases is a very fact-intensive process and may require the application of complex economic models. This is often very costly, and claimants have difficulties in obtaining the data necessary to substantiate their claims. The quantification of damage in competition law cases can thus constitute a substantial barrier preventing effective claims for compensation.
- 26) In the absence of rules for the quantification of damage caused by a competition law infringement, rules for quantifying damage should be determined, and also to determine which requests must be met by the claimant when requesting the amount of damages suffered, the methods that can be used in quantifying the amount, and the consequences of not being able to fully meet those requirements.
- 27) To adjust the information asymmetry of information and some of the difficulties associated with quantifying damage in competition law cases, and to ensure the effectiveness of claims for damages, it is appropriate to presume that cartel infringements result in damages, in particular via an effect on prices. Depending on the facts of the case, cartels result in a rise in prices, or prevent a lowering of prices which would otherwise have occurred but for the cartel. This presumption should not cover the concrete amount of damage. Infringers should be allowed to rebut the presumption. It is appropriate to limit this rebuttable presumption to cartels, given their secret nature, which increases the information asymmetry and makes it more difficult for claimants to obtain the evidence necessary to prove the damage.
- 28) Achieving a “final” settlement for defendants is desirable in order to reduce uncertainty for infringers and injured parties. Therefore, infringers and injured parties should be encouraged to agree on compensating for the damage caused by a competition law infringement through consensual dispute resolution mechanisms, such as out-of-court settlements (including those where a judge can declare a settlement binding), mediation or conciliation. Such consensual dispute resolution should cover as many injured parties and infringers as legally possible.
- 29) Limitation periods for bringing an action for damages could be such that they prevent injured parties and infringers from having sufficient time to come to an agreement on the compensation

to be paid. In order to provide both sides with a genuine opportunity to engage in consensual dispute resolution before bringing proceedings before national courts, limitation periods need to be suspended for the duration of the consensual dispute resolution process.

- 30) To encourage consensual settlements, an infringer that pays damages through consensual dispute resolution should not be placed in a worse position vis-à-vis its co-infringers than it would otherwise be without the consensual settlement.

CHAPTER I CONTENT, PURPOSE AND DEFINITIONS

Article 1

Scope of application

This Guideline sets out certain rules necessary to ensure that any natural or legal person who has suffered a damage caused by a breach of competition law by an undertaking or by an association of undertakings can effectively exercise the right to claim full compensation for that damage from that undertaking or association of undertakings. It sets out rules that promote free and effective competition in the market and remove obstacles to its proper functioning, by ensuring equivalent protection throughout the territory of the Republic of Albania for all those who have suffered such damage.

Article 2

Definitions

For the purposes of this Guideline, the following definitions apply:

1. “Infringement of competition law” means an infringement of Articles 4 and 9 of Law no. 9121/2003 "On Competition Protection", as amended (hereafter referred as the Law);
2. “Infringer” means an undertaking or association of undertakings which has committed an infringement of competition law;
3. “Action for damages” means an action under national law 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 where the law provides for that possibility, or by a natural or legal person that succeeded in the right of the alleged injured party, including the person that acquired the claim;
4. “Claim for damages” means a claim for compensation for damage caused by an infringement of competition law;
5. “Damaged party” means a person that has suffered damage caused by an infringement of competition law;
6. “Competition Authority” means the institution responsible for the application of Law 9121/2003.
7. “Court” means the competent court before which claims for damages are filed, that is empowered by ordinary means of appeal to review decisions of a competition authority;
8. “Infringement decision” means a decision of the Competition Authority or of a court that finds infringements of competition law;

9. "Evidence" means all types of evidence admissible in front of the court, in particular documents and any other evidence containing information;
10. "Prohibited Agreements" means any agreements which have as their object or effect the prevention, restriction or distortion of competition shall be prohibited, and in particular those which: a) directly or indirectly fix purchase or selling prices, or any other trading conditions; b) limit or control production, markets, technical development, or investment; c) divides markets or sources of supply; d) apply different conditions on equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage; e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations, which, by their nature or according to commercial usage, have no connection with the subject of such contracts;
11. "Leniency program" is an important instrument against prohibited agreements, as it encourages undertakings to provide information to the Competition Authority regarding possible infringements of competition. A participant in a collusion, which is a participant in a secret cartel, independently of the other undertakings involved in the cartel, cooperates within an investigation of the Competition Authority, by voluntarily providing information in return he'll gain immunity or reduction of fines for his involvement in the prohibited agreement;
12. "Declaration for leniency" means a verbal or written presentation voluntarily submitted by an undertaking or a natural person by presenting and submitting the information of that undertaking or natural person with respect to a prohibited agreement and describing its role in it, which is specifically presented for submission to the competition authority for the purpose of obtaining immunity or reduction of fines under a leniency program, by not including the prior information.
13. "Pre-existing information" means evidence that exists regardless of the procedures of the Competition Authority;
14. "Immunity recipient" means an undertaking which, or a natural person who, has been granted immunity from fines by the Competition Authority under a leniency program;
15. "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;
16. "Consensual dispute resolution" means any mechanism enabling parties to reach the out-of-court resolution of a dispute concerning a claim for damages;
17. "Consensual settlement" means an agreement reached through consensual dispute resolution;
18. "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;
19. "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.

Article 3

Right to full compensation

1. Any natural or legal person who has suffered damage caused by an infringement of competition law is able to claim and to obtain full compensation for the damage suffered.
2. Full compensation shall place a person who has suffered damages 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 this Guideline shall not lead to overcompensation, whether by means of punitive, different or other types of damages.

Article 4

Principles of effectiveness and equivalence

In accordance with the principle of effectiveness, it shall ensure that all legal rules and procedures relating to the exercise of claims for damages are designed and applied in such a way that they do not render practically impossible or excessively difficult the exercise of the right to full compensation for damage caused by an infringement of competition law.

**CHAPTER II
DISCLOSURE OF EVIDENCE**

Article 5

Disclosure of evidence

1. In proceedings relating to an action for damages, upon request of a claimant (who has presented a reasoned justification containing reasonably available facts and evidence sufficient to support the plausibility of its claim for damages) shall ensure that the defendant or third party to present relevant evidence they possess.
2. The presentation of evidence shall be a subject to the principle of proportionality. In any case, shall consider the legitimate interests of all parties and third parties concerned. They shall, in particular, consider:
 - (a) the extent to which the claim or defense is supported by available facts and evidence justifying the request to present 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.
3. Where is required disclosure of evidence that contain confidential information, it shall be assessed case by case and effective measures shall be taken to protect their information.
4. In each case, when evidence is required should be guaranteed the protection of confidentiality².
5. In each case, should be provided the right to have a hearing to all who are required to submit information.

Article 6

Disclosure of evidence included in the file of the Competition Authority

1. For the purpose of taking actions for damages, shall order the disclosure of evidence included in the file of the Competition Authority.
2. When assessing the proportionality of an order to disclose information, shall be consider the following:

² Pursuant to Article 10 of the Law no. 55/2018 "On the lawyer profession in the Republic of Albania".

- 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 of the Competition Authority;
 - b) whether the party requesting disclosure is doing so in relation to an action for damages before a national court; and
 - c) the need to safeguard the effectiveness of the public enforcement of competition law.
3. The following categories of evidence may be required 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 the Competition Authority;
 - b) information that the Competition Authority has drawn up and sent to the parties in the course of its proceedings;
 4. For the purpose of taking actions for damages, at any time a party or a third party may disclose any of the following categories of evidence:
 - a) Declaration for leniency within the Leniency program framework,
 5. A claimant may present a reasoned request to access the evidence referred to in point 4 or for the sole purpose of ensuring that their contents correspond to the definitions in points 11 of Article 2. In that assessment, national courts may request assistance only from the competent competition authority. The authors of the evidence in question may also have the possibility to be heard. In no case shall the national court permit other parties or third parties access to that evidence.
 6. The disclosure of evidence in the file of the Competition Authority that does not fall into any of the categories listed in this article may be ordered in actions for damages at any time.
 7. The disclosure from the Competition Authority of evidence included in its file is done only where no party or third party is reasonably able to provide that evidence.
 8. The Competition Authority submits its observations on the requirements for filing evidence before the court.

Article 7

Limits on the use of evidence obtained solely through access to the file of the Competition Authority

1. In any case, shall ensure that evidence in the categories listed in Article 6, point 6, which is obtained by a natural or legal person solely through access to the file of a competition authority is either deemed to be inadmissible in actions for damages or is otherwise protected under the applicable national rules to ensure the full effect of the limits on the disclosure of evidence set out in Article 6.
2. Until the Competition Authority has closed its proceedings by adopting a decision or otherwise, evidence in the categories listed in Article 6, point 5, which is obtained by a natural or legal person solely through access to the file of the Competition Authority is either deemed to be inadmissible in actions for damages or is otherwise protected under the applicable national rules to ensure the full effect of the limits on the disclosure of evidence set out in Article 6.
3. The evidence which is obtained by a natural or legal person solely through access to the file of the Competition Authority and which does not fall under paragraph 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.

Article 8
Sanctions

1. In any case, shall effectively impose fines on parties, third parties and their legal representatives in the event of any of the following:
 - a) failure or refusal to enforce the evidence order;
 - b) the destruction of relevant evidence;
 - c) failure or refusal to comply with established obligations that protect confidential information;
 - d) violations of the use of the evidence provided in this Guideline.
2. Sanctions should be effective, proportionate and convincing.

CHAPTER III
EFFECT OF THE DECISIONS, LIMITATION PERIODS, JOINT AND SEVERAL LIABILITY

Article 9
Effect of the decisions

The final decision of the Competition Authority, in which is found the violation of the provisions of the Competition Law or the decision issued by the court concerned, is considered irrefutable for the purpose of filing a claim for compensation before the court.

Article 10
Limitation periods

1. In any case, in accordance with this article shall lay down rules applicable to limitation periods for bringing actions for damages. Those rules shall determine when the limitation period begins to run, the duration thereof and the circumstances under which it is interrupted or suspended.
2. Limitation periods³ shall not begin to run before the infringement of competition law has ceased and the claimant had knowledge, or can reasonably be expected to knowledge:
 - a) of the behavior and the fact that it constitutes an infringement of competition law;
 - b) of the fact that the infringement of competition law caused damage to it; and
 - c) the identity of the infringer.
3. The limitation period shall be suspended or terminated if the Competition Authority takes action for the purpose of investigation or initiation of a procedure relating to a breach of the competition law by which action is taken to recover the damage. The suspension cannot last more than 1 (one) year after the violation decision has become final or after the proceedings have ended otherwise.

³ In EU member states, the restriction periods to take action for damages are at least five years.

Article 11
Joint and several liability

1. Undertakings that have infringed competition law through joint conduct are jointly and severally liable for the damage caused by the infringement of competition law, with the effect that each of these undertakings is obliged to compensate for the damage as a whole and the injured party has right to claim full compensation from each of them until it is fully compensated.
2. An exception to paragraph 1 shall be made where the offender is a small or medium enterprise (SME) and the offender is liable only to his direct and indirect buyers where:
 - a) its share in the relevant market was below 5% at any time during breach of competition law; and
 - b) the application of normal rules of joint and several liabilities would irreversibly endanger its economic viability and would cause loss of value to its assets.
3. The avoidance provided for in paragraph 2 shall not apply where:
 - a) SME's have violated competition law or have compelled other undertakings to participate in them; or
 - b) SMEs have previously been found to have violated the competition law.
4. Exceptionally from paragraph 1, a recipient of immunity (beneficiary of the fines relief program) shall be liable solely and individually as follows:
 - a) to its buyers directly or indirectly; and
 - b) other damaged parties only when full compensation cannot be obtained from other undertakings involved in the same infringement of the competition law.
5. An offender may recover a contribution from any other infringer, the amount of which shall be determined in accordance with their responsibility for the damage caused by the breach of the competition law. The amount of the contribution of an offender who has been granted immunity from fines under an easing program from fines shall not exceed the amount / amount of damage caused to the buyer or its suppliers directly or indirectly.
6. Where the breach of the competition law has caused damage to the injured parties, other than those directly or indirectly to the buyers or the infringers, the amount of any contribution by an immunity recipient to other offenders shall be determined in accordance with its relative responsibility for that damage.

CHAPTER IV
THE PASSING-ON OF OVERCHARGES

Article 12
Passing-on of overcharges and the right to full compensation

1. In order to ensure the full effectiveness of the right to compensation, compensation for damage can be claimed by anyone who has suffered, irrespective of whether they are directly or indirectly buying from an infringer. In this case, the compensation of damage beyond what is caused by the violation of the competition law and the lack of liability of the offender should be avoided.
2. In order to avoid overcharge, the compensation for real damage at any level of the supply chain should not exceed the overcharged damage suffered at that level.
3. It should be noted that the right of the damaged party to seek and receive compensation for the lack of profit due to the full or partial overcharging is not violated.

4. The rules set out in this section should be applied accordingly when breach of competition law relates to the supply of the infringer.
5. The proportion of any overcharge that has passed must be assessed in accordance with the legal provisions.

Article 13

Passing-on defense

It is foreseen the right of the defendant to seek a claim for compensation, the fact that the plaintiff has been wholly or partially overcharged as a result of a breach of competition law. The burden of proof for the fact that the passing-on of the overcharge has been transferred shall be on the defendant, which can reasonably require disclosure of evidence from the plaintiff or third parties.

Article 14

Indirect purchasers

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, and to what extent, the 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 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.

This paragraph 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.

Article 15

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

1. To avoid 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, shall ensure that in assessing whether the burden of proof resulting from the application of Articles 13 and 14 is satisfied, to take due account of any of the followings:
 - 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.

CHAPTER V QUANTIFICATION OF DAMAGE

Article 16

Quantification of damage

1. Neither the burden nor the standard of proof required for the quantification of damage renders the exercise of the right to damages practically impossible or excessively difficult. In accordance with national procedures, to estimate the amount of damage if it is established that a claimant suffered damage but it is practically impossible or excessively difficult precisely to quantify the damage suffered on the basis of the evidence available.
2. It shall be presumed that cartel infringements cause damage. The infringer shall have the right to rebut that presumption.
3. In proceedings relating to an action for damages, the Competition Authority may, assist to the determination of the quantum of damages where it considers such assistance to be appropriate.

CHAPTER VI CONSENSUAL DISPUTE RESOLUTION

Article 17

Suspensive and other effects of consensual dispute resolution

1. The limitation period for bringing an action for damages is suspended for the duration of any consensual dispute resolution process. The suspension of the limitation period shall apply only with regard to those parties that are or that were involved or represented in the consensual dispute resolution.
2. The 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.

Article 18

Entry into force

This Guideline enters into force immediately.