OPINION

of the Committee on the Internal Market and Consumer Protection

for the Committee on Economic and Monetary Affairs


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)

<table>
<thead>
<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
</tr>
</thead>
<tbody>
<tr>
<td>(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.</td>
<td></td>
</tr>
</tbody>
</table>

**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 1

Proposal for a directive
Recital 4 b (new)

Text proposed by the Commission

(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 2

Proposal for a directive
Recital 5 a (new)

Text proposed by the Commission

(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 3

Proposal for a directive

Recital 11

Text proposed by the Commission

(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.

Amendment

This Directive should not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 of the Treaty.
Amendment 4

Proposal for a directive
Recital 11 a (new)

Text proposed by the Commission

(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 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
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

(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 cartelist’s 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

(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

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,

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*

(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.

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 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.

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. 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

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. 

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
(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.**

**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**

(41a) **The costs of legal procedures should not deter claimants from bringing well-founded actions to court. Members 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**

<table>
<thead>
<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
</tr>
</thead>
<tbody>
<tr>
<td>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.</td>
<td>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, <em>without prejudice to any requirement under national law to establish liability.</em></td>
</tr>
</tbody>
</table>

**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)**

<table>
<thead>
<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
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</thead>
<tbody>
<tr>
<td>2a. Member States shall ensure that overcompensation is excluded.</td>
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</tbody>
</table>

**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*

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

*Amendment*

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*

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;

*Amendment*

3. ‘action for damages’ means an action 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)
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

Amendment

(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

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**

<table>
<thead>
<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
</tr>
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<tbody>
<tr>
<td>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 <strong>parties and third</strong> parties concerned. They shall, in particular, consider:</td>
<td></td>
</tr>
<tr>
<td><strong>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.</strong> 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 <strong>private</strong> parties concerned. They shall, in particular, consider:</td>
<td></td>
</tr>
</tbody>
</table>

**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)**

<table>
<thead>
<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
</tr>
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<tbody>
<tr>
<td><strong>(aa) the need to safeguard the effectiveness of the public enforcement of</strong></td>
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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

<table>
<thead>
<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
</tr>
</thead>
<tbody>
<tr>
<td>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.</td>
<td>deleted</td>
</tr>
</tbody>
</table>

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

<table>
<thead>
<tr>
<th>Text proposed by the Commission</th>
<th>Amendment</th>
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</thead>
<tbody>
<tr>
<td>(a) leniency corporate statements; and</td>
<td>(a) all newly produced incriminating documents provided by a leniency applicant; and</td>
</tr>
</tbody>
</table>

Amendment 32
Proposal for a directive
Article 7 a (new)
**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**
(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 counter to such finding of an infringement. This obligation is without prejudice to the rights and obligations under Article 267 of the Treaty.

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, 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 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 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

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

Amendment
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.

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

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

Amendment

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

Text proposed by the Commission

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

1. Member States shall ensure that, in the case of a cartel infringement, it shall be

Amendment

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

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.**

Amendment 44

Proposal for a directive
Article 17 – paragraph 2 a (new)

**Text proposed by the Commission**

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.

**Amendment**

**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

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.]

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 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

<table>
<thead>
<tr>
<th>Title</th>
<th>Rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the EU</th>
</tr>
</thead>
</table>
| Committee responsible | ECON  
Date announced in plenary: 1.7.2013 |
| Opinion by | IMCO  
Date announced in plenary: 1.7.2013 |
| Rapporteur | Olle Schmidt  
Date appointed: 9.7.2013 |
| Discussed in committee | 14.10.2013  
27.11.2013  
16.12.2013 |
| Date adopted | 17.12.2013 |
| Result of final vote | +: 31  
−: 0  
0: 1 |
| Members present for the final vote | Pablo Arias Echeverría, Preslav Borissov, Birgit Collin-Langen, Lara Comi, Vicente Miguel García 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, Róža Gräfin von Thun und Hohenstein, Bernadette Vergnaud, Barbara Weiler |
| Substitute(s) present for the final vote | Jürgen Creutzmann, Ildikó Gáll-Pelcz, Roberta Metsola, Konstantinos Poupakis, Sylvana Rapti, Olle Schmidt, Jutta Steinruck, Marc Tarabella, Kerstin Westphal |
| Substitute(s) under Rule 187(2) present for the final vote | Luis Manuel Capoulas Santos |