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From:	General Secretariat of the Council
On:	24 March 2014
To:	Permanent Representatives Committee
No. prev. doc.:	6493/14 RC 2 JUSTCIV 37 CODEC 412
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Subject:	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 - Analysis of the final compromise text with a view to agreement

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**I. INTRODUCTION**

1. On 12 June 2013, the European Commission submitted the above-mentioned proposal to the Council and the European Parliament. The two main objectives of the proposal are to ensure the effectiveness of the right to compensation for harm caused by an infringement of Union antitrust rules and to optimise the interaction between public and private enforcement of competition law.

## **II. STATE OF PLAY**

2. The Working Party on Competition intensively examined the proposal during the Lithuanian Presidency.
3. On 2 December 2013, the Council (Competitiveness) provided a mandate to the Presidency to start negotiations with the European Parliament (doc. 17317/13).
4. The European Parliament Committee on Economic and Monetary Affairs (ECON) voted its report on 27 January 2014.
5. The first informal trilogue was held on 10 February 2014. The second informal trilogue took place on 27 February, on the basis of a revised mandate approved by the Committee (doc. 6493/14). Before and after each trilogue, a number of technical meetings took place. As the second trilogue already indicated a very high level of common understanding, the Presidency did not see a necessity for asking for another revised mandate, but fully informed the Committee.
6. At the third informal trilogue, which took place on 18 March, a full compromise was achieved. The compromise text is set out in detail in the Annex with a view to approval by the Committee.

## **II. CONTENT OF THE COMPROMISE**

The result achieved presents a finely-tuned compromise that goes to the limits of the flexibility of the co-legislators. It has therefore to be considered as a package-deal that cannot be reopened at any part without jeopardizing the whole agreement.

## RECITALS

The recitals first and foremost reflect the agreement reached on the Articles. Some of them also include important explanations and precisions, such as, for example,

- recital 21 a: the exception from disclosure should also apply to literal quotations of a leniency statement or a settlement submission in other documents, limitations on the disclosure of evidence should not prevent competition authorities from publishing their decisions in accordance with applicable Union or national rules, any content surplus to the definitions should be disclosable under the relevant conditions ),
- recital 21c: Disclosure of evidence should be ordered from a competition authority only when it cannot be reasonably obtained from another party of third party.
- recital 26: Member States should be able to maintain or introduce absolute limitation periods that are generally applicable provided that the duration of such limitation periods does not render practically impossible or excessively difficult the exercise of the right to full compensation.
- recital 31a: The Commission should issue clear, simple and comprehensive guidelines for national courts on how to estimate the share of the overcharge passed on to indirect purchasers.

- recital 37: Achieving a 'once-and-for-all' settlement for defendants is desirable in order to reduce uncertainty for infringers and injured parties. Therefore,, they 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 (including those where a judge can declare a settlement binding), arbitration, mediation or conciliation. Where possible, such consensual dispute resolution should cover as many injured parties and infringers 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.

## 1. CHAPTER I (Articles 1 to 4)

**Article 1 para 1:** it is clarified that the infringer is **an undertaking or an association of undertakings**, and not an individual employee.

**Article 2 para 1:** it is clarified that the injured party can be **any natural or legal person** who has suffered harm caused by an infringement of competition law. The principle of effectiveness is further emphasized by the formulation "*able to claim **and to obtain** full compensation*".

**Article 2 para 2a** contains the provision that overcompensation is to be avoided.

**Article 3** in essence follows the Council General approach.

**Article 4** contains additional definitions for the terms "infringer" (2a), "evidence" (11a), "pre-existing information" (14a), "immunity recipient" (15a), "consensual dispute resolution" (16a), "direct purchaser" (17a) and "indirect purchaser" (17b). Some of these have been requested by the Council, some by Parliament.

## 2. CHAPTER II - Disclosure of evidence (Articles 5,6 and 7)

In Article 5 para 3 b, the need to avoid so-called "fishing expeditions" has been expressed, with a clear definition of what is not permissible: "**non-specific search of information which is unlikely to be of relevance for the parties in the procedure**";

In Article 5 para -4, it is expressed explicitly that **the interest of undertakings to avoid actions for damages following an infringement of competition law shall not constitute an interest that warrants protection**;

In Article 5 para 5a, the right to be heard for parties from whom disclosure of evidence is sought has been enshrined;

Article 5 para 8 contains the right for Member States to introduce rules allowing for wider disclosure of information, but with an important protection for documents in the "black" and "grey" lists.

Article 6 has been restructured after intense negotiations.

Para 1 clarifies that this article refers to the disclosure of evidence included in the file of a competition authority, and that its rules apply in addition to those of Article 5.

Para 1a clarifies that the rules on disclosure of evidence in Chapter II are without prejudice to the rules and practices on public access to documents under Regulation 1049/2001.

**Para 1b** provides that this Chapter is without prejudice to the rules and practices under Union or national law on the protection of internal documents of competition authorities and correspondence between competition authorities.

**Para 1c** contains **the criteria for assessing the proportionality** of an order to disclose information.

**Para 2** contains the **definition of the "grey list"**:

- (a) information that was prepared by a natural or legal person specifically for the proceedings of a competition authority;
- (b) information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and
- (ba) settlement submissions that have been withdrawn.

**Para 2a** contains the **definition of the limited but absolute "black list"**:

- (a) leniency statements; and
- (b) settlement submissions.

**Para 2b** contains a possibility for the court to **verify** that only the documents included in the "black list" are excluded from disclosure.

**Para 2c** clarifies that, if only parts of a requested document are on the "black list", the remaining parts of the documents are disclosable as either "grey list" or "white list" documents.

**Para 3** contains the "**white list**": every evidence that is not on the "black" or "grey" list is disclosable.

**Para 4** establishes a clear **order of requests for disclosure**: first the court should address requests to the parties, then to third parties, and only when these are unable to or cannot reasonably provide the evidence requested, the court may request disclosure from a competition authority.

**Para 5** enables a competition authority to submit **observations** to the court on its views on the proportionality of the disclosure request on its own initiative.

**Article 7** is essentially unchanged and edited to ensure effective application of the provisions on the limits to disclosure of Article 6.

In **Article 8**, the term "**sanctions**" has been replaced by "**penalties**", which is more appropriate to a civil law context.

### 3. **CHAPTER III - Effect of national decisions, limitation periods, joint and several liability**

**Article 9** contains the important rules on the effect of national decisions:

**Para 1** contains the principle that, **within one and the same Member State**, an infringement of competition law found by a final decision of a national competition authority or a review court is deemed to be **irrefutably established** for the purposes of an action for damages brought before their national courts under Article 101 or 102 of the Treaty or under national competition law. This provision is without prejudice to the rights and obligations under Article 267 of the Treaty.

**Para 2** provides that a final decision given in another Member State may, in accordance with the respective national law, be presented before their national courts as **at least *prima facie* evidence** that an infringement of competition law has occurred, may be assessed along with any other material brought by the parties. .

**Article 10** corresponds to the General Approach, with only editorial changes which improve precision.

**Article 11** establishes the principle of **joint and several liability** and contains two exceptions to this principle:

**Para 1 subpara 1a** contains a provision in favour of an infringer who is a **small or medium-sized enterprise**: he shall be liable only to its own direct and indirect purchasers if its market share in the relevant market was below 5% at any time during the infringement; and the application of the normal rules of joint and several liability would irretrievably jeopardize its economic viability and cause its assets to lose all their value. This exception shall not apply if:

- i) it led the infringement or coerced other undertakings to participate in the infringement; or
- ii) it has previously been found to have infringed competition law.



**Para 2** contains a provision in favour of the **immunity recipient**, who shall be jointly and severally liable only

to its direct or indirect purchasers or providers; and to other injured parties only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law.

**Paras 3 and 4** have been reintroduced at the insistence of the Parliament and contain rules on the recovery of damages paid by one infringer from his co-infringers.

#### **4. CHAPTER IV: passing-on of overcharges**

This Chapter has been restructured in the interest of legal clarity without materially affecting its content. A **new Article 12-a** on passing-on of overcharges and the right to full compensation has been created.

**Para 1** establishes the principle that full compensation of harm can be claimed by anyone who suffered it, irrespective of whether they are direct or indirect purchasers, and that compensation of harm exceeding the harm caused by the infringement to the claimant, as well as the absence of liability of the infringer, are avoided.

**Para 1a** provides that Member States shall lay down the appropriate procedural rules in order to ensure that compensation for actual loss at any level of the supply chain does not exceed the overcharge harm suffered at that level.

**Para 2** clarifies that the rules in Chapter IV are without prejudice to the right to claim and obtain compensation for loss of profits due to a full or partial passing-on of the overcharge.

**Para 3** provides that the rules apply accordingly where the infringement of competition law relates to supply to the infringer.

**Para 4** states that the national court shall have the power to **estimate** which share of the overcharge was passed on, in accordance with national procedures.

**Article 12** contains the core provision on the **passing-on defence**.

The burden of proving that the overcharge was passed on shall rest with the defendant **who may reasonably require disclosure from the claimant and from third parties**.

**Article 13** contains rules applicable to **indirect purchasers**.

In **para 1**, it is stated that the burden of proving the pass-on of overcharge rests with the claimant, who may reasonably require disclosure from the defendant and from third parties. A commercial practice of passing on costs down the supply chain is recognized.

**Para 2** provides that the indirect purchaser shall be deemed to have proven that a passing-on to him occurred where he has shown that:

- (a) the defendant has committed an infringement of competition law;

- (b) the infringement of competition law resulted in an overcharge for the direct purchaser of the defendant; and
- (c) he purchased the goods or services that were the subject of the infringement of competition law, or purchased goods or services derived from or containing the goods or services that were the subject of the infringement.

The defendant may rebut the claim of passing-on of the overcharge.

**Article 14** has been deleted.

**Article 15** (Actions for damages by claimants from different levels in the supply chain) addresses the avoidance of overcompensation of lack of compensation in actions by claimants from different levels in the supply chain.

The insertion of a new **Article 15a** has been requested by Parliament creating an obligation for the Commission to issue guidelines for national courts on how to estimate the share of the overcharge which was passed on to the indirect purchaser.

## **5. CHAPTER V - Quantification of harm**

**Article 16** has been reorganised.

**Para 1** has been deleted.

The Article now begins with the old **para 2** containing the obligation to ensure that the burden and the standard of proof required for the quantification of harm does not render the exercise of the right to damages practically impossible or excessively difficult and to empower the national courts, in accordance with national procedures, to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult to precisely quantify the harm suffered on the basis of the available evidence.

The **new para 2a** contains the old para 1: the rebuttable presumption that cartel infringements cause harm. The reformulation takes great care to make clear that there is no double presumption here, as each individual claimant still has to show that harm was caused to him.

The **new para 2b** enables a national competition authority, at its discretion if it considers it appropriate, to assist on the determination of the quantum of damages upon request of a national court.

## **6. CHAPTER VI - Consensual Dispute Resolution**

**Article 17** (suspensive effect of consensual dispute resolution) has not much been changed.

**Para 1**, containing the principle of suspension, is unchanged.

**Para 2** is rephrased in the way of the Councils General Approach, containing the reference to provisions of national law in matter of arbitration.

In **para 2a**, the suspension is set to be no longer than two years.

In **para 2b**, a competition authority is empowered to consider compensation paid as a result of a consensual settlement, and prior to its decision imposing a fine, to be a mitigating factor.

**Article 18**, containing rules on the effect of consensual settlements on subsequent actions for damages, has been rephrased following the General Approach of the Council.

## **7. CHAPTER VII - FINAL PROVISIONS**

**Article 19** (review) has been materially strengthened in accordance with the concerns of the Parliament with regard to maintaining the ability of infringers to pay damages, by avoiding unduly high fines and overcompensation.

A new **Article 20a** has been inserted on temporal application: without prejudice to the non-retroactive application of substantive provisions of this Directive, the national measures adopted pursuant to Article 20 shall not apply to actions for damages brought before a national court before the entry into force of this Directive.

Articles 20 (transposition), 21 (entry into force) and 22 (addressees) are unchanged with regard to the Commission proposal.

## **IV. CONCLUSION**

**The Permanent Representatives Committee is thus invited to:**

- **endorse the annexed compromise text as agreed in the trilogue,**

- **mandate the Presidency to inform the European Parliament that, should the European Parliament adopt its position at first reading, in accordance with Article 294 paragraph 3 of the Treaty, in the form set out in the compromise package contained in the Annex to this document (subject to revision by the legal linguists of both institutions), the Council would, in accordance with Article 294, paragraph 4 of the Treaty, approve the European Parliament's position and the act shall be adopted in the wording which corresponds to the European Parliament's position.**
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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>1</sup>,

After transmission of the draft legislative act to the national parliaments<sup>2</sup>,

Having regard to the opinion of the European Economic and Social Committee<sup>3</sup>,

Acting in accordance with the ordinary legislative procedure<sup>4</sup>,

Whereas:

- (1) Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) are a matter of public policy and should be applied effectively throughout the Union to ensure that competition in the internal market is not distorted.

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<sup>1</sup> OJ C,,p.

<sup>2</sup> OJ C,,p.

<sup>3</sup> *Opinion of 16 October 2013 (OJ C,,p.*

<sup>4</sup> *Position of the European Parliament of ...*

- (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>5</sup>. Articles 81 and 82 of the Treaty establishing the European Community are now Articles 101 and 102 TFEU and remain identical in substance. Public enforcement is also carried out by national competition authorities, which may take the decisions listed in Article 5 of Regulation No 1/2003<sup>6</sup>. In accordance with that Regulation, Member States should be able to designate administrative as well as judicial authorities to apply Articles 101 and 102 TFEU as public enforcers and carry out the various functions conferred upon competition authorities in that Regulation.
- (3) Articles 101 and 102 TFEU produce direct effects in relations between individuals and create, for the individuals concerned, rights and obligations which national courts must enforce. National courts thus have an equally essential part to play in applying the competition rules (private enforcement). When ruling on disputes between private individuals, they protect subjective rights under Union law, for example by awarding damages to the victims of infringements. The full effectiveness of Articles 101 and 102 TFEU, and in particular the practical effect of the prohibitions laid down therein, requires that anyone — be they an individual, including consumers and undertakings, or a public authority — can claim compensation before national courts for the harm caused to them by an infringement of those provisions. This Union right to compensation applies equally to infringements of Articles 101 and 102 TFEU by public undertakings or undertakings entrusted with special or exclusive rights by Member States within the meaning of Article 106 TFEU.

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<sup>5</sup> Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules of competition laid down in Articles 81 and 82 of the Treaty establishing the European Community (OJ L 1, 4.1.2003, p.1. OJ L 1, 4.1.2003, p.1.

<sup>6</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.



- (4) The right to compensation in Union law for infringements of Union and national competition law requires each Member State to have procedural rules ensuring the effective exercise of that right. The need for effective procedural remedies also follows from the right to effective judicial protection as laid down in Article 47, first paragraph, of the Charter of Fundamental Rights of the European Union<sup>7</sup> (the Charter) and in Article 19(1), second subparagraph of the Treaty on European Union (TEU). Member States should ensure effective legal protection in the fields covered by Union law.
- (4a) Actions for damages are only one element of an effective system of private enforcement of infringements of competition law and are complemented by alternative avenues of redress, such as consensual dispute resolution or public enforcement decisions that give parties an incentive to provide compensation.
- (5) To ensure effective private enforcement actions under civil law and effective public enforcement by competition authorities, both tools are required to interact to ensure maximum effectiveness of the competition rules. It is necessary to regulate, in a coherent manner, the way the two forms of enforcement are coordinated, for instance the arrangements for access to documents held by competition authorities. Such coordination at Union level will also avoid divergence of applicable rules, which could jeopardise the proper functioning of the internal market.

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<sup>7</sup> *OJ C 326, 26.10.2012, p.391.*

- (6) In accordance with Article 26(2) TFEU, the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. There exist marked differences between the rules in the Member States governing actions for damages for infringements of national or Union competition law. Those differences lead to uncertainty concerning the conditions under which injured parties can exercise the right to compensation they derive from the TFEU, and affect the substantive effectiveness of such right. As injured parties often choose the forum of their Member State of establishment to claim damages, the discrepancies between the national rules lead to an uneven playing field as regards actions for damages and may affect competition on the markets on which these injured parties, as well as the infringing undertakings, operate.
- (7) Undertakings established and operating in different Member States are subject to procedural rules that significantly affect the extent to which they can be held liable for infringements of competition law. This uneven enforcement of the right to compensation in Union law may result in a competitive advantage for some undertakings which have infringed Articles 101 or 102 TFEU, and a disincentive to the exercise of the rights of establishment and provision of goods or services in those Member States where the right to compensation is more effectively enforced. Therefore, as the differences in the liability regimes applicable in the Member States may negatively affect both competition and the proper functioning of the internal market, it is appropriate to base this Directive on the dual legal basis of Articles 103 and 114 TFEU.

- (8) It is therefore necessary, bearing in mind that large-scale infringements of competition law often have a cross-border element, to ensure a more level playing field for undertakings operating in the internal market and to improve the conditions for consumers to exercise the rights they derive from the internal market. It is also appropriate to increase legal certainty and to reduce the differences between the Member States as to the national rules governing actions for damages for infringements of Union competition law and, when applied in parallel to the latter, national competition law. An approximation of these rules will also help to prevent the emergence of wider differences between the Member States' rules governing actions for damages in competition cases.
- (9) Article 3(1) of Regulation (EC) No 1/2003 provides that 'where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article [101(1)] of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article [101] of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article [102] of the Treaty, they shall also apply Article [102] of the Treaty.' In the interest of the proper functioning of the internal market and with a view to greater legal certainty and a more level playing field for undertakings and consumers, it is appropriate that the scope of this Directive should extend to actions for damages based on the infringement of national competition law where it is applied pursuant to Article 3(1) of Regulation (EC) No 1/2003. Applying diverging rules on civil liability for infringements of Articles 101 and 102 TFEU and for infringements of rules of national competition law which must be applied in the same case and in parallel to Union competition law would otherwise adversely affect the position of claimants in the same case and the scope of their claims, and constitute an obstacle to the proper functioning of the internal market. The provisions of this Directive should not affect damages actions for infringements of national competition law which do not affect trade between Member States within the meaning of Article 101 or 102 TFEU.

- (10) In the absence of Union law, actions for damages are governed by the national rules and procedures of the Member States. According to the case-law of the Court of Justice, any person can claim compensation for harm suffered where there is a causal relationship between that harm and an infringement of the competition law. All national rules governing the exercise of the right to compensation for harm resulting from an infringement of Article 101 or 102 TFEU, including those concerning aspects not dealt with in this Directive such as the notion of causal relationship between the infringement and the harm, must observe the principles of effectiveness and equivalence. This means that they should not be formulated or applied in a way that makes it excessively difficult or practically impossible to exercise the right to compensation guaranteed by the TFEU, and they should not be formulated or applied less favourably than those applicable to similar domestic actions. Where Member States provide other conditions for compensation under national law, such as imputability, adequacy or culpability, they should be able to maintain such conditions insofar as they comply with the case-law of the Court of Justice, the principles of effectiveness and equivalence, and this Directive.
- (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*) plus interest. This is irrespective of whether the national rules define these categories separately or in combination. The payment of interest is an essential component of compensation to make good the damage sustained by taking into account the effluxion of time, and it should be due from the time the harm occurred until compensation is paid, without prejudice to the qualification of such interest as compensatory or default interest under national law. This is also without prejudice to whether effluxion of time is taken into account as a separate category (interest) or as a constituent part of actual loss or loss of profit. It is incumbent on the Member States to lay down the rules to be applied for that purpose.

The right to compensation 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. Without prejudice to compensation for loss of chance, full compensation under this Directive should not lead to overcompensation, whether by means of punitive, multiple or other damages.

(12) Actions for damages for infringements of national or Union competition law typically require a complex factual and economic analysis. The evidence necessary to prove a claim for damages is often held exclusively by the opposing party or by third parties, and is not sufficiently known by and accessible to the claimant. In such circumstances, strict legal requirements for claimants to assert in detail all the facts of their case at the beginning of an action and to proffer precisely specified pieces of supporting evidence can unduly impede the effective exercise of the right to compensation guaranteed by the TFEU.

- (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 claimants 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 claimants. National courts can also order evidence to be disclosed by third parties, including public authorities. 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. When national courts order the public authority to disclose evidence, the principles of legal and administrative cooperation under national or Union law are applicable.

This Directive does not affect the possibility or the conditions under national law according to which appeals can be brought against disclosure orders.

- (14) The court should be able under its strict control, especially as regards the necessity and proportionality of the disclosure measure, to order disclosure of specified pieces of evidence or categories of evidence upon request of a party. It follows from the requirement of proportionality that a disclosure order can only be triggered once a claimant has made it plausible, on the basis of facts which are reasonably available to him, that he has suffered harm that was caused by the defendant. When a request aims at obtaining a category of evidence, it should identify it by common features of its constitutive elements such as the nature, object or content of the documents, the time in which they have been drawn up, or other criteria, provided that the evidence falling within the category is relevant within the meaning of this Directive. The categories should be defined as precisely and narrowly as possible on the basis of reasonably available facts.

- (15) [deleted, moved to recital 19a]
- (16) Where the national court requests a competent court of another Member State to take evidence or requests evidence to be taken directly in another Member State, the provisions of Council Regulation (EC) No 1206/2001<sup>8</sup> apply.
- (17) While relevant evidence containing business secrets or otherwise confidential information should in principle be available in actions for damages, such confidential information needs to be appropriately protected. National courts should therefore have at their disposal a range of measures to protect such confidential information from being disclosed during the proceedings. These may include the possibility of redacting sensitive passages in documents, conducting hearings in camera, restricting the circle of persons entitled to see the evidence, and instruction of experts to produce summaries of the information in an aggregated or otherwise non-confidential form. Measures protecting business secrets and other confidential information should, nevertheless, not impede the exercise of the right to compensation.
- (18) The effectiveness and consistency of the application of Articles 101 and 102 TFEU by the Commission and the national competition authorities require a common approach across the Union on disclosure of evidence that is included in the file of a competition authority. Disclosure of evidence should not unduly detract from the effectiveness of enforcement of competition law by a competition authority. This Directive does not cover the disclosure of internal documents of competition authorities and correspondence between competition authorities.

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<sup>8</sup> OJ L 174, 27.6.2001, p.1.

(19) [deleted, moved to Recital 21a]

(19a) Regulation 1049/2001 governs public access to European Parliament, Council and Commission documents and is designed to confer on the public as wide a right of access as possible to documents of the institutions. That right is nonetheless subject to certain limits based on reasons of public or private interest.

It follows that the system of exceptions laid down in Article 4 of that regulation is based on a balancing of the opposing interests in a given situation, that is to say, first, the interests which would be favoured by the disclosure of the documents in question and, secondly, those which would be jeopardised by such disclosure. This Directive should be without prejudice to such rules and practices under the Regulation 1049/2001.

(19b) In order to ensure effective protection of the right to compensation enjoyed by a claimant, there is no need for every document relating to a proceeding under Article 101 or 102 TFEU to be disclosed to that claimant on the ground that that party is intending to bring an action for damages, as it is highly unlikely that the action for damages will need to be based on all the evidence in the file relating to that proceeding.

(19c) The requirement of proportionality should also be carefully assessed when disclosure risks unravelling the investigation strategy of a competition authority by revealing which documents are part of the file or causing a negative bearing on the way in which companies cooperate with the competition authority. Particular attention should be paid to preventing fishing expeditions, i.e non-specific search of information which is unlikely to be of relevance for the parties in the procedure.



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 pieces of evidence or categories of evidence as precisely and narrowly as possible.

- (19d) This Directive does not affect the right of the court to consider under national or Union law the interest of effective public enforcement of competition law when ordering disclosure of any type of evidence with the exception of leniency statements and settlement submissions.
- (20) 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 and sent to the parties (such as a Statement of Objections) or prepared by a party to those proceedings (such as replies to requests for information of the competition authority, witness statements) should therefore be disclosable in actions for damages only after the competition authority has closed its proceedings, for instance by adopting a decision under Article 5 of Regulation No 1/2003 or under Chapter III of the same Regulation, with the exception of decisions on interim measures.
- (21) [deleted]

(21a) Leniency programmes and settlement procedures are important tools for the public enforcement of Union competition law as they contribute to the detection, the efficient prosecution and the imposition of penalties for the most serious competition law infringements. Furthermore, as many decisions of competition authorities in cartel cases are based on a leniency application and damages actions in cartel cases are generally follow-on actions, leniency programmes are equally important for effective actions for damages in cartel cases. Undertakings may be deterred from co-operating in this context if self-incriminating statements such as leniency statements and settlement submissions, which are solely produced for the purpose of such cooperation, were disclosed. Such disclosure poses a risk of exposing cooperating undertakings or their managing staff to civil or criminal liability under worse conditions than the co-infringers that do not co-operate with competition authorities. To ensure the undertakings' continued willingness to voluntarily approach competition authorities with leniency statements or settlement submissions, such documents should be excepted from disclosure of evidence . The exception from disclosure should also apply to literal quotations of a leniency statement or a settlement submission in other documents. The limitations on the disclosure of evidence should not prevent competition authorities from publishing their decisions in accordance with applicable Union or national rules. In order to ensure that this complete exception from disclosure does not unduly interfere with the injured parties' right to compensation, it should be limited to these voluntary and self-incriminating leniency statements and settlement submissions.

The rules on access to other documents provided for in this Directive ensure that victims still have sufficient other possibilities to obtain access to the relevant evidence needed to prepare their actions for damages. National courts should be able, upon request of a claimant, to access documents for which the exception is invoked in order to ensure with regard to each other document whether its contents do not exceed the definitions of leniency corporate statements and settlement submissions laid down in this Directive. Any content surplus to the definitions should be disclosable under the relevant conditions.

- (21b) National courts should be able to order at any time, in the context of an action for damages, disclosure of evidence that exists irrespective of the proceedings of a competition authority ('pre-existing information').
- (21c) Disclosure of evidence should be ordered from a competition authority only when it cannot be reasonably obtained from another party or a third party.
- (21d) Pursuant to Article 15(3) of Regulation (EU) No 1/2003, competition authorities, acting on their own initiative, may submit written observations to national courts on issues relating to the application of Article 101 or Article 102 of the Treaty. In order to preserve the contribution made by public enforcement to the application of Articles 101 and 102 of the Treaty, competition authorities should likewise be able to submit their observations on their own initiative to a national court for the purpose of assessing the proportionality of a disclosure of evidence included in its file, in light of the impact such disclosure would have on the effectiveness of public enforcement of competition law. Member States should be able to set up a system whereby a competition authority is informed of requests for disclosure of information when the person requesting disclosure or the person from whom disclosure is sought is involved in this competition authority's investigation into the alleged infringement, without prejudice to national laws providing for *ex parte* proceedings.

- (22) Any natural or legal person who obtains evidence through access to the file of a competition authority can use that evidence for the purposes of an action for damages to which he is a party. Such use should also be allowed for the natural or legal person that succeeded in his rights and obligations, including through the acquisition of his claim. In case the evidence was obtained by a legal person forming part of a corporate group constituting one undertaking for the application of Articles 101 and 102 TFEU, the use of such evidence is also allowed for other legal entities belonging to the same undertaking.
- (23) However, the use 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 (20) and (21a) which are obtained solely through access to the file of a competition authority should be either deemed inadmissible in actions for damages or otherwise protected under applicable national rules to ensure full effect of the limits on the use of evidence pursuant to that provision. Moreover, evidence obtained from a competition authority should not become an object of trade. The possibility of using evidence that was obtained solely through access to the file of a competition authority should therefore be limited to the natural or legal person that was granted access and his legal successors, as mentioned in the previous recital. This limitation does not, however, prevent a national court from ordering the disclosure of that evidence under the conditions provided for in this Directive.

(24) Making a claim for damages, or the start of an investigation by a competition authority, entails a risk that the undertakings concerned may destroy or hide evidence that would be useful in substantiating an injured party's claim for damages. To prevent the destruction of relevant evidence and to ensure that court orders requesting disclosure are complied with, national courts should be able to impose sufficiently deterrent penalties. 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 penalty and can avoid delays. Penalties should also be available for non-compliance with obligations to protect confidential information and for abusive use of information obtained through disclosure.

Similarly, penalties should be available if information obtained through access to the file of a competition authority is used abusively in actions for damages.

(25) The effectiveness and consistency of the application of Articles 101 and 102 of the Treaty by the Commission and the national competition authorities necessitates a common approach across the Union on the effect of final infringement decisions on subsequent actions for damages. Such decisions are adopted only after the Commission has been informed of the envisaged decision or, in the absence thereof, any other document indicating the proposed course of action pursuant to Article 11(4) of Regulation 1/2003, and if the Commission has not relieved the national competition authority of its competence by initiating proceedings pursuant to Article 11(6) of the same Regulation. To that end, the Commission should ensure consistent application of Union competition law by providing bilaterally and within the framework of the European Competition Network guidance to the national competition authorities. 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, the finding of an infringement of Article 101 or 102 of the Treaty in a final decision by a national competition authority or a review court should not be relitigated in subsequent actions for damages. Therefore, such finding of an infringement should be deemed to be irrefutably established in actions for damages brought in the Member State of the national competition authority or review court relating to that infringement. The effect of the finding should, however, only cover the nature of the infringement as well as its material, personal, temporal and territorial scope as it was found by the competition authority or review court in the exercise of its jurisdiction. 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 is without prejudice to the rights and obligations of national courts under Article 267 of the Treaty.

Where an action for damages is brought in a Member State other than the Member State of a national competition authority or a review court that found the infringement of Article 101 or 102 of the Treaty to which the action relates, that finding in a final decision by the national competition authority or the review court should be allowed to be presented before a national court as at least *prima facie* evidence of the fact that an infringement of competition law has occurred, and as appropriate, may be assessed along with any other material brought by the parties.

- (26) National rules on the beginning, duration, suspension or interruption of limitation periods should not unduly hamper the bringing of actions for damages. This is particularly important in respect of actions that build upon the competition authority's or a review court's finding of an infringement. To that end, it should still be possible to bring an action for damages after proceedings by a competition authority, with a view to enforcing national and Union competition law. The limitation period should not begin to run before the infringement ceases and before a claimant knows, or can reasonably be expected to have knowledge of the behaviour constituting the infringement, the fact that the infringement caused harm to him and the identity of the infringer who caused such harm. Member States should be able to maintain or introduce absolute limitation periods that are generally applicable provided that the duration of such limitation periods does not render practically impossible or excessively difficult the exercise of the right to full compensation.

- (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 infringers 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, thus potentially making him the preferential target of litigation. 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 infringer, 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 infringers. 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 infringers.



(29) Harm in the form of 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 infringer to invoke the passing-on of actual loss as a defence against a claim for damages. It is appropriate to provide that the infringer, insofar as it invokes the passing-on defence, must prove the existence and extent of pass-on of the overcharge. This burden of proof should not affect the possibility for the infringer to use evidence other than that in his possession, such as evidence already acquired in the proceedings or evidence held by other parties or third parties.

(29a) In situations where the pass-on resulted in reduced sales and thus harm in the form of a loss of profit, the right to claim compensation for such loss of profit should remain unaffected.

(30) [deleted]

(31) Depending on the conditions under which undertakings are operating, it may be commercial practice to pass on price increases down the supply chain. Consumers or undertakings to whom actual loss has thus been passed on have suffered harm that has been caused by an infringement of national or Union competition law. While such harm should be compensated for by the infringer, it may be particularly difficult for consumers or undertakings that did not themselves make any purchase from the infringer to prove the 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 infringer 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, unless the infringer can credibly demonstrate to the satisfaction of the court that the actual loss has not or not entirely been passed on to the indirect purchaser. It is furthermore appropriate to define under what conditions the indirect purchaser is to be regarded as having established such *prima facie* proof. As regards the quantification of passing-on, 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.

(31a) The Commission should issue clear, simple and comprehensive guidelines for national courts on how to estimate the share of the overcharge passed on to indirect purchasers.

- (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 infringers. The infringement may also concern supplies to the infringer (for example in the case of a buyer's cartel). In such cases, the actual loss could result from a lower price paid by infringers to their suppliers. This Directive and in particular the rules on pass-on should apply accordingly
- (33) Actions for damages can be brought both by those who purchased goods or services from the infringer and by purchasers further down the supply chain. 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 infringer being required to pay damages to compensate for harm that has not been suffered, the national court should have the power to estimate which share of the overcharge was suffered by the direct or indirect purchasers in the dispute pending before it. In this context, national courts should be able to take due account, by procedural or substantive means available under Union and national law, of any related action and of the resulting judgment, particularly where it finds that passing-on has been proven. National courts should have at their disposal appropriate procedural means, such as joinder of claims, to ensure that compensation for actual loss paid at any level of the supply chain does not exceed the overcharge harm caused at that level. Such means should be available also in cross-border cases. 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, and to the rules on the evidentiary value of judgments rendered in that context. 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 European Parliament and of the Council<sup>9</sup>. Under this provision, national courts other than the one first seized may stay proceedings or, under certain circumstances, decline jurisdiction. This Directive should be without prejudice to the rights and obligations of national courts under that provision.

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<sup>9</sup> *Regulation (EU) No.1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 351, 20.12.2012, p.78).*

(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 claimants in terms of obtaining the necessary data to substantiate their claims. As such, the quantification of antitrust harm can constitute a substantial barrier preventing effective claims for compensation.

(35) [deleted, moved to recital 36(a)]

(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 to determine their own rules on quantifying harm and for the Member States and for the national courts to determine what requirements the claimant 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. Member States should ensure that, where requested, national competition authorities may provide guidance on quantum. In order to ensure coherence and predictability the Commission should provide general guidance at Union level.

- (36a) 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, such infringement resulted in harm, in particular via a price effect. Depending on the facts of the case this means that the cartel has resulted in a rise in price, or prevented a lowering of prices which would otherwise have occurred but for the infringement. This presumption should not cover the concrete amount of harm. The infringer should be allowed 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 claimants to obtain the necessary evidence to prove the harm.
- (37) Achieving a 'once-and-for-all' settlement for defendants is desirable in order to reduce uncertainty for infringers and injured parties. Therefore,, they 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 (including those where a judge can declare a settlement binding), arbitration, mediation or conciliation. Where possible, such consensual dispute resolution should cover as many injured parties and infringers 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 infringers from having sufficient time to come to an agreement on the compensation to be paid. In order to provide both with a genuine opportunity to engage in consensual dispute resolution before bringing proceedings before the national court, the limitation period thus needs to be suspended for the duration of the consensual dispute resolution process.

- (39) Furthermore, when parties decide to engage in consensual dispute resolution after an action for damages has been brought before the national court for the same claim, that court should be able to suspend the proceedings before it for the duration of the consensual dispute resolution process. When considering whether to suspend the proceedings, the national court should take into account the interest in an expeditious procedure.
- (40) To encourage consensual settlements, an infringer that pays damages through consensual dispute resolution should not be placed in a worse position vis-à-vis its co-infringers than it would 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, regardless of whether the amount of the settlement equals or is different from the relative share of the harm that the settling co-infringer inflicted upon the settling injured party. This share should be determined in accordance with the same rules used to determine the contributions among infringers. Without such reduction, the non-settling infringers would be unduly affected by the settlement to which they were not a party. By way of exception, in order to ensure the right to full compensation, the settling co-infringer will still have to pay damages where that is the only possibility for the settling injured party to obtain compensation for the remaining claim, that is the claim of the settling injured party reduced by the settling co-infringer's share of the harm that the infringement inflicted upon the settling injured party, unless it is expressly excluded under the terms of the consensual settlement.

- (41) It should be avoided that by paying contribution to non-settling co-infringers for damages they paid to non-settling injured parties, the total amount of compensation paid by the settling co-infringers exceeds their relative responsibility for the harm caused by the infringement. Therefore, when settling co-infringers are asked to contribute to damages subsequently paid by non-settling co-infringers to non-settling injured parties, the national court should take account of the damages already paid under the consensual settlement bearing in mind that not all co-infringers are necessarily equally involved in the full substantive, temporal and geographical scope of the infringement,
- (42) This Directive respects fundamental rights and observes the principles recognised in the Charter,
- (43) Since the objectives of this Directive, namely to establish rules concerning actions for damages for infringements of Union competition law in order to ensure the full effect of Articles 101 and 102 TFEU, and the proper functioning of the internal market for undertakings and consumers, cannot be sufficiently achieved by the Member States, but can rather, by reason of the requisite effectiveness and consistency in the application of Articles 101 and 102 TFEU, be better achieved at Union level, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 TEU. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives,

(44) In accordance with the Joint Political Declaration of Member States<sup>10</sup> and the Commission on explanatory documents of 28 September 2011 , Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified,

(44a) it is appropriate to provide rules for the temporal application of this Directive,

HAVE ADOPTED THIS DIRECTIVE:

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<sup>10</sup> ...



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

*Article 2*

*Right to full compensation*

1. Member States shall ensure that any natural or legal person who has suffered harm caused by an infringement of competition law is able to claim and to obtain full compensation for that harm.

2. Full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement not been committed. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus payment of interest
- 2a. Full compensation under this Directive shall not lead to overcompensation, whether by means of punitive, multiple or other types of damages.

### *Article 3*

#### *Principles of effectiveness and equivalence*

Member States shall ensure that all national rules and procedures relating to the exercise of claims for damages are designed and applied in such a way that they do not render practically impossible or excessively difficult the exercise of the Union right to full compensation for harm caused by an infringement of competition law (principle of effectiveness). Any national rules and procedures relating to actions for damages resulting from infringements of Article 101 or 102 TFEU shall not be less favourable to the alleged injured parties than those governing similar actions for damages resulting from infringements of national law (principle of equivalence).

### *Article 4*

#### *Definitions*

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

- (1) ‘infringement of competition law’ means an infringement of Article 101 or 102 TFEU or of national competition law;

- (2) ‘national competition law’ means provisions of national law that predominantly pursue the same objective as Articles 101 and 102 TFEU and that are applied to the same case and in parallel to Union competition law pursuant to Article 3(1) of Regulation (EC) No 1/2003 and does not include national laws which impose criminal penalties on natural persons except to the extent that such penalties are the means whereby competition rules applying to undertakings are enforced;
- (2a) ‘infringer’ means the undertaking or association of undertakings which has committed the infringement of competition law;
- (3) ‘action for damages’ means an action under national law by which a claim for damages is brought before a national court by an alleged injured party, by someone acting on behalf of one or more alleged injured parties, where Union or national law provides for this possibility, or by the natural or legal person that succeeded in his rights including the person that acquired his claim.
- (4) ‘claim for damages’ means a claim for compensation for harm caused by an infringement of competition law;
- (5) ‘injured party’ means anyone who suffered harm caused by an infringement of competition law;
- (6) ‘national competition authority’ means an authority designated by a Member State pursuant to Article 35 of Regulation (EC) No 1/2003 as being responsible for the application of Articles 101 and 102 of the Treaty;

- (7) ‘competition authority’ means the Commission or a national competition authority;
- (8) ‘national court’ means any court or tribunal of a Member State within the meaning of Article 267 of the Treaty;
- (9) ‘review court’ means a national court that is empowered by ordinary means of appeal to review decisions of a national competition authority or judgments pronouncing on it, irrespective of whether that court has the power to find an infringement of competition law;
- (10) ‘infringement decision’ means a decision of a competition authority or review court that finds an infringement of competition law;
- (11) ‘final infringement decision’ means an infringement decision that cannot or can no longer be appealed by ordinary means;
- (11a) ‘evidence’ means all types of means of proof admissible before the national court seized, in particular documents and all other objects containing information, irrespective of the medium on which the information is stored;
- (12) ‘cartel’ means an agreement or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market or influencing the relevant parameters of competition, through practices such as, but not limited to, the fixing or coordination of purchase or selling prices or other trading conditions, including in relation to intellectual property rights, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports or anti-competitive actions against other competitors;

- (13) ‘leniency programme’ means a programme concerning the application of Article 101 TFEU or a corresponding provision under national law on the basis of which a participant in a secret cartel, independently of the other undertakings involved in the cartel, cooperates with an investigation of the competition authority, by voluntarily providing presentations of his knowledge of the cartel and his role therein, in return for which the participant receives, by decision or by a discontinuation of proceedings, immunity from any fine to be imposed for the cartel or a reduction of such fine;
- (14) ‘leniency statement’ means an oral or written presentation voluntarily provided by, or on behalf of, an undertaking or a natural person to a competition authority or a record thereof, describing the undertaking’s or a natural person’s knowledge of a cartel and its role therein, which was drawn up specifically for submission to the authority with a view to obtaining immunity or a reduction of fines under a leniency programme concerning the application of Article 101 TFEU or the corresponding provision under national law; this does not include pre-existing information;
- (14a) ‘pre-existing information’ means evidence that exists irrespective of the proceedings of a competition authority, whether or not such information is in the file of a competition authority;
- (15) ‘settlement submission’ means a voluntary presentation by, or on behalf of, an undertaking to a competition authority describing the undertaking’s acknowledgement of or renunciation to dispute its participation in an infringement of competition law and its responsibility for that infringement, which was drawn up specifically to enable the authority to apply a simplified or expedited procedure;

- (15a) 'immunity recipient' means an undertaking or a natural person which has been granted immunity from fines by a competition authority under a leniency programme;
- (16) 'overcharge' means the difference between the price actually paid and the price that would have prevailed in the absence of an infringement of competition law;
- (16a) 'consensual dispute resolution' means any mechanism enabling the parties to reach an out-of-court resolution of a dispute concerning compensation for harm;
- (17) 'consensual settlement' means an agreement reached through a consensual dispute resolution.
- (17a) 'direct purchaser' means a natural or legal person who acquired products or services that were the subject of an infringement of competition law directly from an infringer;
- (17b) 'indirect purchaser' means a natural or legal person who acquired products or services that were the subject of an infringement of competition law, or products or services derived from or containing such goods or services, not directly from an infringer, but from a direct purchaser or a subsequent purchaser

CHAPTER II  
**DISCLOSURE OF EVIDENCE**

*Article 5*  
*Disclosure of evidence*

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

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

2. Member States shall ensure that national courts are able to order the disclosure of specified pieces of evidence or relevant categories of evidence circumscribed as precisely and as narrowly as possible on the basis of reasonably available facts in the reasoned justification.
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 extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence;
  - (b) the scope and cost of disclosure, especially for any third parties concerned, also to prevent non-specific search of information which is unlikely to be of relevance for the parties in the procedure;
  - (c) whether the evidence to be disclosed contains confidential information, especially concerning any third parties, and the arrangements for protecting such confidential information.
- 4. The interest of undertakings to avoid actions for damages following an infringement of competition law shall not constitute an interest that warrants protection.
4. Member States shall ensure that national courts have the power to order disclosure of evidence containing confidential information where they consider it relevant to the action for damages. Member States shall ensure that, when ordering disclosure of such information, national courts have at their disposal effective measures to protect such information.
5. Member States shall ensure that national courts give full effect to applicable legal professional privilege under Union or national law when ordering the disclosure of evidence.
- 5a. Member States shall ensure that those from whom disclosure is sought are provided with an opportunity to be heard before a national court orders disclosure under this Article.



6. [deleted]
7. [moved to Article 4 (1) (11a)]
8. Without prejudice to paragraphs 4 and 5(a) and to Article 6, this Article shall not prevent Member States from maintaining or introducing rules which would lead to wider disclosure of evidence.

### *Article 6*

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

1. Member States shall ensure that, for the purpose of actions for damages, when national courts order disclosure of evidence included in the file of a competition authority, the following provisions shall apply, in addition to Article 5.
  - 1a. This Chapter is without prejudice to the rules and practices on public access to documents under Regulation 1049/2001.
  - 1b. This Chapter is without prejudice to the rules and practices under Union or national law on the protection of internal documents of competition authorities and correspondence between competition authorities.
  - 1c. When assessing the proportionality of an order to disclose information, in accordance with the criteria laid down in Article 5(3), national courts shall consider
    - (a) whether the request has been formulated specifically with regard to the nature, object or content of documents submitted to a competition authority or held in the file of such competition authority, rather than by a non-specific application concerning documents submitted to a competition authority,

- (b) whether the party requesting disclosure is doing so in relation to an action for damages before a national court; and
  - (c) in relation to paragraphs 2,4, or upon request of a competition authority pursuant to paragraph 5, the need to safeguard the effectiveness of the public enforcement of competition law.
2. National courts may order the disclosure of the following categories of evidence only after a competition authority has closed its proceedings by adopting a decision or otherwise:
- (a) information that was prepared by a natural or legal person specifically for the proceedings of a competition authority;
  - (b) information that the competition authorities have drawn up and sent to the parties in the course of its proceedings;
  - (ba) settlement submissions that have been withdrawn.
- 2a. 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.

- 2b. A claimant may present a justified request that a national court access the documents contained in the above paragraph for the sole purpose of ensuring that their contents fulfil the definitions given in Article 4 (1) (14) and 4 (1) (15). In that assessment, national courts can only ask for assistance from competent competition authority. The authors of the concerned documents may also have the possibility to be heard. In any case, the Court shall not provide access to those documents to the other parties or third parties.
- 2c. If only parts of the requested document are covered by paragraph 2a of this Article, the remaining parts of the documents shall, depending on the category under which they fall, be released in accordance with the relevant disclosure provisions in this Article.
3. Disclosure of evidence in the file of a competition authority that does not fall into any of the categories listed in this Article may be ordered in actions for damages at any time, without prejudice to this Article.
4. Member States shall ensure that national courts are able to request the disclosure of evidence from the competition authority where a party or a third party is unable to or cannot reasonably provide the evidence requested.
5. To the extent that a competition authority is willing to state its views on the proportionality of the disclosure request, a competition authority, acting on its own initiative, may submit observations to the national court before whom a disclosure order is sought.

## 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(2a) which is obtained by a natural or legal person solely through access to the file of a competition authority is either deemed inadmissible in actions for damages or otherwise protected under the applicable national rules to ensure full effect of the limits on the use of evidence pursuant to that provision.
2. Member States shall ensure that evidence falling within one of the categories listed in Article 6(2) which is obtained by a natural or legal person solely through access to the file of a competition authority is either deemed to be inadmissible in actions for damages or otherwise protected under the applicable national rules to ensure full effect of the limits on the use of evidence pursuant to that provision until that competition authority has closed its proceedings by adopting a decision or otherwise.
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 and which does not fall under 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*

*Penalties*

1. Member States shall ensure that national courts are able to effectively impose penalties on parties, third parties and their legal representatives in the event of:
  - (a) failure or refusal to comply with any national court's disclosure order;
  - (b) the destruction of relevant evidence ;
  - (c) failure or refusal to comply with the obligations imposed by a national court order protecting confidential information; or
  - (d) breach of limits on the use of evidence provided for in this Chapter .
  
2. Member States shall ensure that the penalties that can be imposed by national courts are effective, proportionate and dissuasive. The penalties 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*

1. Member States shall ensure that an infringement of competition law found by a final decision of a national competition authority or a review court is deemed to be irrefutably established for the purposes of an action for damages brought before their national courts under Article 101 or 102 of the Treaty or under national competition law . This provision is without prejudice to the rights and obligations under Article 267 of the Treaty.
  
2. Member States shall ensure that a final decision referred to in paragraph 1 given in another Member State may, in accordance with their respective national law, be presented before their national courts as at least prima facie evidence that an infringement of competition law has occurred and, as appropriate, may be assessed along with any other material brought by the parties.

*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 is interrupted or suspended.

2. Member States shall ensure that the limitation period shall not begin to run before the infringement has ceased and the claimant knows, or can reasonably be expected to know:
  - (a) the behaviour and the fact that it constitutes an infringement of competition law;
  - (b) the fact that the infringement of competition law caused harm to him; and
  - (c) the identity of the infringing undertaking.
  
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 or, depending on national law, interrupted, if a competition authority takes action for the purpose of the investigation or proceedings in respect of an infringement of competition law to which the action for damages relates. The suspension shall end at the earliest 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 harm caused by the infringement of competition law: each of those undertakings is bound to compensate for the harm in full, and the injured party has the right to require full compensation from any of them until he has been fully compensated.

2. Member States shall ensure that, without prejudice to the right of full compensation as laid down in Article 2, where the infringer is a small or medium-sized enterprise pursuant to the definition in Commission Recommendation C(2003)1422, it shall be liable only to its own direct and indirect purchasers if:
  - a) its market share in the relevant market was below 5% at any time during the infringement; and
  - b) the application of the normal rules of joint and several liability would irretrievably jeopardize its economic viability and cause its assets to lose all their value.

This exception to the joint and several liability of the small or medium-sized enterprise shall not apply if:

- i) it led the infringement or coerced other undertakings to participate in the infringement; or
    - ii) it has previously been found to have infringed competition law.
2. By way of derogation from paragraph 1, Member States shall ensure that an immunity recipient is jointly and severally liable:
  - a) to its direct or indirect purchasers or providers; and
  - b) to other injured parties only where full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law.



Member States shall ensure that the limitation period for cases under this point is reasonable and sufficient to allow injured parties to bring such actions.

3. Member States shall ensure that an infringing undertaking may recover a contribution from any other infringing undertaking, the amount of which shall be determined in the light of their relative responsibility for the harm caused by the infringement of competition law. The amount of contribution of an undertaking which has been granted immunity from fines by a competition authority under a leniency programme shall not exceed the amount of the harm it caused to its own direct or indirect purchasers or providers.
4. Member States shall ensure that, to the extent the infringement of competition law caused harm to injured parties other than the direct or indirect purchasers or providers of the infringing undertakings, the amount of contribution of the immunity recipient shall be determined in the light of its relative responsibility for that harm.

CHAPTER IV  
PASSING-ON OF OVERCHARGES

*Article 12-a*

*Passing-on of overcharges and the right to full compensation*

1. To ensure the full effectiveness of the right to full compensation as laid down in Article 2, Member States shall ensure that, in accordance with the rules laid down in this Chapter, compensation of harm can be claimed by anyone who suffered it, irrespective of whether they are direct or indirect purchasers, and that compensation of harm exceeding the harm caused by the infringement to the claimant, as well as the absence of liability of the infringer, are avoided.
- 1a In order to avoid overcompensation, Member States shall lay down the appropriate procedural rules in order to ensure that compensation for actual loss at any level of the supply chain does not exceed the overcharge harm suffered at that level.
2. The rules laid down in this Chapter shall be without prejudice to the right of an injured party to claim and obtain compensation for loss of profits due to a full or partial passing-on of the overcharge.
3. 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 infringer.
4. Member States shall ensure that the national court has the power to estimate which share of the overcharge was passed on, in accordance with national procedures.

*Article 12*  
*Passing-on defence*

1. Member States shall ensure that the defendant in an action for damages can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement of competition law. The burden of proving that the overcharge was passed on shall rest with the defendant who may reasonably require disclosure from the claimant and from third parties.

*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, taking into account the commercial practice that price increases are passed on down the supply chain, the burden of proving the existence and scope of such pass-on shall rest with the claimant who may reasonably require disclosure from the defendant and from third parties.

2. In the situation referred to in paragraph 1 of this Article, the indirect purchaser shall be deemed to have proven that a passing-on to him occurred where he has shown that:
- (a) the defendant has committed an infringement of competition law;
  - (b) the infringement of competition law resulted in an overcharge for the direct purchaser of the defendant; and
  - (c) he purchased the goods or services that were the subject of the infringement of competition law, or purchased goods or services derived from or containing the goods or services that were the subject of the infringement.

This paragraph shall not apply where the defendant can demonstrate credibly to the satisfaction of the court that the overcharge was not, or not entirely, passed on to the indirect purchaser.

*Article 14*

*Loss of profits and infringement at supply level*

[deleted (moved to Article 12-a).]

## *Article 15*

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

To avoid that actions for damages by claimants from different levels in the supply chain lead to a multiple liability or to an absence of liability of the infringer, Member States shall ensure that in assessing whether the burden of proof resulting from the application of Articles 12 and 13 is satisfied, national courts seized of an action for damages are able, by means available under Union and national law, to take due account of:

(a) actions for damages that are related to the same infringement of competition law, but are brought by claimants from other levels in the supply chain; or

(b) judgments resulting from such actions;

(ba) relevant information in the public domain resulting from public enforcement cases.

2. This Article shall be without prejudice to the rights and obligations of national courts under Article 30 of Regulation (EU) No 1215/2012.

## *Article 15a*

The Commission shall issue guidelines for national courts on how to estimate the share of the overcharge which was passed on to the indirect purchaser.

CHAPTER V  
QUANTIFICATION OF HARM

*Article 16*

Quantification of harm

1. Member States shall ensure that the burden and the standard of proof required for the quantification of harm does not render the exercise of the right to damages practically impossible or excessively difficult. Member States shall ensure that the national courts are empowered, in accordance with national procedures, to estimate the amount of harm if it is established that a claimant suffered harm but it is practically impossible or excessively difficult to precisely quantify the harm suffered on the basis of the available evidence.
- 2a Member States shall ensure that it shall be presumed that cartel infringements cause harm. The infringer shall have the right to rebut this presumption.
- 2b Member States shall ensure that, in proceedings relating to an action for damages, a national competition authority shall be able, if it deems it appropriate, to assist on the determination of the quantum of damages upon request of a national court.

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 or represented in the consensual dispute resolution.
  
2. Without prejudice to provisions of national law in matters of arbitration, Member States shall ensure that national courts seized of an action for damages may suspend proceedings where the parties to those proceedings are involved in consensual dispute resolution concerning the claim covered by that action for damages.
  - 2a The suspension referred to in paragraph 2 shall not be longer than two years.
  
  - 2b A competition authority may consider that compensation paid as a result of a consensual settlement and prior to its decision imposing a fine to be a mitigating factor in the setting thereof.

## *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. The remaining claim of the settling injured party can only be exercised against non-settling co-infringers, and the non-settling co-infringers cannot recover contribution for it from the settling co-infringer. Member States shall ensure that, by way of derogation from that rule, when the non-settling co-infringers cannot pay the damages that correspond to the remaining claim of the settling injured party, the settling injured party can exercise the remaining claim against the settling co-infringer unless this is expressly excluded under the terms of the consensual settlement.
2. When determining the amount of contribution that a co-infringer may recover from any other co-infringer in accordance with their relative responsibility for the harm caused by the infringement, national courts shall take due account of any damages paid pursuant to a prior consensual settlement involving the relevant co-infringer.

## CHAPTER VII

### FINAL PROVISIONS

## *Article 19*

### *Review*

The Commission shall review this Directive and shall submit a report to the European Parliament and the Council by [...] [OJ please insert date: four years after the date set as the deadline for transposition of this Directive.]



This review shall, among other things, include:

- a. the possible impact of financial constraints flowing from the payment of fines imposed by a competition authority for an infringement of competition law on the possibility for injured parties to obtain full compensation for the harm caused by that infringement;
- b. the extent to which claimants for damages caused by an infringement of competition law established in an infringement decision adopted by a competition authority of a Member State were unable to prove before the national court of another Member State that such infringement occurred; and
- c. the extent to which compensation for actual loss has exceeded the overcharge harm caused by the infringement, or has exceeded the overcharge harm suffered at any level of the supply chain

Where appropriate, that review shall be accompanied by a legislative proposal.

#### *Article 20*

#### *Transposition*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by ...\*[OJ please insert date: 2 years after the date of entry into force of this Directive] at the latest. They shall forthwith communicate to the Commission the text of those provisions.

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

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

*Article 20a*  
*Temporal application*

Without prejudice to the non-retroactive application of substantive provisions of this Directive, the national measures adopted pursuant to Article 20 shall not apply to actions for damages brought before a national court before the entry into force of 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.

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