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COVER NOTE

from: Secretary-General of the European Commission,
signed by Mr Jordi AYET PUIGARNAU, Director

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to: Mr Uwe CORSEPIUS, Secretary-General of the Council of the European
Union

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Subject: COMMISSION STAFF WORKING DOCUMENT
IMPLEMENTATION PLAN Accompanying the document
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

Delegations will find attached Commission document SWD(2013) 270 final.

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Suite à une erreur technique, ce document n'a pas été transmis avec le COM(2013) 404 qu'il accompagne.

COMMISSION STAFF WORKING DOCUMENT

IMPLEMENTATION PLAN

Accompanying the document

Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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

{COM(2013) 404 final}

{SWD(2013) 203 final}

{SWD(2013) 204 final}

IMPLEMENTATION PLAN¹ for the

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

1. INTRODUCTION

The proposed Directive 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 (hereinafter: "the Directive") pursues the objectives of achieving effective enforcement of the right to compensation for harm caused by infringements of the antitrust rules and to level the playing field in the internal market for consumers and businesses. In order to achieve these objectives, 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. The proper and timely transposition of such measures may raise some implementation challenges, concerning not only the smooth incorporation of antitrust specific rules in national legal orders, but also the prompt and coherent application of those rules in national courts. The practical effect of the provisions of the proposed Directive may also rest on the extent to which information can be successfully disseminated among stakeholders.

The Commission's services have thus laid down the present implementation plan, which identifies implementation challenges and suggests a set of actions aimed at targeting them. The measures, which are summarised in explanatory tables annexed to the present plan, encompass both actions by the Commission and actions by the Member States. The time-frame of the actions is structured depending on the specific needs that may arise at different stages of the transposition process and even beyond it. The actions envisaged for Member States are meant to foster cooperation with the Commission in view of easing transposition tasks and foster better compliance with their obligations. The actions envisaged by the Commission are meant to loyally assist and support the Member States in the fulfilment of their tasks, to monitor the implementation process, and to ensure an adequate dissemination of information to stakeholders and support of national courts.

This Implementation Plan is provided for information purposes only. It does not legally bind the Commission on whether the identified actions will be pursued or on the form in which they will be pursued. As regards Member State actions, the present implementation plan does not create further legal obligations on the Member States other than those stemming from the proposed Directive, in accordance with the Treaties. It should be noted that possible adjustments and modifications of the present plan could be necessary to reflect future developments in the implementation of the proposed Directive.

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2. CONTACT POINT

The contact point for information about the implementation plan and for cooperation in the performance of the actions it suggests, is the Commission's Directorate-General for Competition – Unit A6 Private Enforcement. In order to ensure prompt support and a unified port of call for all issues arising from the proposed Directive, the following functional mailbox has already been activated:

COMP-DAMAGES-ACTIONS@EC.EUROPA.EU

As regards national courts willing to avail themselves of the cooperation mechanisms already offered under the EU legal order, the following mailbox is already active:

COMP-AMICUS@EC.EUROPA.EU

3. DELIVERABLES AND IMPLEMENTATION CHALLENGES

The challenges arising from the implementation of the proposed Directive go beyond the mere transposition of the measures into national law, and may give rise to specific risks and problematic issues. As regards these specific risks, four main challenges have been identified. These challenges are explained in the following sub-sections alongside the suggested support actions by the Commission and the Member States.

3.1. Providing full implementation within the time-frame

Member States have to ensure that national rules governing damages actions for breach of national and EU antitrust rules comply with the proposed Directive. In order to comply with their obligation, Member States may amend existing general tort rules within their legal system or lay down specific rules applicable to antitrust damages actions.

The monitoring of existing national rules applicable to antitrust damages actions and the clear understanding of the obligations stemming from the proposed Directive are crucial activities for a full and timely implementation. Firstly, they will help understanding which existing rules are already in line with the requirements of the proposed Directive. Secondly, they will facilitate the assessment of what further amendments are necessary and appropriate to ensure full compliance by the Member States. Following this assessment, an adequate planning for the adoption of the required measures should also be foreseen.

The Commission should loyally cooperate with the Member States in the evaluation of specific problems and in the development of tailored solutions to the technical issues that may arise. Member States should also assist the Commission by transmitting information on the implementation measures undertaken, thus enabling it to monitor the progress of the transposition process within the time-frame.

3.2. Exchange of best practices in meeting technical challenges

In order to meet the requirements of the proposed Directive, Member States may benefit from experience from other jurisdictions in a cross-exchange of best practices. This should cover both the monitoring of existing measures and the identification of better and more efficient technical solutions to the implementation challenges arisen.

A constant exchange of information is thus necessary, although it may in some instances be made difficult by the specificities and differences of each national legal order. The Commission is prepared to foster this process. Member States are thus invited to enter into a constant dialogue with the Commission about the problems encountered, the technical solutions devised, and the best practices already available at national level. The Commission, on its part, should ensure adequate availability and exchange of such information in order to ease the process and allow better mutual understanding among the responsible actors at Member States' level.

3.3. Ensuring adequate training and support for national courts in applying the rules transposing the proposed Directive and fostering cooperation

Beyond the alignment of the national legal system to the requirements of the Directive in order to achieve a minimum standard across the internal market, the success of the initiative and the practical effect of the proposed Directive crucially depends on the enforcement of the rights and obligations of individuals under the Treaty and pursuant to the implementing provisions adopted by Member States. The Commission identified effective compensation for victims of competition law infringements as an indicator which will determine the successful implementation of the proposed Directive. This equally applies to the application of the provisions meant to safeguard public enforcement of the competition rules by the Commission and national competition authorities and regulate its interplay with actions pending before those national courts.

The role played by national courts in this implementation challenge is crucial. It is therefore necessary to foresee specific actions in order to foster adequate training and support for national courts both at national and at EU level. This should also encompass actions aimed at increasing knowledge of the duties of national courts under the EU legal order and of best application practices by national courts compatibly with the applicable national rules. The Commission should also undertake actions to offer support to national courts within existing cooperation mechanisms.

3.4. Ensuring adequate information to citizens and businesses

Beyond the full implementation of the proposed Directive in national legal orders, actions should be put in place to further advance awareness of victims of antitrust infringements about the possibilities offered to them under the EU and the national legal order to obtain redress for the harm suffered. The dissemination of information should also reach those undertakings that may cooperate with the Commission and national competition authorities, in order to increase legal certainty about the legal framework governing the interaction between public and private enforcement. Increased awareness may thus produce benefits in terms of compliance by undertakings, while improved legal certainty about the interplay between public and private enforcement could foster increased cooperation by infringers with competition authorities.

4. SUPPORT ACTIONS

4.1 Commission Actions

a) Full implementation within the time-frame

- The Commission should make available all information about the proposed Directive useful to clearly identify the scope of the obligations for the Member States and by making available all the useful preparatory documents. To this end, all relevant information about the Commission's policy documents, external studies, documents for public consultation and responses thereof are already available on the dedicated website pages at:
<http://ec.europa.eu/competition/antitrust/actionsdamages/documents.html>.
These pages will be updated when necessary.
- Upon request by the relevant services within the Member States, the Commission will offer advice on technical issues arisen. To this end, the Commission identified a single contact point within its services, that can be reached through the functional address indicated below in point 5. The Commission services will also be available to respond to such requests in bilateral meetings.
- If significant transposition issues would arise in several Member States, the Commission may consider issuing interpretative guidance.

b) Exchange of best practices in meeting technical challenges

- The Commission will open a dedicated page on its website, where transposition-related information will be published in order to allow for comparison and cross-exchange of best practices.
- Should particular difficulties arise in several Member States, the Commission may consider the set-up of a network to discuss technical issues and recurring implementation challenges, in order to facilitate the discussion among Member States and the exchange of best practices.

c) Ensuring adequate training and support for national courts and fostering cooperation

- The Commission should continue its effort of analysis of the relevant case-law of national courts on actions for damages as well as consensual settlements among the parties where available. Within this activity, the Commission may set-up a database of non-confidential version of judgments issued by national courts.
- The Commission will participate in conferences aimed at raising national judges' awareness of EU competition law and the issues covered by the proposed Directive. The Commission endeavours to contribute to activities of national training programmes for judges and organise meetings with associations of judges specifically dealing with competition law issues.
- The Commission should continue its programme on the training of judges on issues of application of the EU competition rules. It will consider strengthening the focus of the programme on private enforcement and will take specific training needs within certain jurisdictions into account.
- Within the above actions, the Commission will pursue awareness raising initiatives about the existing cooperation mechanisms under Article 15 of Regulation 1/2003,

notably about the possibility for national courts to request information or opinions from the Commission on issues of application of Articles 101 and 102 of the Treaty. Where appropriate, under the conditions established by the same provision, the Commission may avail itself of the possibility to submit observation of its own initiative, when the coherent application of those Treaty provisions so requires.

- The concrete application of Articles 101 and 102 TFEU and the implementing provisions of the proposed Directive before national courts will be one of the specific criteria for the *ex-post* evaluation of the initiative (see also below, point 4 paragraph d). In drawing up its report to the European Parliament and Council, the Commission will specifically address possible improvements in view of the experience on the application by national courts.

d) Ensuring adequate information to citizens and businesses

- The Commission will intensify its advocacy effort by participating at stakeholder events aimed at increasing awareness on the right to compensation and the interplay between public and private enforcement of the antitrust rules.
- The website-page of DG Competition will be regularly updated to provide information to potential victims about the possibilities offered under EU and national law. DG Competition will produce informative material, such as brochures, particularly targeted at potential victims of antitrust infringements, including small and medium-sized enterprises (SME) and consumers.
- As regards compensation claims following an infringement decision adopted by the Commission, it is current practice to inform potential victims of their right to compensation in the press releases announcing such decisions. The Commission will maintain this practice.

4.2 Member States' Actions

a) Full implementation within the time-frame

- Member States may at any moment inform the Commission's services of specific technical challenges encountered and questions arisen within the transposition effort, so as to allow the Commission to offer the available information and assistance that they may require. Member States may also informally consult the Commission's services on draft transposition measures.
- In order to make it possible for the Commission to monitor the transposition efforts made and the progress in the transposition of the Directive within the time-frame, Member States should communicate to the Commission the text of laws, regulations and administrative provisions adopted to comply with the Directive (Article 20 of the proposed Directive), or the text of already existing provisions that they consider to be in line with it. Such provisions should contain a reference to the Directive or be accompanied by a reference on the occasion of their official publication, in the form chosen by the Member States.
- Member States should transmit explanatory documents showing which existing or new provisions implement the individual measures set out in the proposed Directive.

b) Exchange of best practices in meeting technical challenges

- Member States should transmit transposition-related information to the Commission and communicate any significant implementation issue.
- Where efficient solutions are already in place under national law or have been introduced within the transposition of the proposed Directive, Member States should inform the Commission so as to allow it to offer specific examples to other Member States that may be facing similar issues.

c) Ensuring adequate training and support for national courts and fostering cooperation

- Member States could meet specific needs of national courts on the issues covered by the proposed Directive within the training programmes for their judges, either in general programmes within the initial and continuous training for the judiciary or, where applicable, in specific initiatives aimed at judges that are called to apply competition law.
- Under Article 15(2) of Regulation 1/2003, Member States must transmit a copy of any written judgment of national courts deciding on the application of Article 101 or 102 TFEU. However, at present only a minority of Member States complies with this provision. In order to enable the Commission to cooperate with national courts, better analyse national case-law, and identify potential training needs, Member States should systematically abide by this obligation.
- Under Article 15(3) of Regulation 1/2003 also national competition authorities ('NCAs') are entitled to cooperate with national courts by submitting written observations to national courts of their Member State on issues of application of Articles 101 and 102 TFEU. The Commission and NCAs may consider further cooperation on how to make best use of this joint competence.

d) Ensuring adequate information to citizens and businesses

- Member States should update their information sources, particularly those targeted at potential victims of antitrust infringements, including small and medium-sized enterprises (SME) and consumers, about the possibility to obtain compensation for harm resulting from antitrust infringements.
- National competition authorities may follow the Commission's practice of informing potential victims of antitrust infringements through press releases accompanying their decisions. The Commission will encourage such practice through informative actions within the European Competition Network

4.3 Timing for Support Actions

Planned actions to achieve the objectives outlined above should take place progressively before, during and after the implementation period foreseen in the proposed Directive. In general, the actions may have to take place in one or more of the following indicative steps:

(a) Step 1: Adoption of the proposed Directive

Immediately after the adoption, the Commission endeavours to take all actions to disseminate information to Member States and stakeholder, and adopt all technical means of support to promptly offer assistance to Member States throughout the entire transposition process.

(b) Step 2: First six months of the transposition period

In this period, the Commission should accompany its information effort with a monitoring effort of technical challenges identified by Member States in the review of national rules that fall within the scope of the Directive. Member States may facilitate this process by informing the Commission's services of questions arisen. The Commission actions targeting support and cooperation with national courts and awareness-raising among stakeholders should be intensified.

(c) Step 3: Last 18 months of the transposition period

The monitoring action by the Commission should extend to the measures that Member State start adopting to fulfil the obligations stemming from the Directive. The dissemination of information on the part of the Commission should focus more intensely on the exchange of best practices among Member States. Member States shall publish the transposition measures adopted and inform the Commission thereof. The Commission should make available such information on its website.

(d) Step 4: After the expiry of the transposition period

The Commission should intensify the monitoring on the issues of application of the new legal framework before national courts as regard effective enforcement of the right to compensation, removal of disparities within the internal market, and optimal interplay between public and private enforcement in the overall effective enforcement of the antitrust rules. Continued cooperation with and support to national courts.

The Commission will perform an *ex-post* evaluation of the extent to which the proposed Directive has improved the legal framework for the effective enforcement of the right to antitrust damages and levelled the playing field for the full exercise of the rights and freedoms that businesses and consumers derive from the internal market. Following this evaluation, and in order to target specific issues arisen, the Commission should review the Directive and report to the European Parliament and the Council within 5 years from the expiry of the deadline for transposition (Article 19 of the proposed Directive).

ANNEX 1

DETAILED IMPLEMENTATION PLAN

The following tables summarise the implementation plan, and give a detailed overview of which actions are foreseen to achieve its objectives, and the envisaged time-frame for the actions.

The timing of the support actions envisaged is structured as follows:

Step 1: Adoption of the proposed Directive;

Step 2: First six months of the transposition period;

Step 3: Last 18 months of the transposition period;

Step 4: After the expiry of the transposition period.

A. ACTIONS BY THE COMMISSION TO PROVIDE GENERAL ASSISTANCE TO THE MEMBER STATES AND NATIONAL COURTS

Implementation Challenge	Action	Timing
Full implementation within the time-frame	Publication on website of useful information and background documents.	<i>Already available; regular updates when necessary</i>
	Advice on technical issues to Member States' services, bilateral meetings.	<i>Steps 2 and 3</i>
	Single point of contact for implementation issues.	<i>Already available</i>
	Issuance of interpretative guidance	<i>Step 3 (if necessary)</i>
Exchange of best practices in meeting technical challenges	Dedicated page on website to publish transposition-related information	<i>Step 1</i>
	Network for discussion of technical issues and recurring implementation challenges	<i>Steps 2 and 3 (if necessary)</i>
Ensuring adequate training and support for national courts in applying the rules transposing the proposed Directive and fostering cooperation.	Monitoring and analysis of relevant case-law	<i>Steps 1, 2, 3 and 4</i>
	Data-base of judgments of national courts.	<i>Step 4</i>
	Advocacy actions, also targeted at existing cooperation mechanisms	<i>Steps 2, 3 and 4</i>
	Training of national judges	<i>Steps 1, 2, 3 and 4</i>

	Ex-post evaluation of specific issues of application before national courts	<i>Steps 4</i>
Ensuring adequate information to citizens and businesses	Increased advocacy efforts, dedicated website and informative materials	<i>Steps 2, 3 and 4</i>
	Regular information of potential victims when infringement decisions are adopted	<i>Steps 1, 2, 3 and 4</i>

B. ACTIONS BY THE MEMBER STATES TO ENSURE SMOOTH IMPLEMENTATION AND ADDRESS POTENTIAL RISKS

Implementation Challenge	Action	Timing
Full implementation within the time-frame	Communication of text of laws, regulations and administrative provisions adopted to comply with the Directive	<i>Steps 2 and 3</i>
	Communication of existing rules that are considered already in line with the Directive.	<i>Step 1</i>
	Information of the Commission about specific challenges encountered within the transposition period	<i>Steps 2 and 3</i>
	Consultation of the Commission's services on draft transposition measures	<i>Steps 2 and 3</i>
	Draw-up explanatory documents on national provisions implementing the measures of the proposed Directive	<i>Steps 2, 3 and 4</i>
Exchange of best practices in meeting technical challenges	Exchange of information with other Member States through the Commission about efficient solutions to transposition issues.	<i>Steps 2 and 3</i>
	Training of national judges under general or specific training	<i>Step 4</i>

Ensuring adequate training and support for national courts in applying the rules transposing the proposed Directive and fostering cooperation.	programmes.	
	Transmission of national judgments applying Articles 101 and 102 TFEU (Art. 15(2) of Regulation 1/2003).	<i>Steps 1, 2, 3 and 4</i>
	Written observations by national competition authorities to the courts of their Member State on issues of application of Articles 101 and 102 TFEU.	<i>Steps 1, 2, 3 and 4</i>
Ensuring adequate information to citizens and businesses	Update of Member States information sources, particularly those aimed at SMEs and consumers	<i>Steps 3 and 4</i>
	Regular information of potential victims when infringement decisions are adopted by National Competition Authorities	<i>Steps 1, 2, 3 and 4</i>