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2013/0185 (COD)

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**

(Text with EEA relevance)

{SWD(2013) 203 final}  
{SWD(2013) 204 final}

## EXPLANATORY MEMORANDUM

### 1. CONTEXT OF THE PROPOSAL

#### 1.1. General context

Regulation No 1/2003<sup>1</sup> gives effect to the EU rules prohibiting anticompetitive agreements (including cartels) and abuses of dominant positions ('the EU competition rules'), which are laid down in Articles 101 and 102 of the Treaty on the Functioning of the European Union ('the Treaty'), by setting out the conditions under which the Commission, the national competition authorities ('NCAs') and national courts apply these provisions in individual cases.

Regulation No 1/2003 gives the Commission and the NCAs powers to apply Articles 101 and 102 of the Treaty<sup>2</sup>. The Commission can impose fines on undertakings that have infringed these provisions<sup>3</sup>. The powers of the NCAs are set out in Article 5 of Regulation No 1/2003. The application of the EU competition rules by the Commission and NCAs is commonly referred to as the public enforcement of EU competition law.

In addition to public enforcement, the direct effect of Articles 101 and 102 of the Treaty means that these provisions create rights and obligations for individuals, which can be enforced by the national courts of the Member States<sup>4</sup>. This is referred to as the private enforcement of the EU competition rules.

Damages claims for breaches of Articles 101 or 102 of the Treaty constitute an important area of private enforcement of EU competition law. It follows from the direct effect of the prohibitions laid down in Articles 101 and 102 of the Treaty that any individual can claim compensation for the harm suffered, where there is a causal relationship between that harm and an infringement of the EU competition rules<sup>5</sup>. Injured parties must be able to seek compensation not only for the actual loss suffered (*damnum emergens*) but also for the gain of which they have been deprived (loss of profit or *lucrum cessans*) plus interest<sup>6</sup>. Compensation for harm caused by infringements of EU competition rules cannot be achieved through public enforcement. Awarding compensation is outside the field of competence of the Commission and the NCAs and within the domain of national courts and of civil law and procedure.

Compliance with the EU competition rules is thus ensured through the strong public enforcement of these rules by the Commission and the NCAs, in combination with private enforcement by national courts.

#### 1.2. Grounds for and objectives of the proposal

The present proposal seeks to ensure the effective enforcement of the EU competition rules by

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<sup>1</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, OJ L 1, 4.1.2003, p. 1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become Articles 101 and 102 of the Treaty. Their substance has not been changed.

<sup>2</sup> Articles 4 and 5 of Regulation No 1/2003, respectively.

<sup>3</sup> Article 23 of Regulation No 1/2003.

<sup>4</sup> Article 6 of Regulation No 1/2003; see also Case 127/73, *BRT v. SABAM*, [1974] ECR 51, paragraph 16; Case C-282/95 P, *Guérin Automobiles v Commission*, [1997] ECR I-1503, paragraph 39.

<sup>5</sup> See Case C-453/99, *Courage and Crehan*, [2001] ECR I-6297; Joined Cases C-295/04 to C-298/04, *Manfredi*, [2006] ECR I-6619; Case C-360/09, *Pfleiderer AG v Bundeskartellamt*, [2011] ECR I-5161; and Case C-199/11 *European Community v. Otis NV and others*, [2012] ECR I-0000.

<sup>6</sup> *Manfredi*, see fn 5, paragraph 95.

- (i) optimising the interaction between the public and private enforcement of competition law; and
- (ii) ensuring that victims of infringements of the EU competition rules can obtain full compensation for the harm they suffered.

*Optimising the interaction between the public and private enforcement of competition law*

The overall enforcement of the EU competition rules is best guaranteed through complementary public and private enforcement. However, the existing legal framework does not properly regulate the interaction between the two strands of EU competition law enforcement.

An undertaking that considers cooperating with a competition authority under its leniency programme (whereby the undertaking confesses its participation in a cartel in return for immunity from or a reduction of the fine), cannot know at the time of its cooperation whether victims of the competition law infringement will have access to the information it has voluntarily supplied to the competition authority. In particular, in its 2011 *Pfleiderer* judgment, the European Court of Justice (hereinafter: ‘the Court’)<sup>7</sup>, held that, in the absence of EU law, it is for the national court to decide on the basis of national law and on a case-by-case basis whether to allow the disclosure of documents, including leniency documents. When taking such a decision, the national court should balance both the interest of protecting effective public enforcement of the EU competition rules and of ensuring that the right to full compensation can be effectively exercised. This could lead to discrepancies between and even within Member States regarding the disclosure of evidence from the files of competition authorities. Moreover, the resulting uncertainty as to the disclosability of leniency-related information is likely to influence an undertaking’s choice whether or not to cooperate with the competition authorities under their leniency programme. In the absence of legally binding action at the EU level, the effectiveness of the leniency programmes — which constitute a very important instrument in the public enforcement of the EU competition rules — could thus be seriously undermined by the risk of disclosure of certain documents in damages actions before national courts.

The need to regulate the interaction of private and public enforcement was confirmed in the stakeholders’ responses to the public consultation on the 2008 White Paper on damages actions for breach of the EU antitrust rules (‘White Paper’)<sup>8</sup> and the 2011 consultation on a coherent European approach to collective redress<sup>9</sup>. The May 2012 resolution of the Heads of the European Competition Authorities also stressed the importance of the protection of leniency material in the context of civil damages actions<sup>10</sup>. The European Parliament repeatedly emphasised that public enforcement in the competition field is essential, and called on the Commission to ensure that private enforcement does not compromise the effectiveness of either the leniency programmes or settlement procedures<sup>11</sup>.

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<sup>7</sup> Case C-360/09, *Pfleiderer AG v Bundeskartellamt*, [2011] ECR I-5161.

<sup>8</sup> COM(2008) 165 final; see also Commission Staff Working Paper annexed to the White Paper, SEC(2008) 404.

<sup>9</sup> Public consultation ‘Towards a coherent European approach to collective redress’, see [http://ec.europa.eu/competition/consultations/2011\\_collective\\_redress/index\\_en.html](http://ec.europa.eu/competition/consultations/2011_collective_redress/index_en.html).

<sup>10</sup> Resolution of the Meeting of the Heads of the European Competition Authorities of 23 May 2012, Protection of leniency material in the context of civil damages actions, available at: [http://ec.europa.eu/competition/ecn/leniency\\_material\\_protection\\_en.pdf](http://ec.europa.eu/competition/ecn/leniency_material_protection_en.pdf).

<sup>11</sup> See the European Parliament resolutions of 2 February 2012 on ‘Towards a Coherent European Approach to Collective Redress’ (2011/2089(INI)): <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2012-21>

The first main objective of the present proposal is thus to optimise the interaction between public and private enforcement of the EU competition rules, ensuring that the Commission and the NCAs can maintain a policy of strong public enforcement, while victims of an infringement of competition law can obtain compensation for the harm suffered.

*Ensuring the effective exercise of the victims' right to full compensation*

The second main objective is to ensure that victims of infringements of EU competition rules can effectively obtain compensation for the harm they have suffered.

While the right to full compensation is guaranteed by the Treaty itself and is part of the *acquis communautaire*, the practical exercise of this right is often rendered difficult or almost impossible because of the applicable rules and procedures. Despite some recent signs of improvement in a few Member States, to date most victims of infringements of the EU competition rules in practice do not obtain compensation for the harm suffered.

As long ago as 2005, the Commission identified, in its Green Paper on damages actions for breach of the EC antitrust rules<sup>12</sup> ('the Green Paper'), the main obstacles to a more effective system of antitrust damages actions. Today, those same obstacles continue to exist in a large majority of the Member States. They relate to

- (i) obtaining the evidence needed to prove a case;
- (ii) the lack of effective collective redress mechanisms, especially for consumers and SMEs;
- (iii) the absence of clear rules on the passing-on defence;
- (iv) the absence of a clear probative value of NCA decisions;
- (v) the possibility to bring an action for damages after a competition authority has found an infringement; and
- (vi) how to quantify antitrust harm.

Besides these specific substantive obstacles to effective compensation, there is wide diversity as regards the national legal rules governing antitrust damages actions and that the diversity has actually grown over recent years. This diversity may cause legal uncertainty for all parties involved in actions for antitrust damages, which in turn leads to ineffective private enforcement of the competition rules, especially in cross-border cases.

To remedy this situation, the second main objective of the present proposal is to ensure that throughout Europe, victims of infringements of the EU competition rules have access to effective mechanisms for obtaining full compensation for the harm they suffered. This will lead to a more level playing field for undertakings in the internal market. In addition, if the likelihood increases that infringers of Articles 101 or 102 of the Treaty have to bear the costs of their infringement, this will not only shift the costs away from the victims of the illegal behaviour, but will also be an incentive for better compliance with the EU competition rules.

To achieve that objective, the Commission put forward concrete policy proposals in its 2008 White Paper. In the ensuing public consultation, civil society and institutional stakeholders

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<sup>12</sup> and on the Annual Report on EU Competition Policy (2011/2094(INI)) <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2012-31>. COM(2005) 672final; see also Commission Staff Working Paper annexed to the Green Paper, SEC(2005) 1732.

such as the European Parliament<sup>13</sup> and the European Economic and Social Committee<sup>14</sup> largely welcomed these policy measures and called for specific EU legislation on antitrust damages actions<sup>15</sup>.

### **1.3. Existing provisions in the area of the proposal**

- Council Regulation No 1/2003 on the implementation of the rules on competition laid down in Articles [101] and [102] of the Treaty
  - Pursuant to Article 2, the burden of proving an infringement of Article 101(1) or of Article 102 of the Treaty shall rest on the party alleging the infringement. Should the defending party claim the benefit of Article 101(3) of the Treaty, it shall bear the burden of proving that the conditions of that paragraph are fulfilled. These rules apply both to public enforcement and to actions for compensation for the harm caused by an infringement of Article 101 or 102 of the Treaty.
  - Article 15(1) provides that, in proceedings for the application of Article 101 or 102 of the Treaty, national courts may ask the Commission to transmit to them information in its possession. The Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 101 and 102 of the Treaty<sup>16</sup> elaborates on the interpretation and practical application of this provision.
  - Article 16(1) provides that when national courts rule on agreements, decisions or practices under Article 101 or Article 102 of the Treaty which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission. National courts must also avoid giving decisions which would conflict with a decision contemplated by the Commission in proceedings it has initiated. To that effect, the national court may assess whether it is necessary to stay the proceedings pending before it.
- Council Regulation No 44/2001 contains rules on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters<sup>17</sup>. Under the conditions set out in that Regulation, courts of the Member States have jurisdiction to hear antitrust damages actions, and judgments in such actions are recognised and enforced in other Member States.

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<sup>13</sup> European Parliament Resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules (2008/2154(INI)).

<sup>14</sup> European Economic and Social Committee Opinion of 25 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules, OJ C 228, 22.09.2009, p. 40.

<sup>15</sup> See European Parliament Resolution of 2 February 2012 on the Annual Report on EU Competition Policy (2011/2094(INI)).

<sup>16</sup> OJ C 101, 27.4.2004, p. 54.

<sup>17</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1. This Regulation has been recently replaced by Regulation (EU) No 1215/2012 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. 1, which for the most part will enter into force on 10 January 2015.

- Council Regulation No 1206/2001 regulates the cooperation between the courts of different Member States in the taking of evidence in civil or commercial matters, thus including antitrust damages actions<sup>18</sup>.
- Article 6(3) of Regulation No 864/2007 of the European Parliament and of the Council contains rules on the law applicable in antitrust damages actions<sup>19</sup>.
- Regulation 861/2007 of the European Parliament and of the Council<sup>20</sup> establishes a European procedure for small claims, intended to simplify and speed up litigation concerning small claims in cross-border cases, and to reduce costs.
- Directive 2008/52/EC of the European Parliament and of the Council requires Member States to provide for a possibility to mediate in all civil and commercial matters, thus including antitrust damages actions<sup>21</sup>.
- Article 15(4) of Commission Regulation No 773/2004<sup>22</sup> determines that documents obtained through access to the file of the Commission shall only be used for the purposes of judicial or administrative proceedings for the application of Articles 101 and 102 of the Treaty. The Commission Notice on access to the file<sup>23</sup> provides for more detailed rules as regards access to the Commission file and the use of those documents.
- The Commission Notice on immunity from fines and reduction of fines in cartel cases (the ‘Leniency Notice’)<sup>24</sup> contains rules on the conditions under which undertakings can cooperate with the Commission in the framework of its leniency programme in order to obtain immunity from or a reduction of its fine in a cartel case. In paragraph 33 it determines that access to corporate statements is only granted to the addressees of a statement of objections, provided that — together with the legal counsels obtaining access on their behalf — they do not make any copy by mechanical or electronic means of any information in the corporate statement and that the information from the corporate statement is solely used for the purposes mentioned in the Leniency Notice. Other parties such as complainants are not granted access to corporate statements. This specific protection of a corporate statement is no longer justified when the applicant discloses its content to a third party. Furthermore, the Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases (the ‘Settlement Notice’)<sup>25</sup> sets out the framework for rewarding cooperation with the Commission in the conduct of

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<sup>18</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.

<sup>19</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, p. 40.

<sup>20</sup> Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ L 199, 31.07.2007, p. 1.

<sup>21</sup> Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136, 24.5.2008, p. 3.

<sup>22</sup> Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L 123/18, 27.4.2004, p. 18.

<sup>23</sup> Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, OJ C 325/07, 22.12.2005, p. 7.

<sup>24</sup> Commission Notice on immunity from fines and reduction of fines in cartel cases, OJ C 298, 08.12.2006, p. 17.

<sup>25</sup> OJ 2008/C 167/1.

proceedings commenced in view of the application of Article 101 of the Treaty in cartel cases ('settlement procedure'). Its paragraph 39 contains rules on the disclosure of settlement submissions to national courts.

## **2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS**

### **2.1. Consultation of interested parties**

Both the 2005 Green Paper and the 2008 White Paper triggered a broad debate among stakeholders, and a large number of comments were submitted<sup>26</sup>. The public consultations showed broad support for the Commission's general approach to enabling antitrust damages actions. Respondents welcomed the guiding principle of compensation and the consequential choice not to suggest measures such as US-style class actions, wide pre-trial discovery or multiple damages, which would pursue primarily an objective of deterrence. There was broad acknowledgement of the obstacles that prevent effective redress for victims of infringements of the competition rules. However, different opinions were voiced as to the substantive measures suggested with a view to remedying the problems.

In 2011, the Commission held a public consultation on a coherent European approach to collective redress<sup>27</sup>. In the wake of stakeholders' responses and the position of the European Parliament<sup>28</sup>, the Commission opted for a horizontal approach on this matter rather than the inclusion of competition-specific provisions on collective redress in the current proposal. Adopting a horizontal approach allows for common rules on collective redress for all policy fields in which scattered harm frequently occurs and in which it is difficult for consumers and SMEs to obtain damages. As the first step of an horizontal approach on collective redress, the Commission adopted the Communication 'Towards a European Framework for Collective Redress'<sup>29</sup> and a Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law.<sup>30</sup>

The Commission also held a public consultation in 2011 on a draft Guidance Paper on the quantification of antitrust harm<sup>31</sup>. This sets out insights into a range of methods used to quantify harm in damages actions and explains the strengths and weaknesses of these

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<sup>26</sup> The written comments received by the Commission during the public consultation can be accessed here: [http://ec.europa.eu/competition/antitrust/actionsdamages/green\\_paper\\_comments.html](http://ec.europa.eu/competition/antitrust/actionsdamages/green_paper_comments.html) (Green Paper consultation) and here:

[http://ec.europa.eu/competition/antitrust/actionsdamages/white\\_paper\\_comments.html](http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments.html) (White Paper consultation).

<sup>27</sup> See fn. 9 above.

<sup>28</sup> European Parliament resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress' (2011/2089(INI)): <http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2012-21>.

<sup>29</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards a European Horizontal Framework for Collective Redress, COM(2013) 401 final.

<sup>30</sup> Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, C(2013) 3539 final.

<sup>31</sup> Public consultation on a Draft Guidance Paper – Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty, accessible at: [http://ec.europa.eu/competition/consultations/2011\\_actions\\_damages/index\\_en.html](http://ec.europa.eu/competition/consultations/2011_actions_damages/index_en.html).

methods. Institutional and other stakeholders generally welcomed the idea of issuing non-binding guidance on quantifying harm caused by antitrust infringements<sup>32</sup>.

## **2.2. Collection and use of external expertise**

The Commission commissioned external studies for the preparation of the 2005 Green Paper<sup>33</sup>, for the 2008 White Paper<sup>34</sup> and for the 2011 draft Guidance Paper on the quantification of antitrust harm<sup>35</sup>.

## **2.3. Impact assessment**

The proposed Directive was preceded by an Impact Assessment, which built largely on the findings of the Impact Assessment on the White Paper. In particular, measures that had been excluded in the White Paper because of their likely ineffectiveness or excessive costs were not reconsidered.

The impact assessment report<sup>36</sup> focused on four options for a follow-up initiative aimed at optimising the interaction between public and private enforcement of the EU competition rules and ensuring a more effective legal framework for damages actions for infringements of the EU competition rules across Europe. They ranged from no action at the EU level, through a soft-law approach, to two options for legally binding EU action.

The preferred option — which is the basis of this proposal for a Directive — is considered to be the most cost-efficient way of achieving the set objectives. It takes due account both of the main comments received during the public consultations over the past eight years and of more recent legislative and judicial developments at EU and national level.

# **3. LEGAL ELEMENTS OF THE PROPOSAL**

## **3.1. Legal basis of the proposal**

The choice of a legal basis for a European measure must be based on objective factors which are amenable to judicial review. Those include the aim and content of the measure. The current proposal is based on both Articles 103 and 114 of the Treaty, because it pursues two equally important goals which are inextricably linked, namely (a) to give effect to the principles set out in Articles 101 and 102 of the Treaty and (b) to ensure a more level playing field for undertakings operating in the internal market, and to make it easier for citizens and businesses to make use of the rights they derive from the internal market.

Regarding the first objective, the Court has clarified that the full effectiveness of the EU competition rules and, in particular, the practical effect of the prohibitions they contain would be put at risk if it were not open to any person to claim damages for loss caused to him/her by a contract or conduct liable to restrict or distort competition. It considered that damages actions strengthen the working of the EU competition rules and can thus make a significant

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<sup>32</sup> The submissions received under the public consultation are available at: [http://ec.europa.eu/competition/consultations/2011\\_actions\\_damages/index\\_en.html#contributions](http://ec.europa.eu/competition/consultations/2011_actions_damages/index_en.html#contributions).

<sup>33</sup> ‘Study on the conditions of claims for damages in case of infringement of EC competition rules’, accessible at: <http://ec.europa.eu/competition/antitrust/actionsdamages/study.html>.

<sup>34</sup> ‘Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios’, accessible at: [http://ec.europa.eu/competition/antitrust/actionsdamages/files\\_white\\_paper/impact\\_study.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf).

<sup>35</sup> ‘Quantifying antitrust damages — Towards non-binding guidance for courts’, accessible at: [http://ec.europa.eu/competition/antitrust/actionsdamages/quantification\\_study.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf).

<sup>36</sup> Commission Staff Working Document, Impact Assessment Report, Damages actions for breach of the EU antitrust rules, Strasbourg 11-6-2013, SWD(2013) 203 final.



contribution to maintaining effective competition in the EU<sup>37</sup>. In seeking to improve the conditions under which injured parties can claim damages and to optimise the interaction between the public and private enforcement of Articles 101 and 102 TFEU, the present proposal clearly gives effect to these provisions. This means that the proposed Directive must be based on Article 103 of the Treaty.

However, that legal basis in itself does not suffice, because both the aim and the content of the proposed Directive transcend this legal basis. Indeed, the aim of the proposed Directive is wider than giving effect to Articles 101 and 102 TFEU. The current divergence of national rules governing damages actions for infringements of the EU competition rules, including the interaction of such actions with the public enforcement of those rules, has created a markedly uneven playing field in the internal market. These marked differences were already described in a 2004 comparative study<sup>38</sup> and in the 2008 White Paper and its accompanying Impact Assessment. Since then, these differences have increased due to diverging legislative and judicial developments in only a limited number of Member States.

One example of divergence is given by the different national rules applying to access to evidence. With the exception of a few Member States, the lack of adequate rules on the disclosure of documents in proceedings before a national court means that victims of a competition law infringement, who are seeking compensation for the harm suffered, have no effective access to evidence. Other examples concern national rules on passing-on (where existing differences have major implications for the ability of direct/indirect purchasers to effectively claim damages and, in turn, for the defendant's chances of avoiding compensation for harm caused), the probative value of NCA decisions in subsequent damages actions, and national rules that are relevant to the quantification of antitrust harm (e.g. the existence of a presumption of harm).

Because of this marked diversity of national legislations, the rules applicable in some Member States are considered by claimants to be much more suitable for bringing an antitrust damages action in those Member States rather than in others. These differences lead to inequalities and uncertainty concerning the conditions under which injured parties, both citizens and businesses, can exercise the right to compensation they derive from the Treaty, and affect the effectiveness of such right. Indeed, where the jurisdictional rules allow a claimant to bring its action in one of those 'favourable' Member States and where that claimant has the necessary resources and incentives to do so, it is thus far more likely to effectively exercise its EU right to compensation than when it cannot do so. As injured parties with smaller claims and/or fewer resources tend to choose the forum of their Member State of establishment to claim damages (one reason being that consumers and smaller businesses in particular cannot afford to choose a more favourable jurisdiction), the result of the discrepancies between national rules may be an uneven playing field as regards actions for damages and may affect competition on the markets in which these injured parties operate.

Similarly, these marked differences mean that undertakings established and operating in different Member States are exposed to significantly different levels of risk of being held liable for infringements of competition law. This uneven enforcement of the EU right of compensation may result in a competitive advantage for undertakings that have breached Articles 101 or 102 of the Treaty, but which do not have their headquarters or are not active in one of the 'favourable' Member States. Conversely, uneven enforcement is a disincentive to the exercise of the rights of establishment and provision of goods or services in those Member

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<sup>37</sup> See fn. 5 above.

<sup>38</sup> See fn. 33 above.

States where the right to compensation is more effectively enforced. The differences in the liability regimes may thus negatively affect competition and run a risk of appreciably distorting the proper functioning of the internal market.

To ensure a more level playing field for undertakings operating in the internal market and to improve the conditions for injured parties to exercise the rights they derive from the internal market, it is therefore appropriate to increase legal certainty and to reduce the differences between the Member States as to the national rules governing actions for antitrust damages.

The extent to which the approximation of national rules is pursued is not limited to damages actions for breaches of the EU competition rules, but also of national competition rules when they are applied in parallel. In particular, when an infringement that has an effect on trade between Member States also breaches national competition law, actions for damages based on it must comply with the same standards established for breaches of EU competition law.

Approximating national substantive and procedural rules with the aim of pursuing undistorted competition in the internal market and enabling citizens and undertakings the full exercise of the rights and freedoms they derive therefrom is not merely ancillary to the objective of ensuring effective enforcement of the EU competition rules. This conclusion results not only from the aims, but also from the specific provisions of the proposed Directive. The content of the proposed Directive cannot be fully covered by Article 103 of the Treaty because it also modifies the applicable national rules concerning the right to claim damages for infringements of national competition law, even if that is only in respect to anticompetitive behaviour that has an effect on trade between Member States and to which EU competition law thus equally applies<sup>39</sup>. It follows that the scope of the proposed Directive, arising not only from the aims but also from the contents of the instrument, goes beyond giving effect to Articles 101 and 102 of the Treaty and means that the proposed Directive also has to be based on Article 114 TFEU.

These interdependent, though distinct, aims of the proposed Directive cannot be pursued separately, through the adoption of two different instruments. For instance, it is not feasible to split the proposed Directive into a first instrument, based on Article 103 TFEU, that approximates national rules in damages actions for breaches of Articles 101 and 102 TFEU, and a second one, based on Article 114 TFEU, that requires Member States to apply the same substantive and procedural rules to damages actions for breaches of national competition law. This choice cannot be made for substantive and procedural reasons.

From a substantive point of view, the indissociable link between the two independent objectives underpins the concrete measures that pursue them. For instance, the exceptions to disclosure and limitations of liability give full effect to Articles 101 and 102, even in claims based on breaches of national competition law, when this has been applied in parallel to the Treaty provisions. Moreover, because of the need for legal certainty and a level playing field in the internal market, the same rules must apply to breaches of EU competition rules and of national competition law (where these are applied in parallel to the EU rules). From a procedural point of view, and to avoid impairing the institutional balance within the EU legislature, the only way of achieving uniform rules for the two situations is to adopt a single legal instrument in the same procedure.

For these reasons, the contents of the initiative are not split among separate instruments but are addressed jointly in the proposed Directive, which should thus be based on both Articles 103 and 114 of the Treaty.

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<sup>39</sup> See further under section 4.1 below.

### 3.2. Subsidiarity principle (Article 5(3) of the Treaty on European Union)

The proposed Directive is in line with the subsidiarity principle since its objectives cannot be sufficiently achieved by the Member States, and there is a clear need for, and value in, EU action. A legally binding act at EU level will be better capable of ensuring that full effect is given to Articles 101 and 102 of the Treaty through common standards allowing for effective damages actions across the EU, and that a more level playing field is established in the internal market.

More specifically, the proposed Directive can be deemed to comply with the principle of subsidiarity for the following reasons:

- There is a significant risk that effective public enforcement by the Commission and NCAs would be jeopardised in the absence of EU-wide regulation of the interaction between public and private enforcement, and in particular of a common European rule on information from the file of a competition authority being available for the purposes of a damages action. The point can be illustrated most clearly with regard to information that undertakings have voluntarily given to competition authorities under their leniency programme. The unpredictability that follows from the fact that each national court has to decide on an *ad hoc* basis and according to the applicable national rules whether or not to grant access to this leniency-related information cannot be adequately addressed by — potentially diverging — national legislation. Indeed, since the Commission and the NCAs can exchange information within the ECN, potential leniency applicants are likely to take into account the national legislation which offers the lowest level of protection (for fear that their case may eventually be decided by that NCA). The perceived level of protection of leniency-related information will thus be determined by whichever national legislation offers the lowest level of protection, to the detriment of the applicable rules in other Member States. It is therefore necessary to establish a standard common to all Member States for the interaction between public and private enforcement. This can only be done at the EU level.
- Experience shows that, in the absence of EU legislation, most Member States do not provide, on their own initiative, for an effective framework for compensation for victims of infringements of Articles 101 and 102 of the Treaty, as repeatedly required by the Court. Since the publication of the Commission's Green and White Papers, only a small number of Member States have enacted legislation aimed at enabling antitrust damages actions, and even this is usually limited to specific issues and does not cover the whole range of measures envisaged by the current proposal. Despite the few steps taken by some Member States, there is thus still a lack of effective compensation for victims of infringements of the EU antitrust rules. Only further incentives at European level can create a legal framework that gives effective redress and guarantees the right of effective judicial protection as laid down in Article 47 of the Charter of Fundamental Rights of the European Union.
- There is currently a marked inequality between Member States in the level of judicial protection of individual rights guaranteed by the Treaty; this may cause distortions of competition and of the proper functioning of the internal market. The result is an evident disparity in even the content of the entitlement to damages guaranteed by EU law. More specifically, a claim under the law of one Member State may lead to full recovery of the claimant's loss, while a claim for an identical infringement in another Member State may lead to a significantly lower award or even no award at all. This inequality increases if — as is the case at present — only some Member States

improve the conditions under which victims of a competition law infringement can claim compensation for the harm suffered. The trans-national dimension of Articles 101 and 102 of the Treaty and their intrinsic link to the functioning of the internal market warrants measures at the EU level.

### **3.3. Proportionality principle (Article 5(4) of the Treaty on European Union)**

In terms of proportionality, the proposed Directive does not go beyond what is necessary to effectively achieve its objectives, namely to guarantee effective protection of public enforcement of competition law across the EU, and to guarantee access for victims of competition law infringements to a truly effective mechanism for obtaining full compensation for the harm they have suffered, while protecting the legitimate interests of defendants and third parties.

Under the proposed Directive, those objectives are also achieved at the lowest possible cost. The potential costs for citizens and businesses are proportionate to the stated objectives. A first step in this direction was taken with the White Paper by excluding more radical measures (e.g. multiple damages, opt-out class actions and wide-ranging discovery rules). The efforts to strike this balance were broadly welcomed during the public consultations. The safeguards built into the proposed Directive strengthen this balance further by reducing potential costs (especially litigation costs) without jeopardising the right to compensation. Furthermore, certain measures suggested in the White Paper, such as collective redress and rules on the fault requirement, have since been discarded for the purposes of this proposal. Finally, the choice of a Directive as the appropriate instrument is in line with the principle that there should be as little intervention as possible, so long as the objectives are achieved.

### **3.4. A Directive as the most appropriate legally binding instrument**

The objectives of the present proposal can best be pursued through a Directive. This is the most appropriate legal instrument to make the measures work effectively and to facilitate smooth adaptation into the legal systems of the Member States:

- A Directive requires Member States to achieve the objectives and implement the measures into their national substantive and procedural law systems. This approach gives the Member States more freedom when implementing an EU measure than does a Regulation, in that Member States are left the choice of the most appropriate means of implementing the measures in the Directive. This allows Member States to ensure that these new rules are consistent with their existing substantive and procedural legal framework.
- Furthermore, a Directive is a flexible tool for introducing common rules in areas of national law that are crucial for the functioning of the internal market and the effectiveness of damages actions, and for ensuring adequate guarantees throughout the EU, while leaving room for individual Member States to go further, should they so wish.
- Finally, a Directive avoids unnecessary action wherever the domestic provisions in the Member States are already in line with the proposed measures.

## **4. DETAILED EXPLANATION OF THE PROPOSAL**

### **4.1. Scope and definitions (Chapter I: Articles 1 – 4)**

The proposed Directive seeks to improve the conditions under which compensation can be obtained for harm caused by (a) infringements of the EU competition rules, and (b) infringements of national competition law provisions, where the latter are applied by a

national competition authority or a national court in the same case in parallel to the EU competition rules. Such parallel application has its basis in the way in which Regulation No 1/2003 regulates the relationship between Articles 101 and 102 of the Treaty and national competition laws. Regulation No 1/2003 provides that where national competition authorities or national courts apply national competition law to agreements within the meaning of Article 101 which may affect trade between Member States, they must also apply Article 101. Similarly, where they apply national competition law to any abuse prohibited by Article 102, they must also apply Article 102<sup>40</sup>. In cases where compensation is sought for a violation of both EU and national competition law, it is appropriate for the same substantive and procedural rules to apply to those damages actions. Applying diverging rules on civil liability for a single specific instance of anticompetitive behaviour would not only make it unworkable for judges to handle the case, it would also imply legal uncertainty for all parties involved, and it could lead to conflicting results depending on whether the national court considers the case as an infringement of EU or of national competition law, thus hampering the effective application of those rules. The proposed Directive therefore refers to damages actions for ‘infringements of national or EU competition law’ or jointly ‘infringements of competition law’, whereby ‘national competition law’ is defined narrowly so as to cover only cases where it is applied in parallel to EU competition law.

The proposed Directive sets out rules (i) ensuring that any natural or legal persons harmed by infringements of the competition rules are granted equivalent protection throughout the Union and can effectively enforce their EU right to full compensation through damages actions before national courts; and (ii) optimising the interaction between such damages actions and the public enforcement of the competition rules.

Article 2 recalls the *acquis communautaire* on the EU right to full compensation. The proposed Directive thus embraces a compensatory approach: its aim is to allow those who have suffered harm caused by an infringement of the competition rules to obtain compensation for that harm from the undertaking(s) that infringed the law.

Article 2 also recalls the *acquis communautaire* on standing and on the definition of damage to be compensated. The notion of actual loss referred to in this provision is taken from the case-law of the Court of Justice, and does not exclude any type of damage (material or immaterial) that might have been caused by an infringement of the competition rules.

Article 3 recalls the principles of effectiveness and equivalence which must be complied with by national rules and procedures relating to actions for damages.

#### **4.2. Disclosure of evidence (Chapter II: Articles 5 – 8)**

Establishing an infringement of the competition rules, quantifying antitrust damages, and establishing causality between the infringement and the harm suffered typically require a complex factual and economic analysis. Much of the relevant evidence a claimant will need to prove his case is in the possession of the defendant or of third persons and is often not sufficiently known or accessible to the claimants (‘information asymmetry’). It is widely recognised that the difficulty a claimant encounters in obtaining all necessary evidence constitutes in many Member States one of the key obstacles to damages actions in competition cases. In so far as the burden of proof falls on the (allegedly) infringing undertaking<sup>41</sup>, it too may need to have access to evidence in the hands of the claimant and/or

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<sup>40</sup> Article 3(1) of Regulation No 1/2003.

<sup>41</sup> e.g. with regard to the passing-on defence, see section 4.4 below.

of a third party. The opportunity to ask the judge to order disclosure of information is therefore available to both parties to the proceedings.

The disclosure regime in the proposed Directive builds on the approach adopted in Directive 2004/48/EC on the enforcement of intellectual property rights<sup>42</sup>. Its aim is to ensure that in all Member States there is a minimum level of effective access to the evidence needed by claimants and/or defendants to prove their antitrust damages claim and/or a related defence. At the same time, the proposed Directive avoids overly broad and costly disclosure obligations that could create undue burdens for the parties involved and risks of abuses. The Commission has also paid particular attention to ensuring that the proposal is compatible with the different legal orders of the Member States. To this end, the proposal follows the tradition of the great majority of Member States and relies on the central function of the court seized with an action for damages: disclosure of evidence held by the opposing party or a third party can only be ordered by judges and is subject to strict and active judicial control as to its necessity, scope and proportionality.

National courts should have at their disposal effective measures to protect any business secrets or otherwise confidential information disclosed during the proceedings. Furthermore, disclosure should not be allowed where it would be contrary to certain rights and obligations such as the obligation of professional secrecy. Courts must also be able to impose sanctions which are sufficiently deterrent to prevent destruction of relevant evidence or refusal to comply with a disclosure order.

To prevent that the disclosure of evidence jeopardises the public enforcement of the competition rules by a competition authority, the proposed Directive also establishes common EU-wide limits to disclosure of evidence held in the file of a competition authority:

- (a) First, it provides for absolute protection for two types of documents which are considered to be crucial for the effectiveness of public enforcement tools. The documents referred to are the leniency corporate statements and settlement submissions. The disclosure of these documents risks seriously affecting the effectiveness of the leniency programme and of settlements procedures. Under the proposed Directive, a national court can never order disclosure of such documents in an action for damages.
- (b) Second, it provides for temporary protection for documents that the parties have specifically prepared for the purpose of public enforcement proceedings (e.g. the party's replies to the authority's request for information) or that the competition authority has drawn up in the course of its proceedings (e.g. a statement of objections). Those documents can be disclosed for the purpose of an antitrust damages action only after the competition authority has closed its proceedings.
- (c) Apart from limiting the national court's ability to order disclosure, the above protective measures should also come into play if and when the protected documents have been obtained in the context of public enforcement proceedings (e.g. in the exercise of one of the parties' right of defence). Therefore, where one of the parties in the action for damages had obtained those documents from the file of a competition authority, such documents are not admissible as evidence in an action for damages (documents of category (a) above) or are admissible only when the authority has closed its proceedings (documents of category (b) above).

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<sup>42</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, 30.04.2004, p. 45.

- (d) Documents which fall outside the above categories can be disclosed by court order at any moment in time. However, when doing so, national courts should refrain from ordering the disclosure of evidence by reference to information supplied to a competition authority for the purpose of its proceedings<sup>43</sup>. While the investigation is on-going, such disclosure could hinder public enforcement proceedings, since it would reveal what information is in the file of a competition authority and could thus be used to unravel the authority's investigation strategy. However, the selection of pre-existing documents that are submitted to a competition authority for the purposes of the proceedings is in itself relevant, as undertakings are invited to supply targeted evidence in view of their cooperation. The willingness of undertakings to supply such evidence exhaustively or selectively when cooperating with competition authorities may be hindered by disclosure requests that identify a category of documents by reference to their presence in the file of a competition authority rather than their type, nature or object (e.g. requests for all documents in the file of a competition authority or all documents submitted thereto by a party). Therefore, such global disclosure requests for documents should normally be deemed by the court as disproportionate and not complying with the requesting party's duty to specify categories of evidence as precisely and narrowly as possible.
- (e) Finally, to prevent documents obtained through access to a competition authority's file becoming an object of trade, only the person who obtained access to the file (or his legal successor in the rights related to the claim) should be able to use those documents as evidence in an action for damages.

To achieve coherence regarding the rules on disclosure and the use of certain documents from the file of a competition authority, it is necessary to also amend existing rules on the conduct of Commission's proceedings laid down in Commission Regulation 773/2004<sup>44</sup>, notably as regards access to the Commission's file and use of documents obtained therefrom, and the explanatory Notices published by the Commission<sup>45</sup>. The Commission intends doing so once the present Directive is adopted by the European Parliament and Council.

### **4.3. Effect of national decisions, limitation periods and joint and several liability (Chapter III: Articles 9 – 11)**

#### *4.3.1. Probative effect of national decisions*

Pursuant to Article 16(1) of Regulation No 1/2003, a Commission decision relating to proceedings under Article 101 or 102 of the Treaty has a probative effect in subsequent actions for damages, as a national court cannot take a decision running counter to such Commission decision<sup>46</sup>. It is appropriate to give final infringement decisions by national competition authorities (or by a national review court) similar effect. If an infringement

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<sup>43</sup> Obviously, the same limitation applies when national courts order the disclosure of documents of category (b) above, once a competition authority has closed its proceedings.

<sup>44</sup> Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty, OJ L123, 27.04.2004, p. 18.

<sup>45</sup> Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ C101, 27.4.2004, p. 54; Commission Notice on the rules for access to the Commission file in cases pursuant to Articles 81 and 82 of the EC Treaty, Articles 53, 54 and 57 of the EEA Agreement and Council Regulation (EC) No 139/2004, OJ C 325, 22.12.2005, p. 7; and Commission Notice on the conduct of settlement procedures in view of the adoption of Decisions pursuant to Article 7 and Article 23 of Council Regulation (EC) No 1/2003 in cartel cases, OJ C 167, 2.7.2008, p. 1.

<sup>46</sup> Case C-199/11 *European Community v Otis and others*, [2012] ECR I-0000.

decision has already been taken and has become final, the possibility for the infringing undertaking to re-litigate the same issues in subsequent damages actions would be inefficient, cause legal uncertainty and lead to unnecessary costs for all parties involved and for the judiciary.

The proposed probative effect of final infringement decisions of national competition authorities does not entail any lessening of judicial protection for the undertakings concerned, as infringement decisions by national competition authorities are still subject to judicial review. Moreover, throughout the EU, undertakings enjoy a comparable level of protection of their rights of defence, as enshrined in Article 48(2) of the EU Charter on Fundamental Rights. Finally, the rights and obligations of national courts under Article 267 of the Treaty remain unaffected by this rule.

#### 4.3.2. *Limitation periods*

To give victims of a competition law infringement a reasonable opportunity to bring a damages action, while ensuring an appropriate level of legal certainty for all parties involved, the Commission proposes that the national rules on limitation periods for a damages action:

- allow victims sufficient time (at least five years) to bring an action after they became aware of the infringement, the harm it caused and the identity of the infringer;
- prevent a limitation period from starting to run before the day on which a continuous or repeated infringement ceases; and
- in case a competition authority opens proceedings into a suspected infringement, the limitation period to bring an action for damages relating to such infringement is suspended until at least one year after a decision is final or proceedings are otherwise terminated.

#### 4.3.3. *Joint and several liability*

Where several undertakings infringe the competition rules jointly — typically in the case of a cartel — it is appropriate that they be jointly and severally liable for the entire harm caused by the infringement. While the proposed Directive builds on this general rule, it introduces certain modifications with regard to the liability regime of immunity recipients. The objective of these modifications is to safeguard the attractiveness of the leniency programmes of the Commission and of the NCAs, which are key instruments in detecting cartels and thus of crucial importance for the effective public enforcement of the competition rules.

Indeed, as leniency recipients are less likely to appeal an infringement decision, this decision often becomes final for them earlier than for other members of the same cartel. This may make leniency recipients the primary targets of damages actions. To limit the disadvantageous consequences of such exposure, while not unduly limiting the possibilities for injured parties to obtain full compensation for the loss suffered, it is proposed to limit the immunity recipient's liability, as well as his contribution owed to co-infringers under joint and several liability, to the harm he caused to his own direct or indirect purchasers or, in the case of a buying cartel, his direct or indirect providers. Where a cartel has caused harm only to others than the customers/providers of the infringing undertakings, the immunity recipient would be responsible only for his share of the harm caused by the cartel. How that share is determined (e.g. turnover, market share, role in the cartel, etc.), is left to the discretion of the Member States, as long as the principles of effectiveness and equivalence are respected.

The protection of immunity recipients cannot, however, interfere with the victims' EU right to full compensation. The proposed limitation on the immunity recipient's liability cannot therefore be absolute: the immunity recipient remains fully liable as a last-resort debtor if the



injured parties are unable to obtain full compensation from the other infringers. To guarantee the *effet utile* of this exception, Member States have to make sure that injured parties can still claim compensation from the immunity recipient at the time they have become aware that they cannot obtain full compensation from the co-cartelists.

#### **4.4. Passing-on of overcharges (Chapter IV: Articles 12 – 15)**

Persons who have suffered harm caused by an infringement of the competition rules are entitled to compensation, regardless of whether they are direct or indirect purchasers. Injured parties are entitled to compensation for actual loss (overcharge harm) and for loss of profit. When an injured party has reduced his actual loss by passing it on, partly or entirely, to his own purchasers, the loss thus passed on no longer constitutes harm for which the party that passed it on has to be compensated. However, where a loss is passed on, the price increase by the direct purchaser is likely to lead to a reduction in the volume sold. That loss of profit, as well as the actual loss that was not passed on (in the case of partial passing-on) remains antitrust harm for which the injured party can claim compensation.

If the harm is suffered as a result of an infringement relating to a supply to the infringing undertaking, passing-on could also take place in an upwards direction on the supply chain. This would, for example, be the case when, as a result of a buying cartel, the suppliers of the cartelists charge lower prices, and those suppliers then in turn require lower prices from their own suppliers.

To ensure that only the direct and indirect purchasers that actually suffered overcharge harm can effectively claim compensation, the proposed Directive explicitly recognises the possibility for the infringing undertaking to invoke the passing-on defence.

However, in situations where the overcharge was passed on to natural or legal persons at the next level of the supply chain for whom it is legally impossible to claim compensation, the passing-on defence cannot be invoked. Indirect purchasers may be faced with the legal impossibility of claiming compensation because of national rules on causality (including rules on foreseeability and remoteness). Allowing the passing-on defence when it is legally impossible for the party to whom the overcharge was allegedly passed on to claim compensation would be unjustified, since it would mean that the infringing undertaking is unduly freed from liability for the harm he caused. The burden of proving the passing-on always lies with the infringing undertaking. In the case of an action for damages brought by an indirect purchaser, this implies a rebuttable presumption pursuant to which, subject to certain conditions, a passing-on to that indirect purchaser occurred. As regards the quantification of the 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. Where injured parties from different levels of the supply chain bring separate actions for damages that are related to the same competition law infringement, national courts should take due account, as far as allowed under applicable national or EU law, of parallel or preceding actions (or judgments resulting from such actions) in order to avoid under- and over-compensation of the harm caused by that infringement and to foster consistency between judgments resulting from such linked proceedings. Actions that are pending before the courts of different Member States may be considered as related within the meaning of Article 30 of Regulation No 1215/2012<sup>47</sup>, meaning that they are so closely connected that it is expedient to hear and determine them together to avoid the risk of

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<sup>47</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. 1.

irreconcilable judgments resulting from separate proceedings. As a consequence, any court other than the court first seized may stay its proceedings or decline jurisdiction if the court first seized has jurisdiction over the actions in question and its law permits the consolidation of the actions.

Both Regulation No 1215/2012 and this proposed Directive thus seek to encourage consistency between judgments resulting from related actions. To achieve that, the proposed Directive has an even wider scope than Regulation No 1215/2012, as it also covers the situation of subsequent actions for damages relating to the same competition law infringement, brought by injured parties at different levels of the supply chain. These actions can be brought in the same court, in different courts in the same Member State or in different courts of different Member States. In all instances, the proposed Directive encourages the consistency of linked proceedings and judgments.

#### **4.5. Quantification of harm (Chapter V: Article 16)**

Proving and quantifying antitrust harm is generally very fact-intensive and costly, as it may require the application of complex economic models. To assist victims of a cartel in quantifying the harm caused by the competition law infringement, this proposed Directive provides for a rebuttable presumption with regard to the existence of harm resulting from a cartel. Based on the finding that more than 9 out of 10 cartels indeed cause an illegal overcharge<sup>48</sup>, this alleviates the injured party's difficulties and costs related to proving that the cartel caused higher prices to be charged than if the cartel had not existed.

The infringing undertaking could rebut this presumption and use the evidence at its disposal to prove that the cartel did not cause harm. The burden of proof is thus placed on the party which already has in its possession the necessary evidence to meet this burden of proof. The costs of disclosure, which would most likely be necessary for the injured parties to prove the existence of harm, are thus avoided.

Apart from the above presumption, antitrust harm is quantified on the basis of national rules and procedures. These must, however, be in line with the principles of equivalence and of effectiveness. The latter, in particular, dictates that the burden and the level of proof may not render the injured party's right to damages practically impossible or excessively difficult. In terms of quantifying antitrust harm, where the actual situation needs to be compared with a hypothetical one, this means that judges must be able to estimate the amount of harm. This increases the likelihood that victims will actually obtain an adequate amount of compensation for the harm they have suffered.

To make it easier for national courts to quantify harm, the Commission is also providing non-binding guidance on this topic in its Communication on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union<sup>49</sup>. The Communication is accompanied by a Commission Staff Working Paper taking the form of a Practical Guide on quantifying harm in actions for damages based on breaches of EU competition law. This Practical Guide explains the strengths and weaknesses of various methods and techniques available to quantify antitrust harm. It also presents and discusses a range of practical examples, which illustrate the typical effects that infringements of the EU competition rules tend to have and how the available methods and techniques can be applied in practice.

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<sup>48</sup> 'Quantifying antitrust damages — Towards non-binding guidance for courts', accessible at: [http://ec.europa.eu/competition/antitrust/actionsdamages/quantification\\_study.pdf](http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf), p. 91.

<sup>49</sup> Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, C(2013) 3440.

#### **4.6. Consensual Dispute Resolution (Chapter VI: Articles 17-18)**

One of the primary objectives of the proposed Directive is to enable victims of a competition law infringement to obtain full compensation for the harm suffered. That objective can be achieved either through a damages action in court or through a consensual out-of-court settlement between the parties. To incentivise parties to settle their dispute consensually, the proposed Directive aims at optimising the balance between out-of-court settlements and actions for damages.

It therefore contains the following provisions:

- (i) suspension of limitation periods for bringing actions for damages as long as the infringing undertaking and the injured party are engaged in consensual dispute resolution;
- (ii) suspension of pending proceedings for the duration of consensual dispute resolution;
- (iii) reduction of the settling injured party's claim by the settling infringer's share of harm. For the remainder of the claim, the settling infringer could only be required to pay damages if the non-settling co-infringers were unable to fully compensate the injured party; and
- (iv) damages paid through consensual settlements to be taken into account when determining the contribution that a settling infringer needs to pay following a subsequent order to pay damages. In this context, 'contribution' refers to the situation where the settling infringer was not a defendant in the action for damages, but is asked by co-infringers who were ordered to pay damages to contribute under the rules of joint and several liability.

### **5. BUDGETARY IMPLICATIONS**

The proposed Directive does not have any budgetary implications.

### **6. ADDITIONAL INFORMATION**

#### **6.1. Repeal of existing legislation**

No previous legislative act is repealed through this present proposal.

#### **6.2. Review**

Article 21 of the proposed Directive requires the Commission to report to the European Parliament and the Council on its effects at the latest five years after the deadline for transposition into national law.

Once the proposed Directive has been adopted, the Commission will continue to monitor the legal framework for antitrust damages actions in the Member States, focusing primarily on the achievement of the two main objectives of the proposed Directive, i.e.

- (i) optimising the interaction between the public and private enforcement of competition law; and
- (ii) ensuring that victims of infringements of the EU competition rules can obtain full compensation for the harm they have suffered.

The Commission will assess whether the Directive is successful in removing inefficiencies and obstacles preventing full compensation of victims of antitrust infringements and whether the interaction between public and private enforcement of competition law is functioning

smoothly, to guarantee the optimal overall enforcement of EU competition law. As part of this monitoring process, the Commission will continue its dialogue with all relevant stakeholders.

Finally, an ex-post evaluation as regards the need for further modifications will be made once the measures put forward by the Directive are being fully implemented in the Member States, i.e. at least five years after the deadline for transposition of the Directive.

### **6.3. Explanatory documents**

The proposed Directive sets out specific measures to approximate substantive and procedural national rules governing actions for damages for infringements of the competition law provisions of the Member States and of the European Union. There are several legal obligations stemming from the proposed Directive. Its effective transposition will therefore require that specific and targeted amendments are made to the relevant national rules. In order for the Commission to monitor the correct implementation, it is thus not sufficient for Member States to transmit the text of the implementing provisions, as an overall assessment of the resulting regime under national law may be necessary. For these reasons, Member States should also transmit to the Commission explanatory documents showing which existing or new provisions under national law are meant to implement the individual measures set out in the proposed Directive.

### **6.4. European Economic Area**

The proposed Directive relates to the effective enforcement of Articles 101 and 102 of the Treaty, by optimising the interaction between the public and private enforcement of these provisions as well as by improving the conditions under which victims of competition law infringements can claim damages. The proposed Directive contributes to the proper functioning of the internal market as it creates a more level playing field both for the undertakings that infringe the competition rules and for the victims of this illegal behaviour. Due to these objectives in the fields of competition and the internal market, which form part of the EEA legal rules, the proposal is relevant for the EEA.

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**

(Text with EEA relevance)

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<sup>50</sup>,  
After transmission of the draft legislative act to the national Parliaments,  
Having regard to the opinion of the European Economic and Social Committee<sup>51</sup>,  
Acting in accordance with the ordinary legislative procedure,  
Whereas:

- (1) Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter referred to as the Treaty) are a matter of public policy and must 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>52</sup> (hereinafter: Regulation No 1/2003). Public enforcement is also carried out by national competition authorities, which may take the decisions listed in Article 5 of Regulation No 1/2003.
- (3) Articles 101 and 102 of the Treaty 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 of the Treaty, 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

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<sup>50</sup> OJ C , , p. .

<sup>51</sup> OJ C , , p. .

<sup>52</sup> OJ L 1, 4.1.2003, p. 1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become respectively Articles 101 and 102 TFEU. The two sets of provisions are identical in substance.

of those provisions. This Union right to compensation applies equally to breaches of Articles 101 and 102 by public undertakings or undertakings entrusted with special or exclusive rights by Member States within the meaning of Article 106 of the Treaty.

- (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.
- (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.
- (6) In accordance with Article 26(2) of the Treaty, 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 Treaty, 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 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 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.
- (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.
- (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

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<sup>53</sup> OJ C 326, 26.10.2012, p. 391.

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 of the Treaty 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 of the Treaty, 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 may 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 Treaty, and they may not be formulated or applied less favourably than those applicable to similar domestic actions.
- (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.
- (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 Treaty.
- (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.

- (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.
- (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.
- (16) Where the 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 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters<sup>54</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 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.
- (18) The effectiveness and consistency of the application of Articles 101 and 102 of the Treaty 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

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<sup>54</sup> OJ L 174, 27.6.2001, p. 1.



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. 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.
- (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) Apart from the evidence referred to in recitals (19) and (20), 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 of the Treaty, the use of such evidence is also allowed for other legal entities belonging to the same undertaking.
- (23) However, the use referred to in the previous recital may not unduly detract from the effective enforcement of competition law by a competition authority. Limitations to disclosure referred to in recitals (19) and (20) should thus equally apply to the use of evidence which is obtained solely through access to the file of a 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, 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 of the Treaty 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 of the Treaty 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. This is without prejudice to the rights and obligations of national courts under Article 267 of the Treaty.
- (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.
- (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 (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.

- (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.
- (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.
- (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. It is therefore appropriate to provide that, where the existence of a claim for damages or the amount to be awarded depends on whether or to what degree an overcharge paid by the direct purchaser of the infringing undertaking has been passed on to the indirect purchaser, the latter is regarded as having brought the proof that an overcharge paid by that direct purchaser has been passed on to his level, where he is able to show *prima facie* that such passing-on has occurred. It is furthermore appropriate to define under what conditions the indirect purchaser is to be regarded as having established such

*prima facie* proof. As regards the quantification of passing-on, 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. The infringing undertaking should be allowed to bring proof showing that the actual loss has not been passed on or has not been passed on entirely.

- (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). The rules of 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. 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.
- (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.
- (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.

- (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 may 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 (recital (27) above). 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 of Fundamental Rights of the European Union.

- (43) As it would be impossible, with a disparity of policy choices and legal rules at national level concerning the Union right to compensation in actions for damages for infringement of the Union competition rules, to ensure the full effect of Articles 101 and 102 of the Treaty, and to ensure the proper functioning of the internal market for undertakings and consumers, these objectives cannot be sufficiently achieved by the Member States, and can therefore, by reason of the requisite effectiveness and consistency in the application of Articles 101 and 102 of the Treaty, be better achieved at Union level. The European Parliament and the Council therefore adopt this Directive, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. 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>55</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.

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 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.
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. 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.

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<sup>55</sup> OJ C 369, 17.12.2011, p. 14.

2. Full compensation shall place anyone who has suffered harm in the position in which that person would have been had the infringement not been committed. It shall therefore include compensation for actual loss and for loss of profit, and payment of interest from the time the harm occurred until the compensation in respect of that harm has actually been paid.
3. Member States shall ensure that injured parties can effectively exercise their claims for damages.

### *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 of the Treaty shall not be less favourable to the injured parties than those governing similar domestic actions.

### *Article 4*

#### ***Definitions***

For the purposes of this Directive, the following definitions shall apply:

1. ‘infringement of competition law’ means an infringement of Article 101 or 102 of the Treaty or of national competition law within the meaning of paragraph 2;
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;
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;
4. ‘claim for damages’ means a claim for compensation of harm caused by an infringement of competition law;
5. ‘injured party’ means anyone who has a claim for damages;
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 Articles 101 and 102 of the Treaty;
7. ‘competition authority’ means the Commission or a national competition authority;
8. ‘national court’ or ‘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 Article 101 or 102 of the Treaty;

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 of a competition authority or review court that can no longer be reviewed;
12. 'cartel' means an agreement and/or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition, through practices such as the fixing or coordination of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors;
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;
14. 'leniency corporate statement' means an oral or written presentation voluntarily provided by, or on behalf of, an undertaking to a competition authority, describing the undertaking's knowledge of a secret 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 of the Treaty 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 Article 101 of the Treaty or a corresponding provision under national law and its liability for this infringement, which was drawn up specifically as a formal request for the authority to apply an expedited procedure;
16. 'overcharge' means any positive difference between the price actually paid and the price that would have prevailed in the absence of an infringement of competition law;
17. 'consensual settlement' means an agreement whereby damages are paid following a consensual dispute resolution.



## CHAPTER II

### DISCLOSURE OF EVIDENCE

#### *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 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:
  - (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.

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.

#### *Article 6*

##### ***Limits on the disclosure of evidence from the file of a competition authority***

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:
  - (a) leniency corporate statements; and
  - (b) settlement submissions.
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:
  - (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 by a competition authority in the course of its proceedings.
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 7*

##### ***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.

## *Article 8*

### *Sanctions*

1. Member States shall ensure that national courts can impose sanctions on parties, third parties and their legal representatives in the event of:
  - (a) failure or refusal to comply with any court's disclosure order;
  - (b) the destruction of relevant evidence, provided that, at the time of destruction:
    - (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 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.
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 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.

#### *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 not begin to run before an injured party knows, or can reasonably be expected to have knowledge of:
  - (i) the behaviour constituting the infringement;
  - (ii) the qualification of such behaviour as an infringement of Union or national competition law;
  - (iii) the fact that the infringement caused harm to him; and
  - (iv) the identity of the infringer who caused such harm.
3. Member States shall ensure that the limitation period does not begin to run before the day on which a continuous or repeated infringement 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 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.

## 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 damage caused by the infringement: each of the infringing undertakings is bound to compensate for the harm in full, and the injured party may require full compensation from any of them until he has been fully compensated.
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. 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 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.

## 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. The burden of proving that the overcharge was passed on shall rest with the defendant.
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.

## 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, the burden of proving the existence and scope of such pass-on shall rest with the claimant.
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 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, 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 the court has the power to estimate which share of that overcharge was passed on.

This paragraph shall be without prejudice to the infringer'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 at supply level***

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.
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 Article 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.
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 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.

## 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.

#### *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.
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 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.*]

### *Article 20*

#### ***Transposition***

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [*to be calculated as 2 years after the date of adoption 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 21*

#### ***Entry into force***

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 Strasbourg,

*For the European Parliament*

*For the Council*



## **LEGISLATIVE FINANCIAL STATEMENT**

This proposal has no impact on the EU budget.