



EUROPEAN PARLIAMENT

2009 - 2014

---

*Plenary sitting*

---

**A7-0089/2014**

4.2.2014

**\*\*\*I**  
**REPORT**

on the proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union

(COM(2013)0404 – C7-0170/2013 – 2013/0185(COD))

Committee on Economic and Monetary Affairs

Rapporteur: Andreas Schwab

Rapporteur for the opinion (\*):  
Bernhard Rapkay, Committee on Legal Affairs

(\*) Associated committee – Rule 50 of the Rules of Procedure

### ***Symbols for procedures***

- \* Consultation procedure
- \*\*\* Consent procedure
- \*\*\*I Ordinary legislative procedure (first reading)
- \*\*\*II Ordinary legislative procedure (second reading)
- \*\*\*III Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

### ***Amendments to a draft act***

#### **Amendments by Parliament set out in two columns**

Deletions are indicated in ***bold italics*** in the left-hand column. Replacements are indicated in ***bold italics*** in both columns. New text is indicated in ***bold italics*** in the right-hand column.

The first and second lines of the header of each amendment identify the relevant part of the draft act under consideration. If an amendment pertains to an existing act that the draft act is seeking to amend, the amendment heading includes a third line identifying the existing act and a fourth line identifying the provision in that act that Parliament wishes to amend.

#### **Amendments by Parliament in the form of a consolidated text**

New text is highlighted in ***bold italics***. Deletions are indicated using either the ■ symbol or strikeout. Replacements are indicated by highlighting the new text in ***bold italics*** and by deleting or striking out the text that has been replaced.

By way of exception, purely technical changes made by the drafting departments in preparing the final text are not highlighted.

## CONTENTS

	<b>Page</b>
DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION.....	5
OPINION OF THE COMMITTEE ON LEGAL AFFAIRS (*).....	32
OPINION OF THE COMMITTEE ON THE INTERNAL MARKET AND CONSUMER PROTECTION .....	56
PROCEDURE .....	86

(\*) Associated committee – Rule 50 of the Rules of Procedure



## DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

**on the proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (COM(2013)0404 – C7-0170/2013 – 2013/0185(COD))**

**(Ordinary legislative procedure: first reading)**

*The European Parliament,*

- having regard to the Commission proposal to Parliament and the Council (COM(2013)0404),
  - having regard to Article 294(2) and Articles 103 and 114 of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C7-0170/2013),
  - having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
  - having regard to the opinion of the European Economic and Social Committee / Committee of the Regions of 16 October 2013<sup>1</sup>,
  - having regard to Rule 55 of its Rules of Procedure,
  - having regard to the report of the Committee on Economic and Monetary Affairs and the opinions of the Committee on Legal Affairs and the Committee on the Internal Market and Consumer Protection (A7-0089/2014),
1. Adopts its position at first reading hereinafter set out;
  2. Calls on the Commission to refer the matter to Parliament again if it intends to amend its proposal substantially or replace it with another text;
  3. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

---

<sup>1</sup> Opinion of 16 October 2013 (not yet published in the Official Journal).

## Amendment 1

### AMENDMENTS BY THE EUROPEAN PARLIAMENT\*

to the Commission proposal

-----

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 103 and 114 thereof,

Having regard to the proposal from the European Commission [...],

After transmission of the draft legislative act to the national *parliaments*,

Having regard to the opinion of the European Economic and Social Committee<sup>1</sup>,

Acting in accordance with the ordinary legislative procedure<sup>2</sup>,

Whereas:

- (1) Articles 101 and 102 of the Treaty on the Functioning of the European Union (*TFEU*) are a matter of public policy and *should* be applied effectively throughout the Union to ensure that competition in the internal market is not distorted.
- (2) The public enforcement of those Treaty provisions is carried out by the Commission using the powers provided by Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty establishing the European Community<sup>3</sup> [...]. *Articles 81 and 82 of the Treaty establishing the European Community are now Articles 101 and 102 TFEU and remain identical in substance.* Public enforcement is also carried out by national competition authorities, which may take the decisions listed in Article 5 of Regulation (EC) No 1/2003.

---

\* Amendments: new or amended text is highlighted in bold italics; deletions are indicated by the symbol **■**.

<sup>1</sup> *Opinion of 16 October 2013 (OJ C , , p. ).*

<sup>2</sup> *Position of the European Parliament of...*

<sup>3</sup> *Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty establishing the European Community (OJ L 1, 4.1.2003, p. 1).[...]*

- (3) Articles 101 and 102 *TFEU* produce direct effects in relations between individuals and create, for the individuals concerned, rights and obligations which national courts must enforce. National courts thus have an equally essential part to play in applying the competition rules (private enforcement). When ruling on disputes between private individuals, they protect subjective rights under Union law, for example by awarding damages to the victims of infringements. The full effectiveness of Articles 101 and 102 *TFEU*, and in particular the practical effect of the prohibitions laid down therein, requires that anyone — be they an individual, including consumers and undertakings, or a public authority — can claim compensation before national courts for the harm caused to them by an infringement of those provisions. This Union right to compensation applies equally to *infringements* of Articles 101 and 102 *TFEU* by public undertakings or undertakings entrusted with special or exclusive rights by Member States within the meaning of Article 106 *TFEU*.
- (4) The [...] right to compensation *in Union law* for *infringements of Union and national competition law* requires each Member State to have procedural rules ensuring the effective exercise of that right. The need for effective procedural remedies also follows from the right to effective judicial protection as laid down in Article 47, first paragraph, of the Charter of Fundamental Rights of the European Union<sup>1</sup> (*the Charter*) and in Article 19(1), second subparagraph of the Treaty on European Union (*TEU*). ***Member States should ensure effective legal protection in the fields covered by Union law.***
- (4a) ***Actions for damages are only one element of an effective system of private enforcement of infringements of competition law and are accompanied by non-court based avenues of redress, such as consensual dispute resolution or public enforcement decisions that incentivise parties to provide compensation.***
- (5) To ensure effective ***private enforcement actions under 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 in a coherent manner***, the way the two forms of enforcement are coordinated, for instance the arrangements for access to documents held by competition authorities. Such coordination at Union level will also avoid divergence of applicable rules, which could jeopardise the proper functioning of the internal market.
- (6) In accordance with Article 26(2) *TFEU*, the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. There exist marked differences between the rules in the Member States governing actions for damages for infringements of national or Union competition law. Those differences lead to uncertainty concerning the conditions under which injured parties can exercise the right to compensation they derive from the *TFEU*, and affect the substantive effectiveness of such right. As injured parties often choose the forum of their Member State of establishment to claim damages, the discrepancies between the national rules lead to an uneven playing field as regards actions for

---

<sup>1</sup> OJ C 326, 26.10.2012, p. 391.

damages and may affect competition on the markets on which these injured parties, as well as the infringing undertakings, operate.

- (7) Undertakings established and operating in different Member States are subject to procedural rules that significantly affect the extent to which they can be held liable for infringements of competition law. This uneven enforcement of the [...] right to compensation *in Union law* may result in a competitive advantage for some undertakings which have *infringed* Articles 101 or 102 *TFEU*, and a disincentive to the exercise of the rights of establishment and provision of goods or services in those Member States where the right to compensation is more effectively enforced. **Therefore, as the differences in the liability regimes applicable in the Member States may negatively affect both competition and the proper functioning of the internal market, it is appropriate to base the Directive on the dual legal basis of Articles 103 and 114 TFEU.**
- (8) It is therefore necessary, ***bearing in mind that the nature of large-scale infringements of competition law often have a cross-border element***, to ensure a more level playing field for undertakings operating in the internal market and to improve the conditions for consumers to exercise the rights they derive from the internal market. It is also appropriate to increase legal certainty and to reduce the differences between the Member States as to the national rules governing actions for damages for infringements of *Union* competition law and, when applied in parallel to the latter, national competition law. An approximation of these rules will also help to prevent the emergence of wider differences between the Member States' rules governing actions for damages in competition cases.
- (9) Article 3(1) of Regulation (EC) No 1/2003 provides that 'where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article [101(1)] of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article [101] of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article [102] of the Treaty, they shall also apply Article [102] of the Treaty.' In the interest of the proper functioning of the internal market and with a view to greater legal certainty and a more level playing field for undertakings and consumers, it is appropriate that the scope of this Directive should extend to actions for damages based on the infringement of national competition law where it is applied pursuant to Article 3(1) of Regulation (EC) No 1/2003. Applying diverging rules on civil liability for infringements of Articles 101 and 102 *TFEU* and for infringements of rules of national competition law which must be applied in the same case and in parallel to *Union* competition law would otherwise adversely affect the position of claimants in the same case and the scope of their claims, and constitute an obstacle to the proper functioning of the internal market.
- (10) In the absence of *Union* law, actions for damages are governed by the national rules and procedures of the Member States. All national rules governing the exercise of the right to compensation for harm resulting from an infringement of Article 101 or 102



*TFEU*, including those concerning aspects not dealt with in this Directive such as the notion of causal relationship between the infringement and the harm, must observe the principles of effectiveness and equivalence. This means that they *should* not be formulated or applied in a way that makes it excessively difficult or practically impossible to exercise the right to compensation guaranteed by the *TFEU*, and they *should* not be formulated or applied less favourably than those applicable to similar domestic actions.

- (11) This Directive reaffirms the *acquis communautaire* on the [...] right to compensation *in Union law* for harm caused by infringements of Union competition law, particularly regarding standing and the definition of *damages*, as it has been stated in the case-law of the Court of Justice of the European Union, and does not pre-empt any further development thereof. Anyone who has suffered harm caused by an infringement can claim compensation for the actual loss (*damnum emergens*), for the gain of which he has been deprived (loss of profit or *lucrum cessans*) and payment of interest, ***without prejudice to the existence or extent of the right to interest recognised under national law***. This right is recognised 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 a competition authority. ***There should be no provision for punitive damages or other types of damages and penalties leading to overcompensation of the victim. Compensation for loss of opportunity should not be considered to lead to overcompensation.***
- (11a) ***Achieving a 'once-and-for-all' settlement for defendants is desirable with a view to reducing uncertainty and an exaggerated economic effect that might impact on employees, suppliers, subcontractors and other innocent parties.***
- (12) Actions for damages for infringements of national or Union 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 opposing party or by third parties, and is not sufficiently known by and 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 pieces of supporting evidence can unduly impede the effective exercise of the right to compensation guaranteed by the *TFEU*. ***However, national courts should take due account of any abuse of rights relating to the disclosure of evidence, and information obtained pursuant thereto when assessing the admissibility claims.***
- (13) Evidence is an important element *of* actions for damages for infringement of national or Union competition law. However, as antitrust litigation is characterised by an information asymmetry, it is appropriate to ensure that injured parties are afforded the right to obtain the disclosure of evidence relevant to their claim ■. 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 injured parties. National courts can also order evidence to be disclosed by third parties. Where the national court wishes to order disclosure of evidence by the Commission, the principle of sincere cooperation between the European Union and the Member States (Article

4(3) TEU) and Article 15(1) of Regulation No 1/2003 as regards requests for information are applicable.

- (14) Relevant evidence should be disclosed upon decision of the *national* court and under its strict control, especially as regards the necessity and proportionality of the disclosure measure. It follows from the requirement of proportionality that disclosure requests can only be triggered once an injured party has made it plausible, on the basis of facts which are reasonably available to him, that the party has suffered harm that was caused by the defendant. █
- (15) The requirement of proportionality should also be carefully assessed when disclosure risks unravelling the investigation strategy of a competition authority by revealing which documents are part of the file or causing a negative bearing on the way in which companies cooperate with the competition authority. ***Particular attention should be paid to preventing fishing expeditions, i.e., indiscriminate requests for production of information or documents, in the hope of uncovering material that is helpful to building up a case.***
- (16) Where the *national* court requests a competent court of another Member State to take evidence or requests evidence to be taken directly in another Member State, the provisions of Council Regulation (EC) No 1206/2001 [...] <sup>1</sup> apply.
- (17) 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 appropriately protected. National courts should therefore have at their disposal a range of measures to protect such confidential information from being disclosed during the proceedings. These may include the possibility of ***redacting sensitive passages in documents, conducting hearings in camera***, restricting the circle of persons entitled to see the evidence, and instruction of 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.
- (18) The effectiveness and consistency of the application of Articles 101 and 102 TFEU by the Commission and the national competition authorities require a common approach across the Union regarding the interaction of rules on disclosure of evidence and the way these Articles are enforced by a competition authority. Disclosure of evidence should not unduly detract from the effectiveness of enforcement of competition law by a competition authority. The limitations on the disclosure of evidence should not prevent competition authorities from publishing their decisions in accordance with applicable Union or national rules.
- (19) Leniency programmes and settlement procedures are important tools for the public enforcement of Union competition law as they contribute to the detection, efficient prosecution and sanctioning of the most serious competition law infringements.

---

<sup>1</sup> Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters (OJ L 174, 27.6.2001, p. 1).

Undertakings may be deterred from co-operating in this context if disclosure of documents they solely produce to this end were to expose them to civil liability under worse conditions than the co-infringers that do not co-operate with competition authorities. To ensure that undertakings are willing to produce voluntary statements acknowledging their participation in an infringement of Union or national competition law to a competition authority under a leniency programme or a settlement procedure, such statements should be *exempted* from disclosure of evidence.

- (20) In addition, an exception to disclosure should apply to any disclosure measure that would unduly interfere with an ongoing investigation by a competition authority concerning an infringement of national or Union competition law. Information that was prepared by a competition authority in the course of its proceedings for the enforcement of national or Union competition law (such as a Statement of Objections) or by a party to those proceedings (such as replies to requests for information of the competition authority) should therefore be disclosable in actions for damages only after the competition authority has found an infringement of the national or Union competition rules or has otherwise closed its proceedings.
- (21) [...]National courts should be able to order, in the context of an action for damages, disclosure of evidence that exists irrespective of the proceedings of a competition authority ('pre-existing information').
- (22) Any natural or legal person who obtains evidence through access to the file of a competition authority in exercising his rights of defence in relation to investigations by a competition authority can use that evidence for the purposes of an action for damages to which he is a party. Such use should also be allowed for the natural or legal person that succeeded in his rights and obligations, including through the acquisition of his claim. In case the evidence was obtained by a legal person forming part of a corporate group constituting one undertaking for the application of Articles 101 and 102 *TFEU*, the use of such evidence is also allowed for other legal entities belonging to the same undertaking.
- (23) However, the use of *evidence obtained from a competition authority* should not unduly detract from the effective enforcement of competition law by *that* competition authority. ■ Moreover, evidence obtained from a competition authority in the context of exercise of the rights of defence 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 exercised his rights of defence and his legal successors, as mentioned in the previous recital. This limitation does not, however, prevent a national court from ordering the disclosure of that evidence under the conditions provided for in this Directive.
- (24) Making a claim for damages, or the start of an investigation by a competition authority, entails a risk that the undertakings concerned may destroy or hide evidence that would be useful in substantiating an injured party's claim for damages. To prevent the destruction of relevant evidence and to ensure that court orders requesting disclosure are complied with, *national* courts should be able to impose sufficiently deterrent sanctions. Insofar as parties to the proceedings are concerned, the risk of

adverse inferences being drawn in the proceedings for damages can be a particularly effective sanction and can avoid delays. Sanctions should also be available for non-compliance with obligations to protect confidential information and for abusive use of information obtained through disclosure. Similarly, sanctions should be available if information obtained through access to the file of a competition authority in the exercise of one's rights of defence in relation to investigations of that competition authority is used abusively in actions for damages.

- (25) Article 16(1) of Regulation (EC) No 1/2003 provides that where national courts rule on agreements, decisions or practices under Article 101 or 102 *TFEU* which are already the subject of a Commission decision, they cannot take decisions which run counter to the decision adopted by the Commission. To enhance legal certainty, to avoid inconsistency in the application of those Treaty provisions, to increase the effectiveness and procedural efficiency of actions for damages and to foster the functioning of the internal market for undertakings and consumers, it should similarly not be possible to call into question a final decision by a national competition authority or a review court finding an infringement of Article 101 or 102 *TFEU* in actions for damages relating to the same infringement, regardless of whether or not the action is brought in the Member State of the authority or review court. The same should apply to a decision in which it has been concluded that provisions of national competition law are infringed in cases where national and Union competition law are applied in the same case and in parallel. This effect of decisions by national competition authorities and review courts finding an infringement of the competition rules should apply to the operative part of the decision and its supporting recitals. ***To that end, the Commission should ensure consistent application of Union competition law by providing in a transparent manner within the framework of the European Competition Network strong guidance to the national competition authorities as regards their decisions.*** This is without prejudice to the rights and obligations of national courts under Article 267 *TFEU*.
- (26) 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 the competition authority's or a review court's finding of an infringement. To that end, *it should still be possible to bring an action for damages after proceedings by a competition authority, with a view to enforcing national and Union competition law. Member States should be able to maintain or introduce absolute limitation periods that are generally applicable.*
- (27) Where several undertakings infringe the competition rules jointly (as in the case of a cartel) it is appropriate to make provision for these joint infringers to be held jointly and severally liable for the entire harm caused by the infringement. Amongst themselves, the joint infringers should have the right to obtain contribution if one of the infringing undertakings 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 the applicable national law, while respecting the principles of effectiveness and equivalence.
- (28) Undertakings which cooperate with competition authorities under a leniency programme play a key role in detecting secret cartel infringements and in bringing

these infringements to an end, thereby often mitigating the harm which could have been caused had the infringement continued. It is therefore appropriate to make provision for undertakings which have received immunity from fines from a competition authority under a leniency programme to be protected from undue exposure to damages claims, bearing in mind that the decision of the competition authority finding the infringement may become final for the immunity recipient before it becomes final for other undertakings which have not received immunity. It is therefore appropriate that the immunity recipient is relieved in principle from joint and several liability for the entire harm and that its contribution does not exceed the amount of harm caused to his own direct or indirect purchasers or, in case of a buying cartel, his direct or indirect providers. To the extent a cartel has caused harm to others than the customers/providers of the infringing undertakings, the contribution of the immunity recipient should not exceed his relative responsibility for the harm caused by the cartel. This share should be determined in accordance with the same rules used to determine the contributions among infringing undertakings [...]. The immunity recipient should remain fully liable to the injured parties other than his direct or indirect purchasers or providers only where they are unable to obtain full compensation from the other infringing undertakings.

- (29) Consumers and undertakings which have been harmed by an infringement of national or Union competition law are entitled to compensation for the actual loss and for loss of profit. The actual loss can result from the price difference between what was actually paid and what would have been paid in the absence of the infringement. When an injured party has reduced his actual loss by passing it on, entirely or in part, to his own purchasers, the loss which has been passed on no longer constitutes harm for which the party that passed it on has to be compensated. It is therefore in principle appropriate to allow an infringing undertaking to invoke the passing-on of actual loss as a defence against a claim for damages. It is appropriate to provide that the infringing undertaking, insofar as it invokes the passing-on defence, must prove the existence and extent of pass-on of the overcharge.

## I

- (31) Consumers or undertakings to whom actual loss has been passed on have suffered harm that has been caused by an infringement of national or Union competition law. While such harm should be compensated by the infringing undertaking, it may be particularly difficult for consumers or undertakings that did not themselves make any purchase from the infringing undertaking to prove the scope of that harm. ***In order to prove the existence of passing-on, the indirect purchaser should therefore at least show that the defendant has committed an infringement of Union or national competition law, that the infringement resulted in the direct purchaser of the defendant being overcharged, that the indirect purchaser purchased the goods or services that were the subject of the infringement or purchased goods or services derived from or containing the goods or services that were the subject of the infringement and that the indirect purchaser purchased those goods or services from the direct purchaser or from another indirect purchaser who is directly linked through the supply chain to the defendant.*** As regards the quantification of passing-on, the national court should have the power to estimate which share of the overcharge

has been passed on to the level of indirect purchasers in the dispute pending before it.

- 
- (32) 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 harm for the customers of the infringing undertakings. The infringement may also concern supplies to the infringing undertaking (for example in the case of a buyer's cartel). [...] *This Directive and in particular the rules on pass-on should apply accordingly.*
- (33) Actions for damages can be brought both by injured parties that have purchased goods or services from the infringing undertaking and by purchasers further down the supply chain. In the interest of consistency between judgments resulting from such related proceedings and hence to avoid the harm caused by the infringement of national or Union competition law not being fully compensated or the infringing undertaking being required to pay damages to compensate for harm that has not been suffered, national courts should take due account, as far as allowed under Union and national law, of any related action and of the resulting judgment, particularly where it finds that passing-on has been proven. This should be without prejudice to the fundamental rights of defence and to an effective remedy and a fair trial of those who were not parties to these judicial proceedings. Any such actions pending before the courts of different Member States may be considered as related within the meaning of Article 30 of Regulation No 1215/2012 of the European Parliament and of the Council<sup>1</sup>. Under this provision, national courts other than the one first seized may stay proceedings or, under certain circumstances, decline jurisdiction.
- (34) An injured party who has proven having suffered harm as a result of a competition law infringement still needs to prove the extent of the harm in order to obtain damages. Quantifying antitrust harm is a very fact-intensive process and may require the application of complex economic models. This is often very costly and causes difficulties for injured parties in terms of obtaining the necessary data to substantiate their claims. As such, the quantification of antitrust harm can constitute a substantial barrier preventing injured parties from obtaining compensatory damages for harm suffered. ***Member States should be able to determine their own rules on determining quantum. In order to ensure clear rules and predictability the Commission should provide further guidance at Union level.***
- (35) To remedy ■ some of the difficulties associated with quantifying antitrust harm, ***national courts should be able to establish the existence, and estimate the extent, of harm taking into account the evidence presented by the parties.***
- (36) In the absence of Union rules on the quantification of harm caused by a competition law infringement, it is for the domestic legal system of each Member State and for the national courts to determine what requirements the injured party has to meet when proving the amount of the harm suffered, how precisely he has to prove that amount,

---

<sup>1</sup> *Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351, 20.12.2012, p. 78).*

the methods that can be used in quantifying the amount and the consequences of not being able to fully meet the set requirements. However, these domestic requirements should not be less favourable than those governing similar domestic actions (principle of equivalence), nor should they render the exercise of the Union right to damages practically impossible or excessively difficult (principle of effectiveness). Regard should be had in this respect to any information asymmetries between the parties and to the fact that quantifying the harm means assessing how the market in question would have evolved had there been no infringement. This assessment implies a comparison with a situation which is by definition hypothetical and can thus never be made with complete accuracy. It is therefore appropriate to give national courts the power to estimate the amount of the harm caused by the competition law infringement. ***Member States shall ensure that, where requested, national competition authorities provide guidance on quantum.***

- (37) Injured parties and infringing undertakings should be encouraged to agree on compensating the harm caused by a competition law infringement through consensual dispute resolution mechanisms, such as out-of-court settlements, arbitration and mediation. Where possible, such consensual dispute resolution should cover as many injured parties and infringing undertakings as possible. The provisions in this Directive on consensual dispute resolution are therefore meant to facilitate the use of such mechanisms and increase their effectiveness.
- (38) Limitation periods for bringing an action for damages could be such that they prevent injured parties and infringing undertakings from having sufficient time to come to an agreement on the compensation to be paid. In order to provide both with a genuine opportunity to engage in consensual dispute resolution before bringing proceedings before the national court, the limitation period thus needs to be suspended for the duration of the consensual dispute resolution process.
- (39) Furthermore, when parties decide to engage in consensual dispute resolution after an action for damages has been brought before the national court for the same claim, that court *should be able to* suspend the proceedings before it for the duration of the consensual dispute resolution process. When considering whether to suspend the proceedings, the national court should take into account the interest in an expeditious procedure.
- (40) To encourage consensual settlements, an infringing undertaking that pays damages through consensual dispute resolution should not be placed in a worse position vis-à-vis its co-infringers than it would be in without the consensual settlement. This might happen if a settling infringer, even after a consensual settlement, continued to be fully jointly and severally liable for the harm caused by the infringement. A settling infringer should in principle therefore not contribute to his non-settling co-infringers when the latter have paid damages to the injured party with whom the first infringer had previously settled. The correlate to this non-contribution rule is that the claim of the injured party is reduced by the settling infringer's share of the harm caused to him. This share should be determined in accordance with the same rules used to determine the contributions among infringing undertakings [...]. Without such reduction, the non-settling infringers would be unduly affected by the settlement to which they were not a

party. The settling co-infringer will still have to pay damages where that is the only possibility for the injured party to obtain full compensation.

- (41) When settling co-infringers are asked to contribute to damages subsequently paid by non-settling co-infringers, the national court should take account of the damages already paid under the consensual settlement, bearing in mind that not all co-infringers are necessarily equally involved in the full substantive, temporal and geographical scope of the infringement.
- (42) This Directive respects fundamental rights and observes the principles recognised in the Charter [...].
- (43) *Since the objectives of this Directive, namely to establish rules concerning actions for damages for infringements of Union competition law in order to ensure the full effect of Articles 101 and 102 TFEU, and [...]the proper functioning of the internal market for undertakings and consumers, [...]cannot be sufficiently achieved by the Member States, but can rather, by reason of the requisite effectiveness and consistency in the application of Articles 101 and 102 TFEU, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 TEU. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.*
- (44) In accordance with the Joint Political Declaration of Member States and the Commission on explanatory documents of 28 September 2011<sup>1</sup>, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.
- (44a) *Because this Directive will substantially change the laws of many Member States on civil litigation, in particular as regards disclosure of evidence, an appropriate transitional regime should be established for claims for damages that are pending on the date of entry into force of this Directive. The laws, regulations and administrative provisions of the Member States adopted to transpose this Directive should therefore apply only to matters brought before a national court after the date of the entry into force of this Directive,***

---

<sup>1</sup> OJ C 369, 17.12.2011, p. 14.



HAVE ADOPTED THIS DIRECTIVE:

## CHAPTER I

### SCOPE AND DEFINITIONS

#### *Article 1*

##### *Scope of the Directive*

1. This Directive sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of Article 101 or 102 *TFEU* or of national competition law **by an undertaking or by a group of undertakings**, can effectively exercise the right to **claim** full compensation for that harm **from that undertaking or group**. It also sets out rules fostering undistorted competition in the internal market and removing obstacles to its proper functioning by ensuring equivalent protection throughout the Union for anyone who has suffered such harm.
2. This Directive also sets out rules for the coordination between enforcement of the competition rules by competition authorities and enforcement of those rules in damages actions before national courts.

#### *Article 2*

##### *Right to full compensation*

1. *Member States shall ensure that a person* who has suffered harm caused by an infringement of Union or national competition law *is able to claim and obtain* full compensation for that harm.
2. Full compensation shall place a *person* who has suffered harm in the position in which that person would have been had the infringement not been committed. It shall include compensation for actual loss and for loss of profit, and payment of interest .
  - 2a. ***Full compensation shall not include other damages such as punitive damages or multiple damages, and penalties leading to overcompensation.***
3. Member States shall ensure that injured parties can effectively exercise their claims for damages.
  - 3a. ***The total level of fines and damages paid shall not be affected by proceedings on***

*the part of the competition authority that follow on from or precede a private action. Competition authorities shall link the total level of fines and damages paid, such as through the deferral of a proportion of the fine where proceedings are likely to follow. However, Member States shall ensure that this neither results in lengthy uncertainty for the infringing undertaking as regards the final settlement, nor affects the right of individuals and undertakings to be compensated for damage suffered.*

### Article 3

#### *Principles of effectiveness and equivalence*

Member States shall ensure that all national rules and procedures relating to actions for damages are designed and applied in such a way as to ensure that any injured party can effectively exercise the Union right to full compensation for harm caused by an infringement of competition law. Any national rules and procedures relating to actions for damages resulting from infringements of Article 101 or 102 *TFEU* shall not be less favourable to the injured parties than *to those governing actions for damages resulting from infringements of national law.*

### Article 4

#### *Definitions*

For the purposes of this Directive, the following definitions [...] apply:

- (1) ‘infringement of competition law’ means an infringement of Article 101 or 102 *TFEU* or of national competition law [...];
- (2) ‘national competition law’ means provisions of national law that predominantly pursue the same objective as Articles 101 and 102 *TFEU* and that are applied to the same case and in parallel to Union competition law pursuant to Article 3(1) of Regulation (EC) No 1/2003. ***but does not include provisions of national law which impose criminal penalties on natural persons except to the extent that such penalties are the means by which competition law is enforced.***
- (3) ‘action for damages’ means an action under national law by which an injured party brings a claim for damages before a national court *and* may also cover actions by which someone acting on behalf of one or more injured parties brings a claim for damages before a national court, where national law provides for this possibility;
- (4) ‘claim for damages’ means a claim for compensation *for* harm caused by an infringement of competition law;
- (5) ‘injured party’ means anyone who has ***suffered harm as a result of an infringement of competition law;***

- (6) ‘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 *competition law*;
- (7) ‘competition authority’ means the Commission or a national competition authority;
- (8) ‘national court’ means any court or tribunal of a Member State within the meaning of Article 267 of the Treaty;
- (9) ‘review court’ means a national court that is empowered to review decisions of a national competition authority, in which context it may also have the power to find an infringement of *competition law*;
- (10) ‘infringement decision’ means a decision of a competition authority or review court that finds an infringement of competition law;
- (11) ‘final infringement decision’ means an infringement decision [...] that *cannot* be *appealed*;
- (12) ‘cartel’ means *two or more horizontal competitors coordinating their behaviour within a market to earn rents above those possible under normal competition, or coordinating their behaviour within a market to exclude undertakings operating under normal market conditions from gaining market share*, through practices such as, *inter alia*, the fixing or coordination of purchase or selling prices or other trading conditions, *abusive licensing practices*, 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;
- (13) ‘leniency programme’ means a programme *concerning the application of Article 101 TFEU or the corresponding provision under national law* 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 of his knowledge of the cartel and his role therein, in return for which the participant receives immunity from any fine to be imposed for the cartel or a reduction of such fine;
- (14) ‘leniency statement’ means an oral or written presentation voluntarily provided by, or on behalf of, an undertaking to a competition authority *or a record thereof*, describing the undertaking's knowledge of a cartel and its role therein, which was drawn up specifically for submission to the authority with a view to obtaining immunity or a reduction of fines under a leniency programme concerning the application of Article 101 TFEU or the corresponding provision under national law; this does not include documents or information that exist irrespective of the proceedings of a competition authority (‘pre-existing information’);
- (15) ‘settlement submission’ means a presentation voluntarily provided by, or on behalf of, an undertaking to a competition authority describing the undertaking's acknowledgement of its participation in an infringement of *competition law* and its

liability for *that* infringement, which was drawn up specifically as a formal request for the authority to apply an expedited procedure;

- (16) ‘overcharge’ means ■ the difference between the price actually paid *due to an infringement of competition law* and the price that would have prevailed in the absence of *such* an infringement [...];
- (17) ‘consensual settlement’ means an agreement whereby damages are paid following a consensual dispute resolution;
- (17a) *'direct purchaser' means a direct customer of an undertaking, which committed an infringement of competition law;*
- (17b) *'indirect purchaser' means a purchaser of products or services of an undertaking having committed an infringement of competition law, who purchased those products not directly from the infringing undertaking.*

## CHAPTER II

### DISCLOSURE OF EVIDENCE

#### *Article 5*

#### *Disclosure of evidence*

1. Member States shall ensure that *in a proceeding relating to an action for damages before a national court in the Union upon request of* a claimant *who* has presented *a reasoned justification containing* available facts and evidence *sufficient to support the plausibility of its claim for damages*, national courts can order the defendant or a third party to disclose *relevant* evidence, ■ subject to the conditions set out in this Chapter. Member States shall ensure that courts are also able to order the claimant or a third party to disclose evidence *upon the* request of the defendant.

This *paragraph* is without prejudice to the rights and obligations of national courts under [...] Regulation (EC) No 1206/2001.

- 1a. *Member States shall ensure that national courts request the disclosure of evidence from the national competition authority where the defendant does not provide the evidence requested.*
2. Member States shall ensure that national courts *can* order the disclosure of *specified pieces of evidence or categories thereof, circumscribed as precisely and as*

*narrowly as possible on the basis of reasonably available facts in the reasoned justification, which are in control of the other party or of a third party, and which are necessary for the purpose of estimating the harm caused, pursuant to Article 2.*

3. Member States shall ensure that national courts limit disclosure of evidence to that which is proportionate *and which relates to an action for damages in the Union*. In determining whether any disclosure requested by a party is proportionate, national courts shall consider the *public interests involved and the* legitimate interests of all *private* parties and third parties concerned. They shall, in particular, consider:
- (a) the likelihood that the alleged infringement of competition law occurred;
  - (aa) *the need to safeguard the effectiveness of the public enforcement of competition law;*
  - (b) the scope and cost of disclosure, especially for any third parties concerned, *also to prevent fishing expeditions;*
  - (c) whether the evidence to be disclosed contains confidential information, especially concerning any third parties, and the arrangements for protecting such confidential information; and
  - (d) in cases where the infringement of *competition law* is being or has been investigated by a competition authority, whether the request has been formulated specifically with regard to the nature, object or content of such documents submitted to a competition authority or held in the file of such competition authority.
4. *Member States shall ensure that national courts have the power to order disclosure of evidence containing confidential information where they consider it relevant to the action for damages.* Member States shall ensure that, *when ordering disclosure of such information*, national courts have at their disposal effective measures to protect *such* information.
5. Member States shall *ensure that national courts* give full effect to *applicable* legal *professional privilege under Union or national law when ordering the disclosure of* evidence.
- The interest of undertakings to avoid actions for damages following an infringement of competition law shall not constitute an interest worthy of protection.*
- 5a. *Member States shall ensure that interested parties in possession of a document requested for disclosure are heard before a national court orders disclosure under this Article regarding information derived from the specified documents.*
6. Member States shall ensure that, to the extent that their courts have powers to order

disclosure without hearing the person from whom disclosure is sought, no penalty for non-compliance with such an order may be imposed until the addressee of such an order has been *provided with the possibility to be* heard by the *national* court

7. Evidence shall include all types of evidence admissible before the national court *seized*, in particular documents and all other objects containing information, irrespective of the medium on which the information is stored.
8. Without prejudice to the obligation laid down in paragraph 4 and the limits laid down in Article 6, this Article shall not prevent █ Member States from maintaining or introducing rules which would lead to wider disclosure of evidence.

## *Article 6*

### █ *Disclosure of evidence included in the file of a competition authority*

1. Member States shall ensure that, for the purpose of actions for damages, *when* national █ courts order *disclosure of evidence included in the file of a competition authority, the following provisions shall apply, subject to Article 5.*

*This Chapter is without prejudice to the rules and practices under Union law on access to documents.*

- 1a. When assessing the proportionality of an order to disclose information, in accordance with the criteria laid down in Article 5(3), national courts shall consider whether the request has been formulated specifically with regard to the nature, object or content of documents rather than by a non-specific application concerning documents submitted to a competition authority and whether the party requesting disclosure is doing so in relation to an action for damages before a national court.*

*When assessing the proportionality of an order to disclose evidence under paragraphs 2 and 2a, national courts shall consider the interest of effective public enforcement of competition law.*

2. █ National courts *may* order the disclosure of the following categories of evidence only after a competition authority has, *by any means*, closed its proceedings:
  - (a) information that was prepared by a natural or legal person specifically for the proceedings of a competition authority;
  - (b) information that was drawn up *and sent to the parties* by a competition authority in the course of its proceedings;

*(ba) consensual settlement offers that have been withdrawn.*
- 2a. As a general rule, national courts shall not order a party or a third party to disclose either of the following categories of evidence in any form:*

- (a) *leniency statements; or*
  - (b) *settlement submissions.*
- 2b. *Where a claimant has presented reasonably available facts and evidence showing plausibly that certain data or information pertaining to a document included in the file of a competition authority which cannot be otherwise provided is necessary for determining the damage and supporting its claim, national courts, where the arguments of the claimant is prima facie well founded, and without prejudice to the provisions laid down in this Article and in Article 5 may:*
- (a) *access and analyse such a document;*
  - (b) *hear the interested parties in the possession of it; and*
  - (c) *order the limited disclosure of the relevant data or parts of the document concerned which are strictly needed to provide the claimant with the level of information required for that purpose under appropriate conditions which protect the public interest and the confidentiality of the information.*
3. Disclosure of evidence in the file of a 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 *without prejudice to this Article*.
- 3a. *Member States shall ensure that competition authorities or interested parties in possession of a document relevant to an action for damages are heard before a national court orders disclosure of that document or of information derived therefrom pursuant to this Article.*

## Article 7

### *Limits on the use of evidence obtained solely through access to the file of a competition authority*

- █
- 2. Member States shall ensure that evidence █ listed in Article 6(2) which is obtained by a natural or legal person solely through access to the file of a competition authority in exercise of his rights of defence under Article 27 of Regulation No 1/2003 or corresponding provisions of national law is not admissible in actions for damages until that competition authority has closed its proceedings or taken a decision referred to in Article 5 *or Chapter III* of Regulation No 1/2003 [...].
  - 3. Member States shall ensure that evidence which is obtained by a natural or legal person solely through access to the file of a competition authority in exercise of his rights of defence under Article 27 of Regulation No 1/2003 or corresponding provisions of national law, and which is not inadmissible pursuant to paragraph 2 of this Article, can only be used in an action for damages by that person or by the

natural or legal person that succeeded in his rights, including the person that acquired his claim.

## Article 8

### Sanctions

1. Member States shall ensure that national courts *effectively* impose sanctions on parties, third parties and their legal representatives in the event of:
  - (a) failure or refusal to comply with any *national* court's disclosure order;
  - (b) the destruction of relevant evidence *where*:
    - (i) the destroying party was or had been a party to the proceedings of a competition authority in relation to the conduct underlying the action for damages; or
    - (ii) the destroying party knew or should reasonably have known that an action for damages had been brought before the national court and that the evidence was of relevance in substantiating either the claim for damages or a defence against it; or
    - (iii) the destroying party knew that the evidence was of relevance to pending or prospective actions for damages brought by it or against it;
  - (c) failure or refusal to comply with the obligations imposed by a *national* court order protecting confidential information; or
  - (d) abuse of the rights relating to disclosure of evidence provided for in this Chapter, and of the evidence and information obtained thereunder, ***in particular, where information obtained through disclosure is communicated to third parties or used in other proceedings infringing Article 5(2)(bb).***
2. Member States shall ensure that the sanctions that can be imposed by national courts are effective, proportionate and dissuasive. The sanctions available to national courts shall include, insofar as the behaviour of a party to damages action proceedings is concerned, 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, and the possibility to order the payment of costs.



## CHAPTER III

### EFFECT OF NATIONAL DECISIONS, LIMITATION PERIODS, JOINT AND SEVERAL LIABILITY

#### *Article 9*

##### *Effect of national decisions*

Member States shall ensure that, where national courts rule, in actions for damages under Article 101 or 102 of the Treaty or under national competition law, on agreements, decisions or practices which are already the subject of a final infringement decision by a national competition authority or by a ***national*** court, those courts cannot take decisions running counter to such finding of an infringement *of competition law*. This obligation is without prejudice to the rights and obligations under Article 267 TFEU, ***to the right to an effective remedy and a fair trial, and the right of defence, pursuant to Articles 47 and 48 of the Charter, and to the right to a fair hearing pursuant to Article 6 of the European Convention for the protection of Human Rights and Fundamental Freedoms.***

#### *Article 10*

##### *Limitation periods*

1. Member States shall lay down the rules applicable to limitation periods for bringing actions for damages in accordance with this Article. Those rules shall determine when the limitation period begins to run, the duration of the period and the circumstances under which the period can be interrupted or suspended.
2. Member States shall ensure that the limitation period shall **■** begin ***on the latest date after*** an injured party knows, or can reasonably be expected to have knowledge of:
  - (a) the behaviour constituting the infringement *of competition law*;
  - (b) the qualification of such behaviour as an infringement of [...] competition law;
  - (c) the fact that the infringement *of competition law* caused harm to him; and
  - (d) the identity of the *infringing undertaking*.
3. Member States shall ensure that the limitation period does not begin to run before the day on which a continuous or repeated infringement *of competition law* ceases.
4. Member States shall ensure that the limitation period for bringing an action for damages is at least five years.

5. Member States shall ensure that the limitation period is suspended if a competition authority takes action for the purpose of the investigation or proceedings in respect of an infringement of *competition law* to which the action for damages relates. The suspension shall end at the earliest *two years* after the **■** decision, ***through which the procedure concerning the infringement or alleged infringement of competition law has been closed***, has become final. **■**

## Article 11

### *Joint and several liability*

1. Member States shall ensure that undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the ***harm*** caused by the infringement of *competition law*: 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 has been fully compensated.

***Where the undertaking is an small or medium-sized enterprise pursuant to the definition in Commission Recommendation C(2003)1422<sup>1</sup>, has not led or induced the infringement of competition law by other undertakings and has shown that its relative responsibility for the damage caused by the infringement is less than 5 % of the total, that it shall only be liable to its direct and indirect purchasers.***

2. Member States shall ensure that an undertaking which has been granted immunity from fines by a competition authority under a leniency programme shall be liable to injured parties other than its direct or indirect purchasers or providers only when such injured parties show that they are unable to obtain full compensation from the other undertakings that were involved in the same infringement of competition law.
3. Member States shall ensure that an infringing undertaking may recover a contribution from any other infringing undertaking, 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 undertaking which has been granted immunity from fines by a competition authority under a leniency programme shall not exceed the amount of the harm it caused to its own direct or indirect purchasers or providers.
4. Member States shall ensure that, to the extent the infringement of *competition law* caused harm to injured parties other than the direct or indirect purchasers or providers of the infringing undertakings, the amount of contribution of the immunity recipient shall be determined in the light of its relative responsibility for that harm.

---

<sup>1</sup> *Commission Recommendation c(2003)1422 of 6 May 2013 concerning the definition of micro, small and medium-sized enterprises (OJ L 124, 20.5.2003, p. 36).*

## CHAPTER IV

### PASSING-ON OF OVERCHARGES

#### *Article 12*

##### *Passing-on defence*

1. Member States shall ensure that the 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*, ***unless the claimant has not suffered a loss of profit***. The burden of proving that the overcharge was passed on shall rest with the defendant ***who may reasonably require disclosure from the claimant. The defendant shall not be required to pay more than the value of the total amount of harm caused by the infringement.***
- 1a. Member States shall ensure that the national court has the power to estimate which share of that overcharge was passed on.*
2. Insofar as the overcharge has been passed on to persons at the next level of the supply chain for whom it is legally impossible to claim compensation for their harm, the defendant shall not be able to invoke the defence referred to in [...]paragraph 1.

#### *Article 13*

##### *Indirect purchasers*

1. Member States shall ensure that, 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, ***without prejudice to the commercial presumption that price increases are passed on down the supply chain***, the burden of proving the existence and scope of such pass-on shall rest with the claimant ***who may reasonably require disclosures from the defendant.***
2. In the situation referred to in paragraph 1 of this Article, the indirect purchaser shall be deemed to have proven that a passing-on to him occurred where he has shown that:
  - (a) the defendant has committed an infringement of competition law;
  - (b) the infringement *of competition law* resulted in an overcharge for the direct purchaser of the defendant; and
  - (c) he purchased the goods or services that were the subject of the infringement

*of competition law, or purchased goods or services derived from or containing the goods or services that were the subject of the infringement.*

Member States shall ensure that *their national courts have* the power to estimate which share of *the* overcharge was passed on *to the indirect purchaser*. ***The national courts shall be assisted by clear, simple and comprehensive guidelines issued by the Commission.***

This paragraph shall be without prejudice to the *infringing undertaking's* right to show that the overcharge was not, or not entirely, passed on to the indirect purchaser.

#### *Article 14*

##### *Loss of profits and infringement of competition law at supply level*

1. The rules laid down in this Chapter shall be without prejudice to the right of ***any*** injured party ***that have suffered harm*** to claim compensation for loss of profits, ***actual loss, and payment of interest.***
2. Member States shall ensure that the rules laid down in this Chapter apply accordingly where the infringement of competition law relates to supply to the ***infringing undertaking.***

#### *Article 15*

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

1. Member States shall ensure that, in assessing whether the burden of proof resulting from the application of ***Articles 12 and 13*** is satisfied, national courts seized of an action for damages take due account of
  - (a) actions for damages that are related to the same infringement of competition law, but are brought by claimants from other levels in the supply chain; or
  - (b) judgments resulting from such actions;***(ba) any relevant results from public competition cases.***
2. This Article shall be without prejudice to the rights and obligations of national courts under Article 30 of Regulation (EU) No 1215/2012.

## CHAPTER V

### QUANTIFICATION OF HARM

#### *Article 16*

##### *Quantification of harm*

1. Member States shall ensure that, in the case of a cartel infringement, it shall be presumed that the infringement *has* caused harm ***within the market***. The ***infringing undertaking*** shall have the right to rebut this presumption.
2. Member States shall ensure that the burden and the ***standard*** of proof required for the quantification of harm does not render the exercise of the right to damages practically impossible or excessively difficult. Member States shall provide that *their national courts* be granted the power to estimate the amount of harm, ***if the claimant is unable to directly prove the amount of harm suffered. Where requested, competition authorities shall provide guidance on quantifying the harm.***

## CHAPTER VI

### CONSENSUAL DISPUTE RESOLUTION

#### *Article 17*

##### *Suspensive effect of consensual dispute resolution*

1. Member States shall ensure that the limitation period for bringing an action for damages is suspended for the duration of the consensual dispute resolution process. The suspension of the limitation period shall apply only with regard to those parties that are or were involved in the consensual dispute resolution.
2. Member States shall ensure that national courts seized of an action for damages may suspend proceedings where the parties to those proceedings are involved in consensual dispute resolution concerning the claim covered by that action for damages.
  - 2a. ***The suspension referred to in paragraph 2 shall not be longer than one year.***
  - 2b. ***Following a consensual settlement, a competition authority may consider the compensation paid prior to the decision as a mitigating factor when setting fines.***

## Article 18

### *Effect of consensual settlements on subsequent actions for damages*

1. Member States shall ensure that, 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 inflicted upon the injured party. Non-settling co-infringers cannot recover contribution from the settling co-infringer for the remaining claim. Only when the non-settling co-infringers are not able to pay the damages that correspond to the remaining claim can the settling co-infringer be held to pay damages to the settling injured party, ***unless this is expressly excluded under the terms of the consensual settlement.***
2. When determining the contribution of each co-infringer, national courts shall take due account of any prior consensual settlement involving the relevant co-infringer.

## CHAPTER VII

### FINAL PROVISIONS

## Article 19

### *Review*

The Commission shall review this Directive and *shall submit a report* to the European Parliament and the Council by [...\*] [*OJ please insert date: **four years** after the date of entry into force of this Directive.*]

***Where appropriate, that review shall be accompanied by a legislative proposal. In its proposal, the Commission is invited to consider that early offers to settle claims for damages for infringements of competition law, before a competition authority has found an infringement, which are communicated to the competition authority concerned in a timely manner may constitute a mitigating factor in the calculation of penalties under competition law.***

## Article 20

### *Transposition*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by ...\* [*OJ please insert date: 2*

*years after the date of entry into force of this Directive]* at the latest. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

#### *Article 20a*

#### *Transitional period*

***The laws, regulations and administrative provisions adopted by the Member States pursuant to Article 20 shall not apply to competition law infringements that are the subject of an action for damages pending before a national court on or before the date of entry into force of this Directive.***

#### Article 21

#### Entry into force ***and transitional provision for pending cases***

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

#### *Article 22*

#### ***Addressees***

This Directive is addressed to the Member States.

Done at [...],

*For the European Parliament*

*For the Council*

27.1.2014

## **OPINION OF THE COMMITTEE ON LEGAL AFFAIRS (\*)**

for the Committee on Economic and Monetary Affairs

on the proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (COM(2013)0404 – C7-0170/2013 – 2013/0185(COD))

Rapporteur (\*): Bernhard Rapkay

(\*) Associated committee – Rule 50 of the Rules of Procedure

### **SHORT JUSTIFICATION**

The possible introduction of common rules on actions for damages for competition infringements has been under deliberation for almost a decade. The Commission's proposal for this Directive is therefore welcome, as it can help consumers and small and medium-sized enterprises to exercise their right to compensation for harm caused by competition law infringements. The absence of national rules that adequately govern actions for damages or, on the other hand, the disparity between national legislations places not only victims, but also the perpetrators of competition law infringements in a position of inequality. This may also give a competitive advantage to undertakings that have breached Articles 101 or 102 of the Treaty on the Functioning of the European Union, but which do not have their headquarters or do not conduct business in a Member State whose legislation is favourable for claimants. These differences in the liability rules may damage competition and hinder the proper functioning of the internal market. The rapporteur therefore welcomes the Commission's proposal to facilitate access to justice and enable victims to obtain compensation.

In principle the rapporteur supports leniency programmes, as these can make it possible to identify infringements and feels that undertakings should not be discouraged from cooperating. However, such programmes should not protect undertakings more than is necessary. In particular, they should not absolve infringing parties from paying damages to victims, nor lead to excessive protection of information needed by claimants as evidence in order to bring an action for damages.

Similarly, the rapporteur supports the encouraging of consensual settlements, while emphasising that these must be of a genuinely voluntary nature. In order to facilitate equitable settlements claimants should have the possibility of obtaining pre-litigation information from national or European competition authorities concerning the volume of damages or loss incurred.



Obtaining evidence is a crucial factor for exercising the rights of appeal. Therefore the rapporteur considers it essential to further strengthen the provisions proposed by the Commission to allow proportionate access, under judicial supervision, to the information that is relevant and necessary for the action. While certain types of documents, or certain kinds of information contained in these can merit confidentiality, the rapporteur considers that no categories of documents should be excluded, as such, from an evaluation of whether or not they should be disclosed.

During previous deliberations of how to reinforce the position of the claimants collective redress has been presented as a way to improve the equality of arms of the parties to disputes over damages. While considering that the maintaining or introduction of such mechanisms should be encouraged, even if not made obligatory for the Member States, the rapporteur considers that it would be important to avoid certain practices, such as requiring victims to explicitly opt-out from a collective action or allowing for contingency fees or punitive damages.

## AMENDMENTS

The Committee on Legal Affairs calls on the Committee on Economic and Monetary Affairs, as the committee responsible, to take into account the following amendments:

### Amendment 1

#### Proposal for a directive Recital 4

##### *Text proposed by the Commission*

(4) The Union right to compensation for antitrust harm requires each Member State to have procedural rules ensuring the effective exercise of that right. The need for effective procedural remedies also follows from the right to effective judicial protection as laid down in Article 47, first paragraph, of the Charter of Fundamental Rights of the European Union<sup>53</sup> and in Article 19(1), second subparagraph of the Treaty on European Union.

##### *Amendment*

(4) The Union right to compensation for antitrust harm requires each Member State to have procedural rules ensuring the effective exercise of that right. The need for effective procedural remedies also follows from the right to effective judicial protection as laid down in Article 47, first paragraph, of the Charter of Fundamental Rights of the European Union<sup>53</sup> and in Article 19(1), second subparagraph of the Treaty on European Union. ***Member States should ensure effective legal protection in the fields covered by Union law***

## Amendment 2

### Proposal for a directive Recital 5

#### *Text proposed by the Commission*

(5) To ensure effective **public and** private enforcement of the competition rules, it is necessary to regulate the way the two forms of enforcement are coordinated, for instance the arrangements for access to documents held by competition authorities. Such coordination at Union level will also avoid divergence of applicable rules, which could jeopardise the proper functioning of the internal market.

#### *Amendment*

(5) To ensure effective private enforcement **actions under 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 way the two forms of enforcement are coordinated, for instance the arrangements for access to documents held by competition authorities. Such coordination at Union level will also avoid divergence of applicable rules, which could jeopardise the proper functioning of the internal market.

## Amendment 3

### Proposal for a directive Recital 7

#### *Text proposed by the Commission*

(7) Undertakings established and operating in different Member States are subject to procedural rules that significantly affect the extent to which they can be held liable for infringements of competition law. This uneven enforcement of the Union right to compensation may result in a competitive advantage for some undertakings which have breached Articles 101 or 102 of the Treaty, and a disincentive to the exercise of the rights of establishment and provision of goods or services in those Member States where the right to compensation is more

#### *Amendment*

(7) Undertakings established and operating in different Member States are subject to procedural rules that significantly affect the extent to which they can be held liable for infringements of competition law. This uneven enforcement of the Union right to compensation may result in a competitive advantage for some undertakings which have breached Articles 101 or 102 of the Treaty, and a disincentive to the exercise of the rights of establishment and provision of goods or services in those Member States where the right to compensation is more

effectively enforced. *As such*, the differences in the liability regimes applicable in the Member States may negatively affect both competition and the proper functioning of the internal market.

effectively enforced. *Therefore, as* the differences in the liability regimes applicable in the Member States may negatively affect both competition and the proper functioning of the internal market, *it is appropriate to base the Directive on the dual legal basis of Articles 103 and 114 TFEU.*

#### *Justification*

*The arguments presented in the recital logically lead to the conclusion of the need to base the Directive on the dual legal basis of Articles 103 and 114 TFEU, which conclusion should also be spelled out for the sake of clarity.*

#### **Amendment 4**

#### **Proposal for a directive**

#### **Recital 8**

##### *Text proposed by the Commission*

(8) It is therefore necessary to ensure a more level playing field for undertakings operating in the internal market and to improve the conditions for consumers to exercise the rights they derive from the internal market. It is also appropriate to increase legal certainty and to reduce the differences between the Member States as to the national rules governing actions for damages for infringements of European competition law and, when applied in parallel to the latter, national competition law. An approximation of these rules will also help to prevent the emergence of wider differences between the Member States' rules governing actions for damages in competition cases.

##### *Amendment*

(8) It is therefore necessary, *bearing in mind also the often cross-border nature of large scale infringements of competition law*, to ensure a more level playing field for undertakings operating in the internal market and to improve the conditions for consumers to exercise the rights they derive from the internal market. It is also appropriate to increase legal certainty and to reduce the differences between the Member States as to the national rules governing actions for damages for infringements of European competition law and, when applied in parallel to the latter, national competition law. An approximation of these rules will also help to prevent the emergence of wider differences between the Member States' rules governing actions for damages in competition cases.

#### *Justification*

*Large infringements of competition law will typically not be restricted to only one member*

*State but have cross-border effects, which effect trade between the Member States and thereby the functioning of the internal market.*

## **Amendment 5**

### **Proposal for a directive Recital 13**

#### *Text proposed by the Commission*

(13) Evidence is an important element for bringing actions for damages for infringement of national or Union competition law. However, as antitrust litigation is characterised by an information asymmetry, it is appropriate to ensure that injured parties are afforded 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 injured parties. National courts can also order evidence to be disclosed by third parties. Where the national court wishes to order disclosure of evidence by the Commission, the principle of sincere cooperation between the European Union and the Member States (Article 4(3) TEU) and Article 15(1) of Regulation No 1/2003 as regards requests for information are applicable.

#### *Amendment*

(13) Evidence is an important element for bringing actions for damages for infringement of national or Union competition law. However, as antitrust litigation is characterised by an information asymmetry, it is appropriate to ensure that injured parties are afforded the right to obtain the disclosure of evidence relevant to their claim. 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 injured parties. National courts can also order evidence to be disclosed by third parties. Where the national court wishes to order disclosure of evidence by the Commission, the principle of sincere cooperation between the European Union and the Member States (Article 4(3) TEU) and Article 15(1) of Regulation No 1/2003 as regards requests for information are applicable.

## **Amendment 6**

### **Proposal for a directive Recital 14**

#### *Text proposed by the Commission*

(14) Relevant evidence should be disclosed upon decision of the court and under its

#### *Amendment*

(14) Relevant evidence should be disclosed upon decision of the court and under its

strict control, especially as regards the necessity and proportionality of the disclosure measure. It follows from the requirement of proportionality that disclosure requests can only be triggered once an injured party has made it plausible, on the basis of facts which are reasonably available to him, that the party has suffered harm that was caused by the defendant.

***The request for disclosure should refer to categories of evidence which are as precise and narrow as possible on the basis of reasonably available facts.***

## **Amendment 7**

### **Proposal for a directive Recital 15**

#### *Text proposed by the Commission*

(15) The requirement of proportionality should also be carefully assessed when disclosure risks unravelling the investigation strategy of a competition authority by revealing which documents are part of the file or causing a negative bearing on the way in which companies cooperate with the competition authority. ***The disclosure request should therefore not be deemed proportionate when it refers to the generic disclosure of documents in the file of a competition authority relating to a certain case, or of documents submitted by a party in the context of a certain case. Such wide disclosure requests would also not be compatible with the requesting party's duty to specify categories of evidence as precisely and narrowly as possible.***

strict control, especially as regards the necessity and proportionality of the disclosure measure. It follows from the requirement of proportionality that disclosure requests can only be triggered once an injured party has made it plausible, on the basis of facts which are reasonably available to him, that the party has suffered harm that was caused by the defendant.

#### *Amendment*

(15) The requirement of proportionality should also be carefully assessed when disclosure risks unravelling the investigation strategy of a competition authority by revealing which documents are part of the file or causing a negative bearing on the way in which companies cooperate with the competition authority.

***Special attention should be paid to prevent any types of requests which are aimed at fishing expeditions.***

## *Justification*

*Self-explanatory.*

### **Amendment 8**

#### **Proposal for a directive**

##### **Recital 17**

###### *Text proposed by the Commission*

(17) 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 appropriately protected. National courts should therefore have at their disposal a range of measures to protect such confidential information from being disclosed during the proceedings. These may include the possibility of hearings *in private*, restricting the circle of persons entitled to see the evidence, and instruction of experts to produce summaries of the information in an aggregated or otherwise non-confidential form. Measures protecting business secrets and other confidential information should not *practically* impede the exercise of the right to compensation.

###### *Amendment*

(17) 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 appropriately protected. National courts should therefore have at their disposal a range of measures to protect such confidential information from being disclosed during the proceedings. These may include the possibility of *blinking out sensitive parts of a document*, hearings *in camera*, restricting the circle of persons entitled to see the evidence, and instruction of 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.

## *Justification*

*If documents contain sensitive details, such as the data on third parties not relevant for the procedure these can be blanked out. If necessary proceedings can be held in camera in order to protect particularly sensitive information.*

### **Amendment 9**

#### **Proposal for a directive**

##### **Recital 19**

*Text proposed by the Commission*

(19) Leniency programmes and settlement procedures are important tools for the public enforcement of Union competition law as they contribute to the detection, efficient prosecution and sanctioning of the most serious competition law infringements. Undertakings may be deterred from co-operating in this context if disclosure of documents they solely produce to this end were to expose them to civil liability under worse conditions than the co-infringers that do not co-operate with competition authorities. To ensure that undertakings are willing to produce voluntary statements acknowledging their participation in an infringement of Union or national competition law to a competition authority under a leniency programme or a settlement procedure, such statements should be excepted from disclosure of evidence.

*Amendment*

(19) Leniency programmes and settlement procedures are important tools for the public enforcement of Union competition law as they contribute to the detection, efficient prosecution and sanctioning of the most serious competition law infringements. Undertakings may be deterred from co-operating in this context if disclosure of documents they solely produce to this end were to expose them to civil liability under worse conditions than the co-infringers that do not co-operate with competition authorities. To ensure that undertakings are willing to produce voluntary statements acknowledging their participation in an infringement of Union or national competition law to a competition authority under a leniency programme or a settlement procedure, ***courts should assess whether*** such statements should be excepted from disclosure of evidence.

**Amendment 10**

**Proposal for a directive**

**Recital 26**

*Text proposed by the Commission*

(26) 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 the competition authority's or a review court's finding of an infringement. To that end, injured parties should still be able to bring an action for damages after proceedings by a competition authority, with a view to enforcing national and Union competition law.

*Amendment*

(26) 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 the competition authority's or a review court's finding of an infringement. To that end, injured parties should still be able to bring an action for damages after proceedings by a competition authority, with a view to enforcing national and Union competition law. ***Member States should be allowed to***

*maintain or introduce absolute limitation periods that are generally applicable.*

## Amendment 11

### Proposal for a directive Recital 28

*Text proposed by the Commission*

(28) Undertakings which cooperate with competition authorities under a leniency programme play a key role in detecting secret cartel infringements and in bringing these infringements to an end, thereby often mitigating the harm which could have been caused had the infringement continued. ***It is therefore appropriate to make provision for undertakings which have received immunity from fines from a competition authority under a leniency programme to be protected from undue exposure to damages claims, bearing in mind that the decision of the competition authority finding the infringement may become final for the immunity recipient before it becomes final for other undertakings which have not received immunity. It is therefore appropriate that the immunity recipient is relieved in principle from joint and several liability for the entire harm and that its contribution does not exceed the amount of harm caused to his own direct or indirect purchasers or, in case of a buying cartel, his direct or indirect providers.*** To the extent a cartel has caused harm to others than the customers/providers of the infringing undertakings, the contribution of the immunity recipient should not exceed his relative responsibility for the harm caused by the cartel. This share should be determined in accordance with the same rules used to determine the contributions among infringing undertakings (recital (27) above). The immunity recipient should

*Amendment*

(28) Undertakings which cooperate with competition authorities under a leniency programme play a key role in detecting secret cartel infringements and in bringing these infringements to an end, thereby often mitigating the harm which could have been caused had the infringement continued. To the extent a cartel has caused harm to others than the customers/providers of the infringing undertakings, the contribution of the immunity recipient should not exceed his relative responsibility for the harm caused by the cartel. This share should be determined in accordance with the same rules used to determine the contributions among infringing undertakings (recital (27) above). The immunity recipient should remain fully liable to the injured parties other than his direct or indirect purchasers or providers only where they are unable to obtain full compensation from the other infringing undertakings.



remain fully liable to the injured parties other than his direct or indirect purchasers or providers only where they are unable to obtain full compensation from the other infringing undertakings.

## Amendment 12

### Proposal for a directive Article 1 – paragraph 1

#### *Text proposed by the Commission*

1. This Directive sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of Article 101 or 102 of the Treaty or of national competition law, can effectively exercise the right to full compensation for that harm. It also sets out rules fostering undistorted competition in the internal market and removing obstacles to its proper functioning by ensuring equivalent protection throughout the Union for anyone who has suffered such harm.

#### *Amendment*

1. This Directive sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of Article 101 or 102 of the Treaty or of national competition law **by an undertaking or group of undertakings**, can effectively exercise the right to **claim** full compensation for that harm **from those infringing parties**. It also sets out rules fostering undistorted competition in the internal market and removing obstacles to its proper functioning by ensuring equivalent protection throughout the Union for anyone who has suffered such harm.

## Amendment 13

### Proposal for a directive Article 2 – paragraph 1

#### *Text proposed by the Commission*

1. Anyone who has suffered harm caused by an infringement of Union or national competition law shall be able to claim full compensation for that harm.

#### *Amendment*

1. Anyone who has suffered harm caused by an infringement of Union or national competition law shall be able to claim full compensation for that harm **from the infringing parties in either a direct or a follow-on private case**.

## Amendment 14

### Proposal for a directive

#### Article 4 – paragraph 1 – point 2

*Text proposed by the Commission*

2. ‘national competition law’ means provisions of national law that predominantly pursue the same objective as Articles 101 and 102 of the Treaty and that are applied to the same case and in parallel to Union competition law pursuant to Article 3(1) of Regulation (EC) No 1/2003;

*Amendment*

2. ‘national competition law’ means provisions of national law that predominantly pursue the same objective as Articles 101 and 102 of the Treaty and that are applied to the same case and in parallel to Union competition law pursuant to Article 3(1) of Regulation (EC) No 1/2003 ***This definition does not apply to national laws which impose criminal sanctions on natural persons except to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced.***

*Justification*

*It is important to consider criminal law provisions in place in some Member States. The wording from Recital 8 of Regulation 1/2003 should therefore also apply here.*

## Amendment 15

### Proposal for a directive

#### Article 5

*Text proposed by the Commission*

Article 5

Disclosure of evidence

1. Member States shall ensure that, where a claimant has presented reasonably available facts and evidence showing plausible grounds for suspecting that he, or those he represents, has suffered harm caused by the defendant’s infringement of competition law, national courts can order the defendant or a third party to disclose evidence, regardless of whether or not this

*Amendment*

Article 5

Disclosure of evidence

1. Member States shall ensure that ***in a proceeding relating to an action for damages before a national court in the Union upon request of*** a claimant ***who*** has presented ***a reasoned justification containing*** available facts and evidence ***sufficient to support the plausibility of its claim for damages,*** national courts can order the defendant or a third party to

evidence is also included in the file of a competition authority, subject to the conditions set out in this Chapter. Member States shall ensure that courts are also able to order the claimant or a third party to disclose evidence on request of the defendant.

This provision is without prejudice to the rights and obligations of national courts under Council Regulation (EC) No 1206/2001.

2. Member States shall ensure that national courts order the disclosure of evidence *referred to in paragraph 1 where the party requesting disclosure has*

*(a) shown that evidence in the control of the other party or a third party is relevant in terms of substantiating his claim or defence; and*

*(b) specified either pieces of this evidence or categories of this evidence defined as precisely and narrowly as he can on the basis of reasonably available facts.*

3. Member States shall ensure that national courts limit disclosure of evidence to that which is proportionate. In determining whether any disclosure requested by a party is proportionate, national courts shall consider the legitimate interests of all parties and third parties concerned. They shall, in particular, consider:

disclose *relevant* evidence, [...] subject to the conditions set out in this Chapter. Member States shall ensure that courts are also able to order the claimant or a third party to disclose evidence *upon* request of the defendant.

This provision is without prejudice to the rights and obligations of national courts under Council Regulation (EC) No 1206/2001.

*1a. Member States shall ensure that national courts request the disclosure of evidence from the national competition authority where the defendant does not provide the evidence requested.*

2. Member States shall ensure that national courts *can* order the disclosure of *specified pieces of evidence or categories thereof, circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts in the reasoned justification, which are in control of the other party or a third party and are necessary for the purpose of estimating the harm caused, pursuant to Article 2 of this Directive.*

3. Member States shall ensure that national courts limit disclosure of evidence to that which is proportionate *and which relates to an action for damages in the Union*. In determining whether any disclosure requested by a party is proportionate, national courts shall consider the *public interests involved and the* legitimate interests of all *private* parties and third parties concerned. They shall, in particular,

(a) the likelihood that the alleged infringement of competition law occurred;

(b) the scope and cost of disclosure, especially for any third parties concerned;

(c) whether the evidence to be disclosed contains confidential information, especially concerning any third parties, and the arrangements for protecting such confidential information; and

(d) in cases where the infringement is being or has been investigated by a competition authority, whether the request has been formulated specifically with regard to the nature, object or content of such documents rather than by a non-specific request concerning documents submitted to a competition authority or held in the file of such competition authority.

4. Member States shall ensure that national courts have at their disposal effective measures to protect confidential information from improper use to the greatest extent possible whilst also ensuring that relevant evidence containing such information is available in the action for damages.

5. Member States shall take the necessary measures to give full effect to legal privileges and other rights not to be compelled to disclose evidence.

consider:

(a) the likelihood that the alleged infringement of competition law occurred;

***(aa) the need to safeguard the effectiveness of the public enforcement of competition law;***

(b) the scope and cost of disclosure, especially for any third parties concerned, ***also to prevent fishing expeditions;***

(c) whether the evidence to be disclosed contains confidential information, especially concerning any third parties, and the arrangements for protecting such confidential information; and

(d) in cases where the infringement is being or has been investigated by a competition authority, whether the request has been formulated specifically with regard to the nature, object or content of such documents [...] submitted to a competition authority or held in the file of such competition authority.

***4. Member States shall ensure that national courts have the power to order disclosure of evidence containing confidential information when they consider it relevant for the action for damages. Member states shall ensure that, when ordering disclosure of such information, national courts have at their disposal effective measures to protect such information.***

5. Member States shall ***ensure that national courts*** give full effect to ***applicable*** legal ***professional*** privileges ***under national or Union law when ordering the disclosure of*** evidence.

***The interest that undertakings have to avoid actions for damages following an infringement shall not constitute a commercial interest worthy of protection.***

***5a. Member States shall ensure that***

***interested parties in possession of a document requested for disclosure are heard before a national court orders disclosure under this Article regarding information derived from the specified documents.***

6. Member States shall ensure that, to the extent that their courts have powers to order disclosure without hearing the person from whom disclosure is sought, no penalty for non-compliance with such an order may be imposed until the addressee of such an order has been heard by the court.

7. Evidence shall include all types of evidence admissible before the national court *seised*, in particular documents and all other objects containing information, irrespective of the medium on which the information is stored.

8. Without prejudice to the obligation laid down in paragraph 4 and the limits laid down in Article 6, this Article shall not prevent the Member States from maintaining or introducing rules which would lead to wider disclosure of evidence.

6. Member States shall ensure that, to the extent that their courts have powers to order disclosure without hearing the person from whom disclosure is sought, no penalty for non-compliance with such an order may be imposed until the addressee of such an order has been ***provided with the possibility to be*** heard by the ***national*** court

7. Evidence shall include all types of evidence admissible before the national court *seized*, in particular documents and all other objects containing information, irrespective of the medium on which the information is stored.

8. Without prejudice to the obligation laid down in paragraph 4 and the limits laid down in Article 6, this Article shall not prevent Member States from maintaining or introducing rules which would lead to wider disclosure of evidence.

## **Amendment 16**

### **Proposal for a directive**

#### **Article 6 – paragraph 1 – introductory part**

*Text proposed by the Commission*

1. Member States shall ensure that, for the purpose of actions for damages, national courts ***cannot at any time*** order a ***party or a third party*** to disclose any of the following categories of evidence:

*Amendment*

1. Member States shall ensure that, for the purpose of actions for damages, national courts ***shall in general not*** order a ***competition authority*** to disclose any of the following categories of evidence:

## Amendment 17

### Proposal for a directive

#### Article 6 – paragraph 1 – subparagraph 1 (new)

*Text proposed by the Commission*

*Amendment*

***internal documents of the national competition authority, correspondence between the Commission and the national competition authorities or between the latter within the European Competition Network;***

## Amendment 18

### Proposal for a directive

#### Article 6 – paragraph 2 – introductory part

*Text proposed by the Commission*

*Amendment*

2. Member States shall ensure that, for the purpose of actions for damages, national courts can order the disclosure of the following ***categories of evidence*** only after a competition authority has closed its proceedings or taken a decision referred to in Article 5 of Regulation No 1/2003 or in Chapter III of Regulation No 1/2003:

2. Member States shall ensure that, for the purpose of actions for damages, national courts can order the disclosure of the following only after a competition authority has closed its proceedings or taken a decision referred to in Article 5 of Regulation No 1/2003 or in Chapter III of Regulation No 1/2003:

## Amendment 19

### Proposal for a directive

#### Article 6 – paragraph 3

*Text proposed by the Commission*

*Amendment*

3. Disclosure of evidence in the file of a competition authority that does not fall into any of the categories listed in paragraphs 1 or 2 of this Article may be ordered in actions for damages at any time.

3. Disclosure of evidence in the file of a competition authority that does not fall into any of the categories listed in paragraphs 1 or 2 of this Article may be ordered in actions for damages at any time. ***Article 5 (3) to (7) shall apply mutatis mutandis.***

## Amendment 20

### Proposal for a directive Article 7

*Text proposed by the Commission*

*Amendment*

#### *Article 7*

*deleted*

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

*1. Member States shall ensure that evidence falling into one of the categories listed in Article 6(1) which is obtained by a natural or legal person solely through access to the file of a competition authority in exercise of his rights of defence under Article 27 of Regulation No 1/2003 or corresponding provisions of national law is not admissible in actions for damages.*

*2. Member States shall ensure that evidence falling within one of the categories listed in Article 6, paragraph 2 which is obtained by a natural or legal person solely through access to the file of a competition authority in exercise of his rights of defence under Article 27 of Regulation No 1/2003 or corresponding provisions of national law is not admissible in actions for damages until that competition authority has closed its proceedings or taken a decision referred to in Article 5 of Regulation No 1/2003 or in Chapter III of Regulation No 1/2003.*

*3. Member States shall ensure that evidence which is obtained by a natural or legal person solely through access to the file of a competition authority in exercise of his rights of defence under Article 27 of Regulation No 1/2003 or corresponding provisions of national law, and which is not inadmissible pursuant to paragraphs 1 or 2 of this Article, can only be used in an action for damages by that person or by*

*the natural or legal person that succeeded in his rights, including the person that acquired his claim.*

#### **Amendment 21**

##### **Proposal for a directive**

##### **Article 8 – paragraph 1 – point b – introductory part**

*Text proposed by the Commission*

*Amendment*

(b) the destruction of relevant evidence,  
*provided that, at the time of destruction:*

(b) the destruction of relevant evidence;

#### **Amendment 22**

##### **Proposal for a directive**

##### **Article 8 – paragraph 1 – point b – point i**

*Text proposed by the Commission*

*Amendment*

*(i) the destroying party was or had been a party to the proceedings of a competition authority in relation to the conduct underlying the action for damages; or*

*deleted*

#### **Amendment 23**

##### **Proposal for a directive**

##### **Article 8 – paragraph 1 – point b – point ii**

*Text proposed by the Commission*

*Amendment*

*(ii) the destroying party knew or should reasonably have known that an action for damages had been brought before the national court and that the evidence was of relevance in substantiating either the claim for damages or a defence against it; or*

*deleted*



## Amendment 24

### Proposal for a directive

#### Article 8 – paragraph 1 – point b – point iii

*Text proposed by the Commission*

*(iii) the destroying party knew that the evidence was of relevance to pending or prospective actions for damages brought by it or against it;*

*Amendment*

*deleted*

## Amendment 25

### Proposal for a directive

#### Article 8 – paragraph 2

*Text proposed by the Commission*

2. Member States shall ensure that the sanctions that can be imposed by national courts are effective, proportionate and dissuasive. *The sanctions available to national courts shall include, insofar as the behaviour of a party to damages action proceedings is concerned, 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, and the possibility to order the payment of costs.*

*Amendment*

2. Member States shall ensure that the sanctions that can be imposed by national courts are effective, proportionate and dissuasive *in the event of failure or refusal to comply with any court's disclosure order or order protecting confidential information.*

## Amendment 26

### Proposal for a directive

#### Article 10 – paragraph 2 – introductory part

*Text proposed by the Commission*

2. Member States shall ensure that the limitation period shall *not begin to run before* an injured party knows, or can

*Amendment*

2. Member States shall ensure that the limitation period shall begin *on the latest date after* an injured party knows, or can

reasonably be expected to have knowledge of:

reasonably be expected to have knowledge of:

## **Amendment 27**

### **Proposal for a directive Article 10 – paragraph 2 – introductory part**

*Text proposed by the Commission*

2. Member States shall ensure that the limitation period shall not begin to run before an injured party knows, or can reasonably be expected to have knowledge of:

*Amendment*

2. Member States shall ensure that the limitation period shall not begin to run before ***the infringement has ceased*** an injured party knows, or can reasonably be expected to have knowledge of:

## **Amendment 28**

### **Proposal for a directive Article 10 – paragraph 5**

*Text proposed by the Commission*

5. Member States shall ensure that the limitation period is suspended if a competition authority takes action for the purpose of the investigation or proceedings in respect of an infringement to which the action for damages relates. The suspension shall end at the earliest ***one year*** after the ***infringement*** decision has become final ***or the proceedings are otherwise terminated.***

*Amendment*

5. Member States shall ensure that the limitation period is suspended if a competition authority takes action for the purpose of the investigation or proceedings in respect of an infringement to which the action for damages relates. The suspension shall end at the earliest ***two years*** after the decision, ***through which the procedure concerning the infringement or alleged infringement has been closed,*** has become final.

*Justification*

*The limitation period should be sufficiently long so as to allow for genuine access to justice.*

## Amendment 29

### Proposal for a directive Article 11 – paragraph 2

*Text proposed by the Commission*

*2. Member States shall ensure that an undertaking which has been granted immunity from fines by a competition authority under a leniency programme shall be liable to injured parties other than its direct or indirect purchasers or providers only when such injured parties show that they are unable to obtain full compensation from the other undertakings that were involved in the same infringement of competition law.*

*Amendment*

*deleted*

## Amendment 30

### Proposal for a directive Article 13 – paragraph 2 – subparagraph 1 – introductory part

*Text proposed by the Commission*

In the situation referred to in paragraph 1 of this Article, the indirect purchaser shall ***be deemed to have proven*** that a passing-on to him occurred where he has shown that:

*Amendment*

In the situation referred to in paragraph 1 of this Article, the indirect purchaser shall ***prove*** that a passing-on to him occurred where he has shown that ***at least***:

## Amendment 31

### Proposal for a directive Article 14 – paragraph 1

*Text proposed by the Commission*

1. The rules laid down in this Chapter shall be without prejudice to the right of an injured party to claim compensation for loss of profits.

*Amendment*

1. The rules laid down in this Chapter shall be without prejudice to the right of an injured party to claim compensation for loss of profits, ***actual loss, and interest from the time the harm occurred until the***

*compensation in respect of that harm has been paid.*

## **Amendment 32**

### **Proposal for a directive Article 15 – paragraph 1 – point b a (new)**

*Text proposed by the Commission*

*Amendment*

*(ba) any relevant results from public competition cases which help to fulfil the criteria in paragraph 2 of Article 13.*

## **Amendment 33**

### **Proposal for a directive Article 16 – paragraph 1**

*Text proposed by the Commission*

*Amendment*

1. Member States shall ensure that, in the case of a cartel infringement, it shall be presumed that the infringement caused harm. The infringing undertaking shall have the right to rebut this presumption.

1. Member States shall ensure that, in the case of a cartel infringement, it shall be presumed that the infringement caused harm *within the market*. The infringing undertaking shall have the right to rebut this presumption.

## **Amendment 34**

### **Proposal for a directive Article 17**

*Text proposed by the Commission*

*Amendment*

Article 17

Article 17

Suspensive effect of consensual dispute resolution

Suspensive effect of consensual dispute resolution

1. Member States shall ensure that the limitation period for bringing an action for damages is suspended for the duration of

1. Member States shall ensure that the limitation period for bringing an action for damages is suspended for the duration of

the consensual dispute resolution process. The suspension of the limitation period shall apply only with regard to those parties that are or were involved in the consensual dispute resolution.

2. Member States shall ensure that national courts seized of an action for damages may suspend proceedings where the parties to those proceedings are involved in consensual dispute resolution concerning the claim covered by that action for damages.

the consensual dispute resolution process. The suspension of the limitation period shall apply only with regard to those parties that are or were involved in the consensual dispute resolution.

2. Member States shall ensure that national courts seized of an action for damages may suspend proceedings where the parties to those proceedings are involved in consensual dispute resolution concerning the claim covered by that action for damages.

***2a. The suspension referred to in paragraph 2 of this Article may not, in any case, have a duration exceeding one year.***

***2b. Following a consensual settlement, a competition authority may consider the compensation paid prior to the decision as a mitigating factor when setting fines.***

## Amendment 35

### Proposal for a directive Article 18 – paragraph 1

#### *Text proposed by the Commission*

1. Member States shall ensure that, 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 inflicted upon the injured party. Non-settling co-infringers cannot recover contribution from the settling co-infringer for the remaining claim. Only when the non-settling co-infringers are not able to pay the damages that correspond to the remaining claim can the settling co-infringer be held to pay damages to the settling injured party.

#### *Amendment*

1. Member States shall ensure that, 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 inflicted upon the injured party. Non-settling co-infringers cannot recover contribution from the settling co-infringer for the remaining claim. Only when the non-settling co-infringers are not able to pay the damages that correspond to the remaining claim can the settling co-infringer be held to pay damages to the settling injured party, ***unless this is expressly excluded by the settlement conditions.***



## PROCEDURE

<b>Title</b>	Rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the EU
<b>References</b>	COM(2013)0404 – C7-0170/2013 – 2013/0185(COD)
<b>Committee responsible</b> Date announced in plenary	ECON 1.7.2013
<b>Opinion by</b> Date announced in plenary	JURI 1.7.2013
<b>Associated committee(s) - date announced in plenary</b>	12.12.2013
<b>Rapporteur</b> Date appointed	Bernhard Rapkay 19.6.2013
<b>Discussed in committee</b>	16.12.2013
<b>Date adopted</b>	21.1.2014
<b>Result of final vote</b>	+: 22 -: 0 0: 0
<b>Members present for the final vote</b>	Raffaele Baldassarre, Sebastian Valentin Bodu, Françoise Castex, Christian Engström, Marielle Gallo, Giuseppe Gargani, Lidia Joanna Geringer de Oedenberg, Sajjad Karim, Klaus-Heiner Lehne, Antonio López-Istúriz White, Antonio Masip Hidalgo, Alajos Mészáros, Bernhard Rapkay, Evelyn Regner, Francesco Enrico Speroni, Rebecca Taylor, Alexandra Thein, Cecilia Wikström, Tadeusz Zwiefka
<b>Substitute(s) present for the final vote</b>	Piotr Borys, Eva Lichtenberger, Angelika Niebler, Axel Voss
<b>Substitute(s) under Rule 187(2) present for the final vote</b>	María Irigoyen Pérez

09.01.2014

## **OPINION OF THE COMMITTEE ON THE INTERNAL MARKET AND CONSUMER PROTECTION**

for the Committee on Economic and Monetary Affairs

on the proposal for a directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union (COM(2013)0404 – C7-0170/2013 – 2013/0185(COD))

Rapporteur: Olle Schmidt

### **SHORT JUSTIFICATION**

After almost a decade of deliberation, your rapporteur fully welcomes the Commission's proposal for this directive. Consumers as well as small and medium-sized enterprises are currently hampered in exercising their rights at Union level to obtain compensation for harm caused by competition law infringements.

With regard to private enforcement, your rapporteur would like to see representative and collective redress mechanisms being introduced. In its follow-up statement to the European Parliament's resolution (P6\_TA(2009)0187), the Commission agreed that there should be an integrated approach to collective redress to ensure consistent treatment of claims for damages in the area of Union competition law. Binding horizontal measures for collective redress are still not a reality. Collective actions would allow for genuine and qualified entities, such as consumer associations or trade organisations, to bring actions forward on behalf of the individual claimant. However, the rapporteur calls for only a clearly identified group of people to be able to act as representative and to take part in the claim. This identification must be completed when the claim is brought, and the rapporteur suggests an opt-in model. Given that only 25 % of cartel cases lead to actions for damages within the Union more has to be done to encourage consumers to exercise their rights.

The rapporteur acknowledges that the application for leniency programme contributes to a



great extent to uncovering cartels, thus making claims for damages possible in the first place. However, the rapporteur does not agree with the Commission's proposal to introduce a grey list of limits on the disclosure of evidence after a competition authority has closed its proceedings. All evidence from leniency applicants should be covered by the rules in the first paragraph of Article 6, irrespective of whether they were received in the leniency application or after a request from the competition authority.

Even though competition cases are sometimes made possible through a whistle-blower, there is no specific reference to this in the Commission's proposal. The protection of whistle-blowers only concerns the identity of the whistle-blower, and not the information provided. The identity is of no importance to the damage or to the value of the damage. Today the identity of whistle-blowers is protected under Member States' law. To ensure predictability and equivalent ruling personal data should be added to the Commission's proposal.

The rapporteur welcomes the Commission's proposal to put the burden of proof on the defendant. This would make it easier for claimants to establish their claims. Gaps in evidence would favour the claimant and there would be a clear benefit for direct purchasers. In line with Court of Justice case-law indirect purchasers must also be entitled to bring actions. However, the proposed rules include both a presumption of absence and of existence of pass-on of overcharges to indirect purchasers. This will most likely lead to claims both from direct and indirect claimants. The rapporteur does not favour such a dual system and suggests that when there is not enough evidence to prove pass-on, the burden of proof lies on the indirect purchaser. By doing so a one-pillar system is created giving clear guidance to national courts.

The damage suffered must be compensated for. This is vital if cartels are to feel the real damage they caused on the markets and to customers. To increase protection of the party injured from a competition law infringement, it is important to ensure that it has a strong voice in the court proceedings. Therefore, the rapporteur suggests that the injured party should have the upper hand in the estimation, and therefore would like the estimation to be based on the injured party's estimation. In addition, this would further discourage cartel participation because the influence of infringers in court proceedings would be reduced.

For a consumer, a consumer organisation or a small company, the risk of having to pay court costs in case of a loss may severely deter them from raising claims for damages. To enhance the possibility of raising such claims, your rapporteur suggests to set up a fund financed by fines paid by competition infringement cases. This fund would finance a first indicative verdict of a potential case based on evidence provided by a potential claimant. This would lower the threshold for claims for damages and reduce unnecessary claims before the courts. Finally, it should be pointed out that the rule of 'losers pay' should be kept.

## **AMENDMENTS**

The Committee on the Internal Market and Consumer Protection calls on the Committee on Economic and Monetary Affairs, as the committee responsible, to incorporate the following amendments in its report:

## **Amendment 1**

### **Proposal for a directive Recital 4 a (new)**

*Text proposed by the Commission*

*Amendment*

***(4a) Private enforcement is a vital mechanism for effective enforcement of competition law. However only individual actions will not be satisfactory and it is therefore necessary to allow for collective actions in this Directive.***

*Justification*

*There should be an integrated approach to collective redress to ensure consistent treatment of damages, such as consumer protection laws. Since such horizontal measures are still not reality, the rapporteur would like to introduce them in this Directive. Given the low number of actions for damages more has to be done to encourage consumers to claim their rights. Collective actions will lower the threshold for consumers to approach national courts.*

## **Amendment 2**

### **Proposal for a directive Recital 4 b (new)**

*Text proposed by the Commission*

*Amendment*

***(4b) Respective of the prerogative of Member States to introduce different collective redress schemes, Member States, when setting up such scheme, should only introduce an opt-in system and refrain from foreseeing the use of a contingency fee, the possibility to award punitive damages and third party funding where the fund provider is given remuneration based on the settlement reached or the compensation awarded.***

### **Amendment 3**

#### **Proposal for a directive Recital 5 a (new)**

*Text proposed by the Commission*

*Amendment*

***(5a) Effective means for consumers and undertakings to obtain damages will deter undertakings from committing infringements and will ensure greater compliance with the Union competition rules. Accordingly, in the interests of enhancing public enforcement of competition rules in the Union, cost-effective, timely and efficient compensation of victims of breaches of those rules should be encouraged. Encouraging consensual compensation of victims should be without prejudice to the need for harmonisation of the rules in the Members States governing actions for damages for infringements of national or Union competition law.***

*Justification*

*In the interest of consumers and undertakings, compensation of damages need to be cost-effective, timely and efficient. Therefore early consensual dispute resolution needs to be encouraged by giving an incentive linked to the fine set by the competition authorities to ensure such a cost-effective, timely and efficient compensation.*

### **Amendment 4**

#### **Proposal for a directive Recital 11**

*Text proposed by the Commission*

*Amendment*

(11) This Directive reaffirms the acquis communautaire on the Union right to compensation for harm caused by infringements of Union competition law, particularly regarding standing and the definition of damage, as it has been stated in the case-law of the Court of Justice of

(11) This Directive reaffirms the acquis communautaire on the Union right to compensation for harm caused by infringements of Union competition law, particularly regarding standing and the definition of damage, as it has been stated in the case-law of the Court of Justice of

the European Union, and does not pre-empt any further development thereof. Anyone who has suffered harm caused by an infringement can claim compensation for the actual loss (*damnum emergens*), for the gain of which he has been deprived (loss of profit or *lucrum cessans*) and payment of interest accruing from the time the harm occurred until compensation is paid. This right is recognised 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 a competition authority. ***This Directive should not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 of the Treaty.***

the European Union, and does not pre-empt any further development thereof. Anyone who has suffered harm caused by an infringement can claim compensation for the actual loss (*damnum emergens*), for the gain of which he has been deprived (loss of profit or *lucrum cessans*) and payment of interest accruing from the time the harm occurred until compensation is paid, ***without prejudice to the kind of interest recognised under national law.*** This right is recognised 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 a competition authority.

## Amendment 5

### Proposal for a directive Recital 11 a (new)

*Text proposed by the Commission*

*Amendment*

***(11a) The correct enforcement of competition law and the effective exercise by both business and consumers of their right to compensation are tightly interwoven and key in achieving competitive growth. A European right to collective redress will, in this regard, contribute to the completion of the internal market and the development of a genuine area of freedom, security and justice.***

### *Justification*

*In February 2012 the European Parliament adopted the resolution 'Towards a Coherent European Approach to Collective Redress', in which it called for any proposal in the field of collective redress including a common set of principles providing uniform access to justice*

*via collective redress within the Union dealing with the infringement of consumer rights. A collective redress mechanism would greatly enhance effective enforcement of competition law and increase consumer protection.*

## **Amendment 6**

### **Proposal for a directive Recital 13**

#### *Text proposed by the Commission*

(13) Evidence is an important element for bringing actions for damages for infringement of national or Union competition law. However, as antitrust litigation is characterised by an information asymmetry, it is appropriate to ensure that injured parties are afforded 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 injured parties. National courts can also order evidence to be disclosed by third parties. Where the national court wishes to order disclosure of evidence by the Commission, the principle of sincere cooperation between the European Union and the Member States (Article 4(3) TEU) and Article 15(1) of Regulation No 1/2003 as regards requests for information are applicable.

#### *Amendment*

(13) Evidence is an important element for bringing actions for damages for infringement of national or Union competition law. However, as antitrust litigation is characterised by an information asymmetry, it is appropriate to ensure that injured parties are afforded the right to obtain the disclosure of evidence relevant to their claim. 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 injured parties. National courts can also order evidence to be disclosed by third parties. Where the national court wishes to order disclosure of evidence by the Commission, the principle of sincere cooperation between the European Union and the Member States (Article 4(3) TEU) and Article 15(1) of Regulation No 1/2003 as regards requests for information are applicable.

#### *Justification*

*Evidence needs to be specified as precisely and narrowly as possible in order to prevent fishing expeditions, which might harm importantly an efficient and fair functioning the internal market.*

## **Amendment 7**

### **Proposal for a directive Recital 19 a (new)**

*Text proposed by the Commission*

*Amendment*

***(19a) It is of importance that information given by leniency applicants is protected since this will enhance the incentive for cartelists to come forward and participate in leniency programmes. Therefore limitation on disclosure of evidence from a competition authority should be extended to include all information given from the leniency applicant, irrespective of if the information was given on the cartelists' own initiative or after a request from a competition authority.***

*Justification*

*Applications for leniency programmes make a major contribution to uncovering cartels, thus making private prosecutions possible in the first place. All evidence from leniency applicants shall be covered by the rules in the first paragraph of article 6, irrespective of if they were received under the leniency statements or after a request from the competition authority.*

## **Amendment 8**

### **Proposal for a directive Recital 21 a (new)**

*Text proposed by the Commission*

*Amendment*

***(21a) Even if the role of individual whistle-blowers in so far has been small, the protection of individuals coming forward with information must be explicitly included in the directive. Only personal data and information linking to personal data should be included in the information that national courts at any time cannot order a party or third party to disclose.***

## *Justification*

*Even though there exist competition cases made possible through only a whistle-blower there is no specific reference to this in the proposed directive. The protection of whistle-blowers only concerns the identity of the whistle-blower, and not the information provided. To ensure predictability and equivalent ruling personal data should be added to the directive. Today the identity of whistle-blowers is protected under the Members State's law.*

### **Amendment 9**

#### **Proposal for a directive**

##### **Recital 24**

###### *Text proposed by the Commission*

(24) Making a claim for damages, or the start of an investigation by a competition authority, entails a risk that the undertakings concerned may destroy or hide evidence that would be useful in substantiating an injured party's claim for damages. To prevent the destruction of relevant evidence and to ensure that court orders requesting disclosure are complied with, courts should **be able to** impose sufficiently deterrent sanctions. Insofar as parties to the proceedings are concerned, the risk of adverse inferences being drawn in the proceedings for damages can be a particularly effective sanction and can avoid delays. Sanctions should also be available for non-compliance with obligations to protect confidential information and for abusive use of information obtained through disclosure. Similarly, sanctions should be available if information obtained through access to the file of a competition authority in the exercise of one's rights of defence in relation to investigations of that competition authority is used abusively in actions for damages.

###### *Amendment*

(24) Making a claim for damages, or the start of an investigation by a competition authority, entails a risk that the undertakings concerned may destroy or hide evidence that would be useful in substantiating an injured party's claim for damages. To prevent the destruction of relevant evidence and to ensure that court orders requesting disclosure are complied with, courts should impose sufficiently **and effectively** deterrent sanctions. Insofar as parties to the proceedings are concerned, the risk of adverse inferences being drawn in the proceedings for damages can be a particularly effective sanction and can avoid delays. Sanctions should also be available for non-compliance with obligations to protect confidential information and for abusive use of information obtained through disclosure. Similarly, sanctions should be available if information obtained through access to the file of a competition authority in the exercise of one's rights of defence in relation to investigations of that competition authority is used abusively in actions for damages.

## Amendment 10

### Proposal for a directive Recital 28

#### *Text proposed by the Commission*

(28) Undertakings which cooperate with competition authorities under a leniency programme play a key role in detecting *secret cartel infringements* and in bringing these infringements to an end, thereby often mitigating the harm which could have been caused had the infringement continued. It is therefore appropriate to make provision for undertakings which have received immunity from fines from a competition authority under a leniency programme to be protected from undue exposure to damages claims, bearing in mind that the decision of the competition authority finding the infringement may become final for the immunity recipient before it becomes final for other undertakings which have not received immunity. It is therefore appropriate that the immunity recipient is relieved in principle from joint and several liability for the entire harm and that its contribution does not exceed the amount of harm caused to his own direct or indirect purchasers or, in case of a buying cartel, his direct or indirect providers. To the extent a cartel has caused harm to others than the customers/providers of the infringing undertakings, the contribution of the immunity recipient should not exceed his relative responsibility for the harm caused by the cartel. This share should be determined in accordance with the same rules used to determine the contributions among infringing undertakings (recital (27) above). The immunity recipient should remain fully liable to the injured parties other than his direct or indirect purchasers or providers only where they are unable to obtain full compensation from the other infringing undertakings.

#### *Amendment*

(28) Undertakings which cooperate with competition authorities under a leniency programme play a key role in detecting *anticompetitive agreements, decisions or practices* and in bringing these infringements to an end, thereby often mitigating the harm which could have been caused had the infringement continued. It is therefore appropriate to make provision for undertakings which have received immunity from fines from a competition authority under a leniency programme to be protected from undue exposure to damages claims, bearing in mind that the decision of the competition authority finding the infringement may become final for the immunity recipient before it becomes final for other undertakings which have not received immunity. It is therefore appropriate that the immunity recipient is relieved in principle from joint and several liability for the entire harm and that its contribution does not exceed the amount of harm caused to his own direct or indirect purchasers or, in case of a buying cartel, his direct or indirect providers. To the extent a cartel has caused harm to others than the customers/providers of the infringing undertakings, the contribution of the immunity recipient should not exceed his relative responsibility for the harm caused by the cartel. This share should be determined in accordance with the same rules used to determine the contributions among infringing undertakings (recital (27) above). The immunity recipient should remain fully liable to the injured parties other than his direct or indirect purchasers or providers only where they are unable to obtain full compensation from the other infringing undertakings.



*Justification*

*The chosen term is too narrow and would not take into account the realities of the internal market.*

**Amendment 11**

**Proposal for a directive  
Recital 30**

*Text proposed by the Commission*

*Amendment*

***(30) However, in a situation where the overcharge was passed on to persons who are legally unable to claim compensation, it is not appropriate to allow the infringing undertaking to invoke the passing-on defence, as this would render it free of liability for the harm which it has caused. The court seized of the action should therefore assess, when the passing-on defence is invoked in a specific case, whether the persons to whom the overcharge was allegedly passed on are legally able to claim compensation. While indirect purchasers are entitled to claim compensation, national rules of causality (including rules on foreseeability and remoteness), applied in accordance with principles of Union law, may entail that certain persons (for instance at a level of the supply chain which is remote from the infringement) are legally unable to claim compensation in a given case. Only when the court finds that the person to whom the overcharge was allegedly passed on is legally able to claim compensation will it assess the merits of the passing-on defence.***

***deleted***

*Justification*

*Deletion as a consequence of Article 12 (2).*

## Amendment 12

### Proposal for a directive Recital 34

#### *Text proposed by the Commission*

(34) An injured party who has proven having suffered harm as a result of a competition law infringement still needs to prove the extent of the harm in order to obtain damages. Quantifying antitrust harm is a very fact-intensive process and may require the application of complex economic models. This is often very costly and causes difficulties for injured parties in terms of obtaining the necessary data to substantiate their claims. As such, the quantification of antitrust harm can constitute a substantial barrier preventing injured parties from obtaining compensatory damages for harm suffered.

#### *Amendment*

(34) An injured party who has proven having suffered harm as a result of a competition law infringement still needs to prove the extent of the harm in order to obtain damages. Quantifying antitrust harm is a very fact-intensive process and may require the application of complex economic models. This is often very costly and causes difficulties for injured parties in terms of obtaining the necessary data to substantiate their claims. As such, the quantification of antitrust harm can constitute a substantial barrier preventing injured parties from obtaining compensatory damages for harm suffered. ***The process of quantifying harm may vary between different national jurisdictions. In order to ensure clear rules and predictability the Commission should provide further guidance at Community level.***

#### *Justification*

*To ensure efficient and harmonised ruling on actions for damages of competition law infringement by national courts the commission should provide further guidance at the Community level as regards the quantification of damages. This would simplify the difficult process of estimating the harm caused by a competition law infringement and enhance predictability and harmonisation of the process.*

## Amendment 13

### Proposal for a directive Recital 35

#### *Text proposed by the Commission*

(35) To remedy the information asymmetry and some of the difficulties associated with quantifying antitrust harm, and to ensure the effectiveness of claims for damages, it

#### *Amendment*

(35) To remedy the information asymmetry and some of the difficulties associated with quantifying antitrust harm, and to ensure the effectiveness of claims for damages, it

is appropriate to presume that in the case of a cartel infringement, the infringement has caused harm, in particular via a price effect. Depending on the facts of the case this means that the cartel has caused a rise in price, or prevented a lowering of prices which would otherwise have occurred but for the infringement. The infringing undertaking should be free to rebut such presumption. ***It is appropriate to limit this rebuttable presumption to cartels, given the secret nature of a cartel, which increases the said information asymmetry and makes it more difficult for the injured party to obtain the necessary evidence to prove the harm.***

is appropriate to presume that in the case of a cartel infringement, the infringement has caused harm, in particular via a price effect. Depending on the facts of the case this means that the cartel has caused a rise in price, or prevented a lowering of prices which would otherwise have occurred but for the infringement. The infringing undertaking should be free to rebut such presumption. ***Member States should provide that national courts be granted the power to estimate the amount of harm taking into account the presentation of evidence by the parties.***

#### **Amendment 14**

##### **Proposal for a directive Recital 36**

###### *Text proposed by the Commission*

(36) In the absence of Union rules on the quantification of harm caused by a competition law infringement, it is for the domestic legal system of each Member State and for the national courts to determine what requirements the injured party has to meet when proving the amount of the harm suffered, how precisely he has to prove that amount, the methods that can be used in quantifying the amount and the consequences of not being able to fully meet the set requirements. However, these domestic requirements should not be less favourable than those governing similar domestic actions (principle of equivalence), nor should they render the exercise of the Union right to damages practically impossible or excessively difficult (principle of effectiveness). Regard should be had in this respect to any information asymmetries between the parties and to the fact that quantifying the

###### *Amendment*

(36) In the absence of Union rules on the quantification of harm caused by a competition law infringement, it is for the domestic legal system of each Member State and for the national courts to determine what requirements the injured party has to meet when proving the amount of the harm suffered, how precisely he has to prove that amount, the methods that can be used in quantifying the amount and the consequences of not being able to fully meet the set requirements. However, these domestic requirements should not be less favourable than those governing similar domestic actions (principle of equivalence), nor should they render the exercise of the Union right to damages practically impossible or excessively difficult (principle of effectiveness). Regard should be had in this respect to any information asymmetries between the parties and to the fact that quantifying the

harm means assessing how the market in question would have evolved had there been no infringement. This assessment implies a comparison with a situation which is by definition hypothetical and can thus never be made with complete accuracy. It is therefore appropriate to give national courts the power to estimate the amount of the harm caused by the competition law infringement.

harm means assessing how the market in question would have evolved had there been no infringement. This assessment implies a comparison with a situation which is by definition hypothetical and can thus never be made with complete accuracy. It is therefore appropriate to give national courts the power to estimate the amount of the harm caused by the competition law infringement. ***In this estimation emphasis shall be given to the injured party's estimation of the harm.***

#### *Justification*

*To increase protection of the party injured from a competition law infringement it is important to ensure that it has a strong voice in the court proceedings. By emphasising the injured party's estimation of the harm it is ensured that the weaker party is protected. In addition, it further disincentives cartel participation because the power of infringers in court proceedings is reduced.*

#### **Amendment 15**

##### **Proposal for a directive Recital 37**

###### *Text proposed by the Commission*

(37) ***Injured*** parties and infringing undertakings should be encouraged to agree on compensating the harm caused by a competition law infringement through consensual dispute resolution mechanisms, such as out-of-court settlements, arbitration and mediation. Where possible, such consensual dispute resolution should cover as many injured parties and infringing undertakings as possible. ***The provisions in this Directive on consensual dispute resolution are therefore meant to facilitate the use of such mechanisms and increase their effectiveness.***

###### *Amendment*

(37) ***Points out that national courts are often overburdened and that actions for damages can be a time consuming process. Therefore, injured*** parties and infringing undertakings should be encouraged to agree on compensating the harm caused by a competition law infringement through consensual dispute resolution mechanisms, such as out-of-court settlements, arbitration and mediation. Where possible, such consensual dispute resolution should cover as many injured parties and infringing undertakings as possible. ***As individual actions may not suffice, collective actions brought by genuine and qualified entities, such as consumer associations or trade organisations acting on behalf of individual claimant should be explicitly***

*included in this Directive.*

*Justification*

*Collective actions would allow for genuine and qualified entities, such as consumer associations or trade organisations, to bring actions forward on behalf of the individual claimant. However, only a clearly identified group of people should be able to act as a representative and to take part in the claim. This identification must be complete when the claim is brought, and the rapporteur suggests an opt-in model.*

**Amendment 16**

**Proposal for a directive**  
**Recital 41 a (new)**

*Text proposed by the Commission*

*Amendment*

***(41a) The costs of legal procedures should not deter claimants from bringing well-founded actions to court. Member States should take appropriate measures to provide injured parties with access to finance for a damage claim. This can be done through a fund which is financed with the fines paid by infringers.***

*Justification*

*The risk of having to pay court costs may severely deter a consumer, a consumer organisation or a small company from raising claims. A fund, financed by fines paid by previous competition infringement cases, would enhance the possibility of raising claims. It would finance a first indicative verdict of a potential case based on evidence provided by a potential claimant. It should be pointed out that the rule of 'losers pay' shall be kept.*

**Amendment 17**

**Proposal for a directive**  
**Article 2 – paragraph 1**

*Text proposed by the Commission*

*Amendment*

1. Anyone who has suffered harm caused by an infringement of Union or national competition law shall be able to claim full compensation for that harm.

1. Anyone who has suffered harm caused by an infringement of Union or national competition law shall be able to claim full compensation for that harm, ***without***

***prejudice to any requirement under national law to establish liability.***

*Justification*

*In order to claim compensation, requirements under national law to establish liability need to be satisfied.*

**Amendment 18**

**Proposal for a directive**

**Article 2 – paragraph 2 a (new)**

*Text proposed by the Commission*

*Amendment*

***2a. Member States shall ensure that overcompensation is excluded.***

*Justification*

*Overcompensation needs to be prevented as it would harm the objective of a level-playing field in the internal market.*

**Amendment 19**

**Proposal for a directive**

**Article 2 – paragraph 3**

*Text proposed by the Commission*

*Amendment*

3. Member States shall ensure that injured parties can effectively exercise their claims for damages.

3. Member States shall ensure that injured parties can effectively exercise their claims for damages ***and obtain actual enforcement of redress.***

**Amendment 20**

**Proposal for a directive**

**Article 4 – paragraph 1 – point 3**

*Text proposed by the Commission*

*Amendment*

3. ‘action for damages’ means an action

3. ‘action for damages’ means an action

under national law by which an injured party brings a claim for damages before a national court; it *may* also *cover* actions by which someone acting on behalf of one or more injured parties brings a claim for damages before a national court, *where national law provides* for this possibility;

under national law by which an injured party brings *individual or jointly* a claim for damages before a national court; it also *covers* actions by which someone acting on behalf of one or more injured parties brings a claim for damages before a national court. *National law shall provide* for this possibility *especially in regards to collective redress. When setting up a collective redress scheme, Member States may only introduce an opt-in system and refrain from foreseeing the use of a contingency fee, the possibility to award punitive damages and third party funding where the fund provider is given remuneration based on the settlement reached or the compensation awarded;*

## Amendment 21

### Proposal for a directive

#### Article 4 – paragraph 1 – point 3 a (new)

*Text proposed by the Commission*

*Amendment*

*3a. ‘collective redress’ means: (i) a legal mechanism that ensures a possibility to claim cessation of illegal behaviour collectively by two or more natural or legal persons or by an entity entitled to bring a representative action (injunctive collective redress); (ii) a legal mechanism that ensures a possibility to claim compensation collectively by two or more natural or legal persons claiming to have been harmed in a mass harm situation or by an entity entitled to bring a representative action (compensatory collective redress);*

#### *Justification*

*In February 2012 the European Parliament adopted the resolution ‘Towards a Coherent European Approach to Collective Redress’, in which it called for any proposal in the field of collective redress including a common set of principles providing uniform access to justice via collective redress within the Union dealing with the infringement of consumer rights. A*

*collective redress mechanism would enhance effective enforcement of competition law and consumer protection.*

## **Amendment 22**

### **Proposal for a directive Article 4 – paragraph 1 – point 13**

#### *Text proposed by the Commission*

13. ‘leniency programme’ means a programme 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 of his knowledge of the *cartel* and his role therein, in return for which the participant receives immunity from any fine to be imposed for the *cartel* or a reduction of such fine;

#### *Amendment*

13. ‘leniency programme’ means a programme on the basis of which a participant in *an anticompetitive agreement, decision or practice*, independently of the other undertakings involved in *that agreement, decision or practice*, cooperates with an investigation of the competition authority, by voluntarily providing presentations of his knowledge of the *agreement, decision or practice* and his role therein, in return for which the participant receives immunity from any fine to be imposed for the *agreement, decision or practice* or a reduction of such fine;

#### *Justification*

*The chosen term is too narrow and would not take into account the realities of the internal market.*

## **Amendment 23**

### **Proposal for a directive Article 4 – paragraph 1 – point 17**

#### *Text proposed by the Commission*

17. ‘consensual settlement’ means an agreement whereby damages are paid following a consensual dispute resolution.

#### *Amendment*

17. ‘consensual settlement’ means an agreement whereby damages are paid following a consensual dispute resolution *including an agreement pursuant to which an undertaking commits to paying damages to the victims of breaches of the*



***competition rules from a secured  
compensation fund;***

*Justification*

*The possibility of creating a secured compensation fund shall strengthen the injured parties' right to compensation.*

**Amendment 24**

**Proposal for a directive  
Article 5 – paragraph 2 – point a**

*Text proposed by the Commission*

(a) ***shown that evidence*** in the control of the other party or a third party is relevant in terms of substantiating his claim or defence; ***and***

*Amendment*

(a) ***specified evidence which lies*** in the control of the other party or a third party ***and which*** is relevant in terms of substantiating his claim or defence;

*Justification*

*The European Commission states in its explanatory memorandum of the legislative proposal that global disclosure requests for documents should normally be deemed as disproportionate and not complying with the requesting party's duty to specify (categories of) evidence precisely and as narrowly as possible. In order to avoid 'fishing expeditions', pieces of evidence or categories of evidence have to be defined as precisely and narrowly as possible by the claimant.*

**Amendment 25**

**Proposal for a directive  
Article 5 – paragraph 2 – point b a (new)**

*Text proposed by the Commission*

***(ba) demonstrated that it is pursuing the request for disclosure of evidence for an identified action for damages that has been introduced before a national court in the Union; and***

*Amendment*

### *Justification*

*Article 5 does not provide any guidance regarding requests for disclosure of evidence from outside the EU. However, evidence of an EU anticompetitive agreement or arrangement shall not be used as a surrogate for (class) actions outside the EU jurisdiction. The amendment is designed to address this question adequately and to avoid such an effect.*

### **Amendment 26**

#### **Proposal for a directive**

#### **Article 5 – paragraph 2 a (new)**

*Text proposed by the Commission*

*Amendment*

***2a. Member States shall ensure that national courts may order the disclosure of specified parts of that evidence or categories thereof, circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts.***

### *Justification*

*The European Commission states in its explanatory memorandum of the legislative proposal that global disclosure requests for documents should normally be deemed as disproportionate and not complying with the requesting party's duty to specify (categories of) evidence precisely and as narrowly as possible. In order to avoid 'fishing expeditions', pieces of evidence or categories of evidence have to be defined as precisely and narrowly as possible by the claimant.*

### **Amendment 27**

#### **Proposal for a directive**

#### **Article 5 – paragraph 3 – introductory part**

*Text proposed by the Commission*

*Amendment*

3. Member States shall ensure that national courts limit disclosure of evidence to that which is proportionate. In determining whether any disclosure requested by a party is proportionate, national courts shall consider the legitimate interests of all ***parties and third*** parties concerned. They

3. Member States shall ensure that national courts limit disclosure of evidence to that which is proportionate ***and which relates to an action for damages in the Union***. In determining whether any disclosure requested by a party is proportionate, national courts shall consider the ***public interests involved and the*** legitimate

shall, in particular, consider:

interests of all *private* parties concerned.  
They shall, in particular, consider:

*Justification*

*Safeguarding sufficient incentives of the leniency programme is of utmost importance for ensuring a level-playing field of the internal market. Leniency programmes are the most efficient tool in detecting anticompetitive agreements. If there is no or little detection of anticompetitive behaviour, there are ultimately no victims to compensate. Thus documents brought forward by the applicant need to be protected while providing for a per-se protection is incompatible with primary law (Donau Chemie).*

**Amendment 28**

**Proposal for a directive**

**Article 5 – paragraph 3 – point a a (new)**

*Text proposed by the Commission*

*Amendment*

***(aa) the need to safeguard the effectiveness of the public enforcement of competition law, in particular with regard to risks that the disclosure of documents would pose to:***

***(i) leniency programmes operated by competition authorities;***

***(ii) settlement procedures operated by competition authorities;***

***(iii) the internal decision-making procedures within a competition authority and within the European Competition Network;***

*Justification*

*Safeguarding sufficient incentives of the leniency programme is of utmost importance for ensuring a level-playing field of the internal market. Leniency programmes are the most efficient tool in detecting anticompetitive agreements. If there is no or little detection of anticompetitive behaviour, there are ultimately no victims to compensate. This importance needs to be considered by national judges when ordering a disclosure.*

## Amendment 29

### Proposal for a directive Article 5 – paragraph 4

*Text proposed by the Commission*

4. Member States shall ensure that national courts have at their disposal effective measures to protect confidential information from improper use to the greatest extent possible whilst also ensuring that relevant evidence containing such information is available in the action for damages.

*Amendment*

4. Member States shall ensure that national courts have at their disposal effective measures to protect confidential information from improper use to the greatest extent possible whilst also ensuring that relevant evidence containing such information is available in the action for damages ***within the Union. The interest that undertakings have to avoid actions for damages following an infringement shall not constitute a commercial interest worthy of protection.***

*Justification*

*The interest to avoid damage actions for an infringement of competition rules does not constitute a commercial interest worth of protection, as it would go directly against the effective right to compensation (cf CDC Hydrogen Peroxide v Commission (T-437/08) )*

## Amendment 30

### Proposal for a directive Article 5 – paragraph 8

*Text proposed by the Commission*

***8. Without prejudice to the obligation laid down in paragraph 4 and the limits laid down in Article 6, this Article shall not prevent the Member States from maintaining or introducing rules which would lead to wider disclosure of evidence.***

*Amendment*

***deleted***

*Justification*

*Safeguarding sufficient incentives of the leniency programme is of utmost importance for ensuring a level-playing field of the internal market. Leniency programmes are the most efficient tool in detecting anticompetitive agreements. If there is no or little detection of*

*anticompetitive behaviour, there are ultimately no victims to compensate. The same levels of protection need to be ensured to maintain the effectiveness of the leniency programme*

### **Amendment 31**

#### **Proposal for a directive Article 6 – paragraph 1 – point a**

*Text proposed by the Commission*

*(a) leniency corporate statements; and*

*Amendment*

*(a) all newly produced incriminating documents provided by a leniency applicant; and*

### **Amendment 32**

#### **Proposal for a directive Article 7 a (new)**

*Text proposed by the Commission*

*Amendment*

#### **Article 7a**

#### **Whistleblowing**

*1. Any person who has reasonable grounds to believe that a person has committed or intends to commit an offence under this Directive, may notify a competition authority of the particulars of the matter and may request that his or her identity be kept confidential with respect to the notification.*

*2. The competition authority shall keep confidential the identity of the person which notified the competition authority under article 7(1) and to whom an assurance of confidentiality has been given.*

#### *Justification*

*In order to encourage members of the public to provide information to competition authorities this Directive should include explicit protection of the identity of the whistleblower. Even if the information given will not be sufficient as evidence in a cartel case, the competition authority will be able to start an investigation.*

## Amendment 33

### Proposal for a directive

#### Article 8 – paragraph 1 – introductory part

*Text proposed by the Commission*

1. Member States shall ensure that national courts *can* impose sanctions on parties, third parties and their legal representatives in the event of:

*Amendment*

1. Member States shall ensure that national courts *effectively* impose sanctions on parties, third parties and their legal representatives in the event of:

## Amendment 34

### Proposal for a directive

#### Article 8 – paragraph 1 – point b – point iii

*Text proposed by the Commission*

(iii) the destroying party knew that the evidence was of relevance to pending or prospective actions for damages brought by it or against it;

*Amendment*

(iii) the destroying party knew *or could reasonably have inferred* that the evidence was of relevance to pending or prospective actions for damages brought by it or against it;

## Amendment 35

### Proposal for a directive

#### Article 9 – paragraph 1

*Text proposed by the Commission*

Member States shall ensure that, where national courts rule, in actions for damages under Article 101 or 102 of the Treaty or under national competition law, on agreements, decisions or practices which are already the subject of a final infringement decision by a national competition authority or by a review court, those courts cannot take decisions running

*Amendment*

Member States shall ensure that, where national courts rule, in actions for damages under Article 101 or 102 of the Treaty or under national competition law, on agreements, decisions or practices which are already the subject of a final infringement decision by a national competition authority or by a review court, those courts cannot take decisions running

counter to such finding of an infringement. This obligation is without prejudice to the rights and obligations under Article 267 of the Treaty.

counter to such finding of an infringement. This obligation is without prejudice to the rights and obligations under Article 267 of the Treaty, ***to the right to an effective remedy and a fair trial, and the right of defence, pursuant to Articles 47 and 48 of the Charter, and to the right to a fair hearing pursuant to Article 6 of the ECHR. Accordingly, decisions of national competition authorities and competition courts shall be binding provided that there were no manifest errors in the investigation and provided that the rights of the defence were complied with.***

#### *Justification*

*In order to ensure the rights of defence for consumers and undertakings, the binding effect shall not apply, when these have not been respected.*

#### **Amendment 36**

##### **Proposal for a directive Article 10 – paragraph 2 – point ii**

###### *Text proposed by the Commission*

(ii) ***the qualification of*** such behaviour as an infringement of Union or national competition law;

###### *Amendment*

(ii) ***facts qualifying*** such behaviour as an infringement of Union or national competition law;

#### **Amendment 37**

##### **Proposal for a directive Article 10 – paragraph 5**

###### *Text proposed by the Commission*

5. Member States shall ensure that the limitation period is suspended if a competition authority takes action for the purpose of the investigation or proceedings in respect of an infringement to which the action for damages relates. The suspension

###### *Amendment*

5. Member States shall ensure that the limitation period is suspended if a competition authority takes action for the purpose of the investigation or proceedings in respect of an infringement to which the action for damages relates. The suspension

shall end at the earliest **one year** after the infringement decision has become final or the proceedings are otherwise terminated.

shall end at the earliest **two years** after the infringement decision has become final or the proceedings are otherwise terminated.

*Justification*

*Taking on board the complex economic nature and the difficulty to timely raise claims of damages stemming from anticompetitive behaviour, given the information asymmetries especially for consumers, it is proper to extend the suspension period for one year, in order to effectively guarantee the right of claimants to full compensation.*

**Amendment 38**

**Proposal for a directive  
Article 10 – paragraph 5 a (new)**

*Text proposed by the Commission*

*Amendment*

***5a. Notwithstanding paragraphs 1 to 4 of this Article, actions for damages shall be instituted within 10 years of the events that gave rise to them.***

**Amendment 39**

**Proposal for a directive  
Article 12 – paragraph 1 a (new)**

*Text proposed by the Commission*

*Amendment*

***1a. Member States shall ensure that the national court has the power to estimate which share of that overcharge was passed on.***

*Justification*

*It needs to be clarified that the national court has the power to estimate the share of the overcharge which was passed on to remedy to problems such as the asymmetry of information.*



## Amendment 40

### Proposal for a directive Article 12 – paragraph 2

*Text proposed by the Commission*

*Amendment*

**2. Insofar as the overcharge has been passed on to persons at the next level of the supply chain for whom it is legally impossible to claim compensation for their harm, the defendant shall not be able to invoke the defence referred to in the preceding paragraph.** **deleted**

*Justification*

*It is difficult to evaluate what would be the definition of a 'legal impossibility'. Furthermore, legal obstacles which would make it 'legally impossible' for indirect costumers to claim compensation for their harm suffered would violate the European Court of Justice's Case law (cf Courage and Crehan; Manfredi) and should thus not occur in the first place. The proposed wording can lead to awarding compensation to claimants who have not suffered any harm and/or to over-compensation.*

## Amendment 41

### Proposal for a directive Article 13 – paragraph 2 – subparagraph 2

*Text proposed by the Commission*

*Amendment*

Member States shall ensure that the court has the power to estimate which share of that overcharge was passed on.

Member States shall ensure that the court has the power to estimate which share of that overcharge was passed on. ***The courts shall be assisted by clear, simple and comprehensive guidelines from the Commission.***

## Amendment 42

### Proposal for a directive Article 15 – paragraph 1 – subparagraph 1

***To avoid that actions for damages by claimants from different levels in the supply chain lead to a multiple liability of the infringer, Member States shall ensure that, in cases where it was proven that full or partial passing-on of the overcharge occurred, national courts seized of an action for damages cannot attribute damages to the claimant for that part of the overcharge. The court has the power to estimate which share of the overcharge was suffered by the direct or the indirect purchaser.***

#### **Amendment 43**

##### **Proposal for a directive Article 16**

*Text proposed by the Commission*

*Amendment*

1. Member States shall ensure that, in the case of a cartel infringement, it shall be presumed that the infringement caused harm. The infringing undertaking shall have the right to rebut this presumption.

1. Member States shall ensure that, in the case of a cartel, it shall be presumed that the infringement caused harm. The infringing undertaking shall have the right to rebut this presumption. ***Member States shall provide that national courts be granted the power to estimate the amount of harm.***

2. Member States shall ensure that the burden and the level of proof and of fact-pleading required for the quantification of harm does not render the exercise of the injured party's right to damages practically impossible or excessively difficult. ***Member States shall provide that the court be granted the power to estimate the amount of harm.***

2. Member States shall ensure that the burden and the level of proof and of fact-pleading required for the quantification of harm does not render the exercise of the injured party's right to damages practically impossible or excessively difficult.

## Amendment 44

### Proposal for a directive

#### Article 17 – paragraph 2 a (new)

*Text proposed by the Commission*

*Amendment*

***2a. Member States shall ensure that competition authorities forming part of the network of public authorities applying the Union competition rules may suspend proceedings where the parties to those proceedings are involved in consensual dispute resolution proceedings concerning a claim for damages.***

*Justification*

*In the interest of consumers and undertakings, compensation of damages needs to be cost-effective, timely and efficient. Therefore early consensual dispute resolution needs to be encouraged by giving an incentive linked to the fine set by the competition authorities to ensure such a cost-effective, timely and efficient compensation. If the CA considers the compensation paid as accurate and lawful, it should subsequently take it into account when defining its fine.*

## Amendment 45

### Proposal for a directive

#### Article 19 – paragraph 1

*Text proposed by the Commission*

*Amendment*

The Commission shall review this Directive and report to the European Parliament and the Council by [...] at the latest [to be calculated as 5 years after the date set as the deadline for transposition of this Directive.]

The Commission shall review this Directive and report to the European Parliament and the Council by [...] at the latest [to be calculated as 5 years after the date set as the deadline for transposition of this Directive.]

***The Report shall be accompanied by a coherent post-implementation assessment of the functioning of collective redress and collective ADR mechanisms within the competition sector, with particular evaluation of the essence of widening the application of such mechanisms in other sectors as well or establishing such a***

*mechanism at EU level, to secure effective consumer protection and a balanced operation of the internal market.*

## PROCEDURE

<b>Title</b>	Rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the EU		
<b>References</b>	COM(2013)0404 – C7-0170/2013 – 2013/0185(COD)		
<b>Committee responsible</b> Date announced in plenary	ECON 1.7.2013		
<b>Opinion by</b> Date announced in plenary	IMCO 1.7.2013		
<b>Rapporteur</b> Date appointed	Olle Schmidt 9.7.2013		
<b>Discussed in committee</b>	14.10.2013	27.11.2013	16.12.2013
<b>Date adopted</b>	17.12.2013		
<b>Result of final vote</b>	+: -: 0:	31 0 1	
<b>Members present for the final vote</b>	Pablo Arias Echeverría, Preslav Borissov, Birgit Collin-Langen, Lara Comi, Vicente Miguel Garcés Ramón, Małgorzata Handzlik, Malcolm Harbour, Philippe Juvin, Toine Manders, Hans-Peter Mayer, Sirpa Pietikäinen, Phil Prendergast, Mitro Repo, Robert Rochefort, Zuzana Roithová, Heide Rühle, Christel Schaldemose, Andreas Schwab, Catherine Stihler, Róza Gräfin von Thun und Hohenstein, Bernadette Vergnaud, Barbara Weiler		
<b>Substitute(s) present for the final vote</b>	Jürgen Creutzmann, Ildikó Gáll-Pelcz, Roberta Metsola, Konstantinos Poupakis, Sylvana Rapti, Olle Schmidt, Jutta Steinruck, Marc Tarabella, Kerstin Westphal		
<b>Substitute(s) under Rule 187(2) present for the final vote</b>	Luis Manuel Capoulas Santos		

## PROCEDURE

<b>Title</b>	Rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the EU		
<b>References</b>	COM(2013)0404 – C7-0170/2013 – 2013/0185(COD)		
<b>Date submitted to Parliament</b>	11.6.2013		
<b>Committee responsible</b> Date announced in plenary	ECON 1.7.2013		
<b>Committee(s) asked for opinion(s)</b> Date announced in plenary	ITRE 1.7.2013	IMCO 1.7.2013	JURI 1.7.2013
<b>Not delivering opinions</b> Date of decision	ITRE 8.7.2013		
<b>Associated committee(s)</b> Date announced in plenary	JURI 12.12.2013		
<b>Rapporteur(s)</b> Date appointed	Andreas Schwab 18.6.2013		
<b>Discussed in committee</b>	17.10.2013	25.11.2013	
<b>Date adopted</b>	27.1.2014		
<b>Result of final vote</b>	+: -: 0:	40 3 4	
<b>Members present for the final vote</b>	Marino Baldini, Burkhard Balz, Jean-Paul Basset, Sharon Bowles, George Sabin Cutaş, Leonardo Domenici, Derk Jan Eppink, Diogo Feio, Markus Ferber, Ildikó Gáll-Pelcz, Jean-Paul Gauzès, Sven Giegold, Liem Hoang Ngoc, Wolf Klinz, Jürgen Klute, Rodi Kratsa-Tsagaropoulou, Philippe Lambert, Werner Langen, Astrid Lulling, Ivana Maletić, Alfredo Pallone, Antolín Sánchez Presedo, Peter Simon, Kay Swinburne, Sampo Terho, Marianne Thyssen, Pablo Zalba Bidegain		
<b>Substitute(s) present for the final vote</b>	Pervenche Berès, Zdravka Bušić, Sari Essayah, Robert Goebbels, Olle Ludvigsson, Andreas Schwab		
<b>Substitute(s) under Rule 187(2) present for the final vote</b>	Marta Andreasen, Alejandro Cercas, António Fernando Correia de Campos, Jürgen Creutzmann, Andrew Duff, Richard Howitt, Tunne Kelam, Eduard Kukan, Verónica Lope Fontagné, George Lyon, Emma McClarkin, Evelyn Regner, Alda Sousa, Alf Svensson		
<b>Date tabled</b>	4.2.2014		