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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
- Adoption of the general approach

Delegations will find in the Annex the text of a revised Presidency compromise proposal with a view to the adoption of a general approach by the Council at its meeting on 2 December 2013.

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.

2. The Working Party on Competition examined the proposal and the compromise texts prepared by the Presidency on 10 July, 2 and 24 September, 15 and 31 October and 13-14 November 2013 as well as during a Competition Attachés meeting on 19 November. The Presidency compromise text set out in doc. 15979/1/13 REV 1 was further discussed at the Permanent Representatives Committee on 22 November 2013. During the meeting of the Permanent Representatives Committee the Presidency proposed amendments to recitals 20, 22, 30 as well as Articles 6(6) and 11, which have contributed to the present compromise.

II. MAIN POINTS OF THE COMPROMISE

a) Legal basis

Following discussions in the Permanent Representatives Committee, the Presidency compromise text maintains the dual legal basis as proposed by the Commission.

b) Article 7

The Presidency has amended the wording in order to allow Member States to protect the documents that have been obtained by a natural or legal person solely through access to the file of a competition authority by either classifying them as inadmissible or by other means, using the tools available under national law. Such a provision, while securing the protection of the identified documents, does not predetermine the ways in which Member States shall secure such protection.

c) Article 9

The objective of Article 9 of the Commission proposal was to to avoid inconsistency in the application of Treaty provisions and to increase the effectiveness of actions for damages by preventing relitigation of competition infringements established by a final decision of a national competition authority or a review court.

In order to achieve the widest possible agreement, the Presidency compromise removes the cross-border binding effect of national decisions and only obliges Member States to accept them as means of evidence, in line with applicable national procedural rules.

d) Article 11

The objective of Article 11(2) and (3) of the Commission proposal was to strike the right balance between private and public enforcement of competition law.

The Presidency compromise deletes the second sentence of Article 11(3) of the Commission proposal, thereby limiting the protection of leniency applicants against civil liability to what is necessary to neutralise the negative effect of actions for damages on leniency programmes and public enforcement. At the same time, Article 11(2) is maintained in the wording already submitted to COREPER on 22 November.

III. CONCLUSION

In the light of the above, the Council (Competitiveness) is invited to confirm the agreement on the general approach on the basis of the Presidency compromise as set out in Annex to this note; and invite the Presidency to start negotiations with the European Parliament on the basis of this general approach, with a view to reaching an agreement at first reading.

2013/0185 (COD)

Proposal for a

**DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
on certain rules governing actions for damages under national law for infringements of the
competition law provisions of the Member States and of the European Union¹**

(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 Commission²,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee³,

Acting in accordance with the ordinary legislative procedure,

¹ DK: parliamentary scrutiny for the whole text. EE: reservation for the whole text.

² OJ C , , p. .

³ OJ C , , p. .

Whereas:

- (1) Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter referred to as the Treaty) are a matter of public policy and must be applied effectively throughout the Union to ensure that competition in the internal market is not distorted.
- (2) The public enforcement of those Treaty provisions is carried out by the Commission using the powers provided by Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty establishing the European Community⁴ (hereinafter: Regulation No 1/2003). Public enforcement is also carried out by national competition authorities, which may take the decisions listed in Article 5 of Regulation No 1/2003. In accordance with that Regulation, Member States should be able to designate administrative as well as judicial authorities to apply Articles 101 and 102 of the Treaty as public enforcers and carry out the various functions conferred upon competition authorities in the said Regulation.

⁴ 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.

- (3) Articles 101 and 102 of the Treaty produce direct effects in relations between individuals and create, for the individuals concerned, rights and obligations which national courts must enforce. National courts thus have an equally essential part to play in applying the competition rules (private enforcement). When ruling on disputes between private individuals, they protect subjective rights under Union law, for example by awarding damages to the victims of infringements. The full effectiveness of Articles 101 and 102 of the Treaty, and in particular the practical effect of the prohibitions laid down therein, requires that anyone — be they an individual, including consumers and undertakings, or a public authority — can claim compensation before national courts for the harm caused to them by an infringement of those provisions. This Union right to compensation applies equally to breaches of Articles 101 and 102 by public undertakings or undertakings entrusted with special or exclusive rights by Member States within the meaning of Article 106 of the Treaty.
- (4) The Union right to compensation for antitrust harm requires each Member State to have procedural rules ensuring the effective exercise of that right. The need for effective procedural remedies also follows from the right to effective judicial protection as laid down in Article 47, first paragraph, of the Charter of Fundamental Rights of the European Union⁵ and in Article 19(1), second subparagraph of the Treaty on European Union.

⁵ OJ C 326, 26.10.2012, p. 391.

- (5) To ensure effective public and private enforcement of the competition rules, it is necessary to regulate the way the two forms of enforcement are coordinated, for instance the arrangements for access to documents held by competition authorities. Such coordination at Union level will also avoid divergence of applicable rules, which could jeopardise the proper functioning of the internal market.
- (6) In accordance with Article 26(2) of the Treaty, the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. There exist marked differences between the rules in the Member States governing actions for damages for infringements of national or Union competition law. Those differences lead to uncertainty concerning the conditions under which injured parties can exercise the right to compensation they derive from the Treaty, and affect the substantive effectiveness of such right. As injured parties often choose the forum of their Member State of establishment to claim damages, the discrepancies between the national rules lead to an uneven playing field as regards actions for damages and may affect competition on the markets on which these injured parties, as well as the infringing undertakings, operate.
- (7) Undertakings established and operating in different Member States are subject to procedural rules that significantly affect the extent to which they can be held liable for infringements of competition law. This uneven enforcement of the Union right to compensation may result in a competitive advantage for some undertakings which have breached Articles 101 or 102 of the Treaty, and a disincentive to the exercise of the rights of establishment and provision of goods or services in those Member States where the right to compensation is more effectively enforced. As such, the differences in the liability regimes applicable in the Member States may negatively affect both competition and the proper functioning of the internal market.

- (8) It is therefore necessary to ensure a more level playing field for undertakings operating in the internal market and to improve the conditions for consumers to exercise the rights they derive from the internal market. It is also appropriate to increase legal certainty and to reduce the differences between the Member States as to the national rules governing actions for damages for infringements of 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 of the Treaty and for infringements of rules of national competition law which must be applied in the same case and in parallel to Union competition law would otherwise adversely affect the position of claimants in the same case and the scope of their claims, and constitute an obstacle to the proper functioning of the internal market.

The provisions of this Directive should not affect damages actions for infringements of national law which may not affect trade between Member States within the meaning of Article 101 or 102 of the Treaty.

- (10) In the absence of Union law, actions for damages are governed by the national rules and procedures of the Member States. The case-law of the Court of Justice determines that any person can claim compensation for the harm suffered where there is a causal relationship between that harm and an infringement of the competition rules. All national rules governing the exercise of the right to compensation for harm resulting from an infringement of Article 101 or 102 of the Treaty, including those concerning aspects not dealt with in this Directive such as the notion of causal relationship between the infringement and the harm, must observe the principles of effectiveness and equivalence. This means that they may not be formulated or applied in a way that makes it excessively difficult or practically impossible to exercise the right to compensation guaranteed by the Treaty, and they may not be formulated or applied less favourably than those applicable to similar domestic actions. 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 the provisions of 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. 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.

- (12) Actions for damages for infringements of national or Union competition law typically require a complex factual and economic analysis. The evidence necessary to prove a claim for damages is often held exclusively by the opposing party or by third parties, and is not sufficiently known by and accessible to the claimant. In such circumstances, strict legal requirements for claimants to assert in detail all the facts of their case at the beginning of an action and to proffer precisely specified pieces of supporting evidence can unduly impede the effective exercise of the right to compensation guaranteed by the Treaty.
- (13) Evidence is an important element for bringing actions for damages for infringement of national or Union competition law. However, as antitrust litigation is characterised by an information asymmetry, it is appropriate to ensure that 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. 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. Member States can apply wider rules on disclosure of evidence under national law, provided that they comply with the limitations laid down in this Directive.

- (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 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) Where the court requests a competent court of another Member State to take evidence or requests evidence to be taken directly in another Member State, the provisions of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters⁶ apply.
- (16) While relevant evidence containing business secrets or otherwise confidential information should in principle be available in actions for damages, such confidential information needs to be appropriately protected. National courts should therefore have at their disposal a range of measures to protect such confidential information from being disclosed during the proceedings. These may include the possibility of hearings in private, restricting the circle of persons entitled to see the evidence, and instruction of experts to produce summaries of the information in an aggregated or otherwise non-confidential form. Measures protecting business secrets and other confidential information should not practically impede the exercise of the right to compensation.

⁶ OJ L 174, 27.6.2001, p. 1.

- (17) The effectiveness and consistency of the application of Articles 101 and 102 of the Treaty by the Commission and the national competition authorities require a common approach across the Union 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. The limitations on the disclosure of evidence should not prevent competition authorities from publishing their decisions in accordance with applicable Union or national rules. This Directive does not cover the disclosure of internal documents of competition authorities and correspondence between competition authorities.
- (18) The requirement of proportionality should be carefully assessed when disclosure risks unravelling the investigation strategy of a competition authority by revealing which documents are part of the file or causing a negative bearing on the way in which companies cooperate with the competition authority. The disclosure request should therefore not be deemed proportionate when it refers to the generic disclosure of documents in the file of a competition authority relating to a certain case, or of documents submitted by a party in the context of a certain case. Such wide disclosure requests would also not be compatible with the requesting party's duty to specify pieces of evidence or categories of evidence as precisely and narrowly as possible. Moreover, disclosure of evidence should be ordered from a competition authority only when it cannot be reasonably obtained from another party or a third party. 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 evidence referred to in Recital 21.

- (19) Apart from the evidence referred to in recitals (20) and (21), national courts should be able to order, in the context of an action for damages, disclosure of evidence that exists irrespective of the proceedings of a competition authority.
- (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) Leniency programmes and settlement procedures are important tools for the public enforcement of Union competition law as they contribute to the detection, efficient prosecution and sanctioning of the most serious competition law infringements. 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. 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.

- (22) Pursuant to Article 15(3) of Regulation 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.
- (23) 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 of the Treaty, the use of such evidence is also allowed for other legal entities belonging to the same undertaking.

- (24) 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 (21) should thus not be jeopardised and documents referred to in recitals (20) and (21) 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 to this effect under applicable national rules. 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.
- (25) Making a claim for damages, or the start of an investigation by a competition authority, entails a risk that the undertakings concerned may destroy or hide evidence that would be useful in substantiating an injured party's claim for damages. To prevent the destruction of relevant evidence and to ensure that court orders requesting disclosure are complied with, courts should be able to impose sufficiently deterrent sanctions. Insofar as parties to the proceedings are concerned, the possibility to order the payment of costs as well as the risk of adverse inferences (such as presuming the relevant issue to be proven or dismissing claims and defences in whole or in part) being drawn in the proceedings for damages can be a particularly effective sanction and can avoid delays. Sanctions should also be available for non-compliance with obligations to protect confidential information and for abusive use of information obtained through disclosure. Similarly, sanctions should be available if information obtained through access to the file of a competition authority is used abusively in actions for damages.

(26) 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 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 evidence, among other, of the fact that an infringement of competition law has occurred.

(27) National rules on the beginning, duration, suspension or interruption of limitation periods should not unduly hamper the bringing of actions for damages. This is particularly important in respect of actions that build upon the competition authority's or a review court's finding of an infringement. To that end, injured parties should still be able to bring an action for damages after proceedings by a competition authority, with a view to enforcing national and Union competition law. 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. When determining whether a claimant knows or can reasonably be expected to have knowledge of the behaviour constituting the infringement it should be assessed whether such claimant may reasonably have knowledge that the behaviour infringes Union or national competition law. A claimant can reasonably be expected to have this knowledge as soon as the decision of the competition authority is published. Member States should be allowed to maintain or introduce absolute limitation periods that are generally applicable, provided that the duration and the application of such limitation periods do not render practically impossible or excessively difficult the exercise of the right to full compensation and provided that the practical effectiveness of the provisions on limitation periods in this Directive is not undermined.

- (28) 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.
- (29) Undertakings which cooperate with competition authorities under a leniency programme play a key role in detecting cartel infringements and in bringing these infringements to an end, thereby often mitigating the harm which could have been caused had the infringement continued. 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 liable in principle only to his own direct and indirect purchasers or providers. The immunity recipient should remain fully liable to the injured parties other than his direct or indirect purchasers or providers only where they cannot obtain full compensation from the other infringers.

- (30) 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. In situations where the pass-on resulted in reduced sales and thus harm in the form of a loss of profit (recital (11) above), the right to claim compensation for such loss of profit should remain unaffected.
- (31) Consumers or undertakings to whom actual loss has been passed on have suffered harm that has been caused by an infringement of national or Union competition law. While such harm should be compensated by the 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 for a rebuttable presumption that where the infringement resulted in an overcharge, an overcharge is presumed to have affected the price of the goods or services purchased by the indirect purchaser. The infringer should be allowed to bring proof showing that the actual loss has not been passed on or has not been passed on entirely.

- (32) Infringements of competition law often concern the conditions and the price under which goods or services are sold and lead to an overcharge and other harm for the customers of the infringers. The infringement may also concern supplies to the infringer (for example in the case of a buyer's cartel). The rules of this Directive and in particular the rules on pass-on should apply accordingly. In such cases, the actual loss referred to in recital (30) could result from a lower price paid by infringers to their suppliers.
- (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, rather than to calculate precisely, 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. 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. 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.

- (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) In the absence of Union rules on the quantification of harm caused by a competition law infringement, it is for the domestic legal system of each Member State and for the national courts to determine what requirements the 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, rather than to calculate precisely, the amount of the harm caused by the competition law infringement.

- (36) 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) Injured parties and infringers 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 agree to engage in consensual dispute resolution after an action for damages has been brought before the national court for the same claim, that court may suspend the proceedings before it for the duration of the consensual dispute resolution process. When considering whether to suspend the proceedings, the national court should take into account the interest in an expeditious procedure.

(40) To encourage consensual settlements, an 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 (recital (28) above). 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.

- (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
- (42) This Directive respects fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union.
- (43) As it would be impossible, with a disparity of policy choices and legal rules at national level concerning the Union right to compensation in actions for damages for infringement of the Union competition rules, to ensure the full effect of Articles 101 and 102 of the Treaty, and to ensure the proper functioning of the internal market for undertakings and consumers, these objectives cannot be sufficiently achieved by the Member States, and can therefore, by reason of the requisite effectiveness and consistency in the application of Articles 101 and 102 of the Treaty, be better achieved at Union level. The European Parliament and the Council therefore adopt this Directive, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(44) In accordance with the Joint Political Declaration of Member States and the Commission on explanatory documents of 28 September 2011⁷, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

HAVE ADOPTED THIS DIRECTIVE:

CHAPTER I

SCOPE AND DEFINITIONS

Article 1

Scope of the Directive

1. This Directive sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of competition law, as defined in Article 4 of the Directive, can effectively exercise the right to full compensation for that harm. It also sets out rules fostering undistorted competition in the internal market and removing obstacles to its proper functioning by ensuring equivalent protection throughout the Union for anyone who has suffered such harm.
2. This Directive also sets out rules for the coordination between enforcement of the competition rules by competition authorities and enforcement of those rules in damages actions before national courts.

⁷ OJ C 369, 17.12.2011, p. 14.

Article 2

Right to full compensation

1. Anyone who has suffered harm caused by an infringement of competition law shall be able to claim full compensation for that harm.
2. Full compensation shall place anyone who has suffered harm in the position in which that person would have been had the infringement not been committed. It shall therefore cover the right to compensation for actual loss and for loss of profit, plus payment of interest from the time the harm occurred until the compensation in respect of that harm has actually been paid.

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 of the Treaty shall not be less favourable to the injured parties than those governing similar domestic actions (principle of equivalence).

Article 4
Definitions

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

1. ‘infringement of competition law’ means an infringement of Article 101 or 102 of the Treaty or of national competition law within the meaning of paragraph 2;
2. ‘national competition law’ means provisions of national law that predominantly pursue the same objective as Articles 101 and 102 of the Treaty and that are applied to the same case and in parallel to Union competition law pursuant to Article 3(1) of Regulation (EC) No 1/2003. This definition does not cover national laws which impose criminal sanctions on natural persons except to the extent that such sanctions are the means whereby competition rules applying to undertakings are enforced;
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, its representative or its legal successor;
4. ‘claim for damages’ means a claim for compensation of 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’ or ‘court’ means any court or tribunal of a Member State within the meaning of Article 267 of the Treaty;
9. ‘review court’ means a national court that is empowered by ordinary means of appeal to review decisions of a national competition authority or judgments pronouncing on it, irrespective of whether or not this court has the power to find an infringement of Article 101 or 102 of the Treaty;
10. ‘infringement decision’ means a decision of a competition authority or review court that finds an infringement of competition law;
11. ‘final’ infringement decision means an infringement decision of a competition authority or review court that can no longer be reviewed by ordinary means of appeal;
12. ‘evidence’ means all types of means of proof admissible before national courts, in particular documents and all other objects containing information, irrespective of the medium on which the information is stored;

13. 'cartel' means an agreement and/or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition, through practices such as the fixing or coordination of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets and customers, including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors;
14. 'leniency programme' means a programme on the basis of which a participant in a 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 formal decision or informal discontinuation of procedure, immunity from any fine to be imposed for the cartel or a reduction of such fine;
15. '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 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 of the Treaty or the corresponding provision under national law; this does not include pre-existing information;
16. '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;

17. '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 Article 101 or 102 of the Treaty or a corresponding provision under national law and its responsibility for this infringement, which was drawn up specifically to enable the authority to apply a streamlined procedure;
18. 'immunity recipient' means an undertaking which has been granted immunity from fines by a competition authority under a leniency programme;
19. 'overcharge' means any positive difference between the price actually paid and the price that would have prevailed in the absence of an infringement of competition law;
20. 'consensual dispute resolution' means any mechanism enabling the parties to reach an out-of-court resolution of a dispute concerning the compensation of harm;
21. 'consensual settlement' means an agreement on compensation of harm, which is reached through a consensual dispute resolution.

CHAPTER II

DISCLOSURE OF EVIDENCE

Article 5

Disclosure of evidence

1. Member States shall ensure that, upon request of a claimant who has presented reasonably available facts and evidence sufficient to support the plausibility of its claim for damages, national courts can order the defendant or a third party to disclose relevant evidence 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 request of the defendant.
2. Paragraph 1 of this Article is without prejudice to the rights and obligations of national courts under Council Regulation (EC) No 1206/2001.
3. National courts may order disclosure of specified pieces of evidence and relevant categories of evidence defined as precisely and narrowly as possible on the basis of reasonably available facts.
4. 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; and
 - (c) whether the evidence to be disclosed contains confidential information, especially concerning any third parties, and the arrangements for protecting such confidential information.
5. Member States shall ensure that national courts have the power to order disclosure of evidence containing confidential information when they consider it relevant for the action for damages. Member states shall ensure that, when ordering disclosure of such information, national courts have at their disposal effective measures to protect such information.
6. Member States shall ensure that national courts give full effect to applicable legal professional privileges under national or Union law when ordering the disclosure of evidence .

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 pre-existing information or other evidence included in the file of a competition authority, the following provisions shall apply in addition to the rules laid down in Article 5.

Provisions laid down in this Chapter are without prejudice to the rules and practices under national or Union law on the protection of internal documents of competition authorities and correspondence between competition authorities.

2. When assessing the proportionality of a disclosure order for information, in addition to the criteria laid down in Article 5(4), national courts shall consider whether the request has been formulated specifically with regard to the nature, object or content of documents rather than by a non-specific application concerning documents submitted to a competition authority.

When assessing the proportionality of a disclosure order under paragraphs 3 and 4 or upon request of a competition authority pursuant to paragraph 6 of this Article, national courts shall consider the interest of effective public enforcement of competition law.

3. The order for disclosure of evidence shall be directed to a competition authority only when such evidence cannot reasonably be obtained from a party or another third party.
4. National courts can 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 was drawn up by a competition authority and sent to the parties in the course of its proceedings.

5. National courts cannot at any time order a party or a third party to disclose any of the following categories of evidence in any form:
 - (a) leniency statements; and
 - (b) settlement submissions.

6. 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(5) 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 to this effect under applicable national rules.

2. Member States shall ensure that evidence falling within one of the categories listed in Article 6(4) 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 to this effect under applicable national rules 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

Sanctions

Member States shall ensure that national courts can impose effective, proportionate and dissuasive sanctions in the event of failure or refusal to comply with any court's disclosure order or order protecting confidential information; in the event of destruction of relevant evidence; or in the event of breach of limits on the use of evidence, provided for in this Chapter.

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 can be presented before their national courts as evidence, among other, of the fact that an infringement of competition law has occurred.

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 a claimant knows, or can reasonably be expected to have knowledge of:
 - (i) the behaviour constituting the infringement;
 - (ii) the fact that the infringement caused harm to him; and
 - (iii) the identity of the infringer who caused such harm.
3. Member States shall ensure that the limitation period for bringing an action for damages is at least three years.
4. Member States shall ensure that the limitation period is suspended or interrupted if a competition authority takes action for the purpose of the investigation or proceedings in respect of an infringement to which the action for damages relates. The suspension shall end at the earliest one year after the infringement decision has become final or the proceedings are otherwise terminated.

Article 11

Joint and several liability

1. Member States shall ensure that undertakings which have infringed competition law through joint behaviour are jointly and severally liable for the harm caused by the infringement: each of the infringers is bound to compensate for the harm in full, and the injured party may require full compensation from any of them until he has been fully compensated.

2. By way of exception to the preceding paragraph, Member States shall ensure that an immunity recipient shall be jointly and severally liable:
 - a) to its direct or indirect purchasers or providers; and
 - b) to other injured parties only if full compensation cannot be obtained from the other undertakings that were involved in the same infringement of competition law. To that end Member States shall ensure that injured parties are not time-barred from bringing such actions.
3. Member States shall ensure that an infringer may recover a contribution from any other infringer, the amount of which shall be determined in the light of their relative responsibility for the harm caused by the infringement.

CHAPTER IV

PASSING-ON OF OVERCHARGES

Article 12

Passing-on defence

Member States shall ensure that the defendant in an action for damages can invoke as a defence against a claim for damages the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement. The burden of proving that the overcharge was passed on shall rest with the defendant.

Article 13
Indirect purchasers

Member States shall ensure that where an indirect purchaser claims compensation in relation to an infringement which led to an overcharge, a passing-on of overcharge having an impact on the price of the goods or services he purchased shall be deemed to have been proven, provided that these are the same goods or services that were subject to the infringement, or goods or services derived from or containing the goods or services that were the subject of the infringement.

This Article shall be without prejudice to the infringer's right to show that the overcharge was not, or not entirely, passed on to the indirect purchaser.

Article 14
Infringement at supply level

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.

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:

- (a) the court has the power to estimate which share of the overcharge was suffered by the direct or the indirect purchaser and to exercise that power in accordance with national procedures; and

- (b) 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:
- (i) 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
 - (ii) judgments resulting from such actions.

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 provide that the court be granted the power to estimate the amount of harm and to exercise that power in accordance with national procedures.
2. Member States shall ensure that, in the case of a cartel infringement, harm is presumed to have occurred. The infringer shall have the right to rebut this presumption.

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

Article 18

Effect of consensual settlements on subsequent actions for damages

1. Member States shall ensure that, following a consensual settlement, the claim of the settling injured party is reduced by the settling co-infringer's share of the harm that the infringement inflicted upon the injured party. The remaining claim of the settling injured party can only be exercised against non-settling co-infringers, and they cannot recover contribution for it from the settling co-infringer. By way of exception, when the non-settling co-infringers cannot pay the damages that correspond to the remaining claim of the settling injured party, then the settling injured party can exercise the remaining claim against the settling co-infringer.

2. When determining the amount of contribution that a co-infringer may recover from any other co-infringer in accordance with their relative share of the harm inflicted 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 report to the European Parliament and the Council by [...] at the latest [*to be calculated as 5 years after the date set as the deadline for transposition of this Directive.*]

Article 20

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [*to be calculated as 2 years after the date of adoption of this Directive*] at the latest. They shall forthwith communicate to the Commission the text of those provisions.

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

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

Article 21

Entry into force

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

Article 22

Addressees

This Directive is addressed to the Member States.

Done at Strasbourg,

For the European Parliament

For the Council