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EXECUTIVE SUMMARY OF THE IMPACT ASSESSMENT

Damages actions for breach of the EU antitrust rules

Accompanying the 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

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1. INTRODUCTION

1. ***The EU right to antitrust damages.*** Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) prohibit anticompetitive agreements and abuses of a dominant position. The European Commission, together with National Competition Authorities ('NCAs'), is responsible for enforcing those prohibitions **(public enforcement)**. At the same time, the Treaty provisions create rights and obligations upon individuals, which must be enforced by national courts **(private enforcement)**. Among these is the right to claim compensation for any harm suffered as a result of an infringement of the EU competition rules. **The Court of Justice has, since 2001, repeatedly stated that, as a matter of EU law, any individual must be able to claim compensation for such harm** (*Courage*, C-453/99 and *Manfredi*, C-295 – 298/04)**. More than ten years later, most victims of a competition law infringement are still not able, whether individually or collectively, to effectively exercise that EU right to compensation.** This is largely due to a lack of appropriate national rules governing actions for damages. Moreover, where those rules exist, they are so different among Member States that they result in an uneven playing field for both infringers and victims of the illegal conduct.

2. *Public vs private enforcement.* Recent case law at national and at EU level has also highlighted that the EU right to compensation can sometimes be at odds with the effectiveness of public enforcement of EU competition rules by the Commission and NCAs. This is the case when the victim of a competition law infringement is seeking access to information that a competition authority obtained under a 'leniency programme' (see below at paragraph 11). Following a judgment of the Court of Justice in June 2011 (*Pfleiderer*, C-360/09), in the absence of EU rules on this matter, potential leniency applicants do not know whether the information they give to a competition authority will eventually be divulged to a victim of the competition law infringement. This may put them in a weaker position in terms of potential damages claims compared to other undertakings that did not cooperate with the authority. Legal uncertainty may thus be detrimental for the effectiveness of leniency programmes at EU or national level and hence for the effectiveness of public enforcement measures to tackle secret cartels.

3. ***Objectives of the initiative.*** The current Antitrust Damages Initiative has two primary objectives:

(i) to **ensure the effective exercise of the EU right to compensation**; and

(ii) to regulate some key aspects of **the interaction between public and private enforcement of EU competition law**, with a view to striking a balance between enforcement by the Commission and NCAs and damages actions before national courts and thus achieving **effective overall enforcement of the EU competition rules**.

2. PROBLEMS TO BE ADDRESSED

2.1. Ensuring the effective exercise of the EU right to compensation

4. ***Removing obstacles to effective compensation.*** Most victims of infringements of EU competition law still remain uncompensated. Apart from a perceived lack of awareness, even those victims who want to obtain redress face a **very unfavourable risk/reward balance**, due to procedural obstacles and the costs of bringing an action. This weakens the functioning of the EU competition rules and is difficult to reconcile with the fundamental right to effective judicial protection pursuant to the EU Charter of Fundamental Rights. In its 2005 Green Paper on damages actions for breach of the EC antitrust rules, **the Commission identified the main obstacles to effective compensation**. In 2008, it adopted a **White Paper on antitrust damages actions, setting out a number of suggestions as to how to remove these obstacles and ensure effective private enforcement** in the Member States.

5. ***Public consultations.*** In the public consultation on the White Paper, and in two subsequent public consultations, civil society and institutional stakeholders such as **the European Parliament and the European Economic and Social Committee welcomed the proposed measures.** Moreover, the European Parliament has explicitly called for EU legislation on antitrust damages actions.

6. ***Stakeholders' submissions.*** In the above public consultations, stakeholders concurred with the Commission's analysis of a number of main obstacles which stand in the way of more effective compensation:

- Potential claimants pointed at the difficulties they face in obtaining **access to the evidence** they need to prove a case. By nature, antitrust damages actions often require an unusually high level of costly factual and economic analysis. They present difficulties for claimants in terms of access to crucial pieces of evidence that are often kept secret in the hands of defendants. Stakeholders also pointed to the lack of clear rules on the **passing-on defence**, i.e. whether a defendant should be allowed to demonstrate that a direct purchaser passed on the higher price resulting from a cartel to its own customers further down the distribution chain. Among other issues that may have a negative effect on the chances of success of an action, **limitation periods** are also significant, e.g. when there is insufficient time to bring an action after an infringement has been found. The costs of an action can significantly increase when the parties have to prove the infringement even if it has already been found by an NCA, in the absence of uniform rules on the **probative value of such infringement decisions**. Moreover, the **quantification of the harm suffered** is often a complex and costly exercise that may affect the likelihood of a case being pursued.

- Consumers and SMEs are negatively affected by a lack of effective **collective redress mechanisms,** which would allow many consumers or businesses to bring their claims jointly and to **share the costs and burdens of legal action.**
- Business associations, while welcoming the objectives pursued by the Commission, generally warned against the risks of litigation excesses as experienced in other jurisdictions, and stressed the **need to provide safeguards against abusive unmeritorious litigation**, in particular if claims are pursued collectively.

7. ***An uneven playing field in the internal market.*** Besides the specific obstacles which hamper the effective exercise of the EU right to compensation, there are still **highly diverse national rules governing antitrust damages actions**. This diversity has increased over recent years: it causes legal uncertainty for all parties involved and may hamper effective private enforcement of competition rules, especially in cross-border cases. This also results in **appreciable distortions of competition in the internal market**, as the opportunity for victims to obtain redress and the chances for infringers to face liability differ depending on where they are established and where they can bring their claims. This is illustrated by the current **concentration of antitrust damages actions in three EU jurisdictions: the UK, Germany and the Netherlands.** This indicates that claimants consider the rules applicable in those countries to be more suited to their purposes than in others. Conversely, it appears **more difficult for victims of competition law infringements in the other Member States to effectively exercise their EU right to compensation.** This uneven enforcement may even result in a competitive advantage for some undertakings that have breached Articles 101 or 102 TFEU, and serve as a disincentive to exercise the right of establishment and the freedom to provide goods or services in Member States where the right to compensation is more effectively enforced.

8. *Likely costs of the current situation.* The cost of ineffective private enforcement of competition law is estimated at up to €23 billion or 0.18% of the EU's 2012 GDP — in terms of compensation that is foregone by victims each year across the EU. Remedying this problem would shift the cost of antitrust infringements from the victims to the infringers, and make it easier to detect distortions of competition. In terms of overall enforcement of Articles 101 and 102 TFEU, the increased likelihood of being held liable for illegal conduct would discourage anti-competitive behaviour (increased deterrence), with subsequent benefits for consumer welfare.

2.2. The interaction between public and private enforcement of EU competition law

9. ***Definitions.*** **Public enforcement** of EU competition law is a matter for the Commission and NCAs, which are empowered to find, sanction and prevent infringements of EU competition rules. Public enforcement is also a matter for the courts reviewing decisions taken by competition authorities. **Private enforcement** concerns enforcement of the same rules by way of actions brought before national courts. **In the absence of EU law on the matter, private enforcement is almost exclusively governed by national civil law**. Private enforcement can broadly be subdivided into three types of cases:

(i) compensation of harm suffered as a result of an infringement of EU competition law (actions for damages),

(ii) requests to cease behaviour infringing EU competition law (injunctive relief); and

(iii) declaration of nullity of contractual provisions in breach of the EU competition rules.

10. ***Complementarity and interaction of public and private enforcement.*** Public and private enforcement are complementary tools for the effective application of Articles 101 and 102 TFEU. A private action can be brought before a court without a prior decision by a competition authority **('stand-alone actions')**. However, antitrust damages actions are most often brought once a competition authority has found an infringement of EU competition rules **(follow-on actions)**. The resulting interaction between public and private enforcement concerns the following **key aspects**:

(i) access to information held by the competition authorities,

(ii) the binding effect of infringement decisions, and

(iii) limitation periods on bringing a damages action.

11. *A key issue: disclosure of leniency documents.* To detect and punish secret cartels, competition authorities offer infringers immunity from or a reduced fine in exchange for their cooperation. These 'leniency programmes' are a very effective tool in the hands of public enforcers. Victims of the same infringement may need the information that has been voluntarily provided by infringers to use it as evidence and obtain compensation. In the recent *Pfleiderer* case, parties who wanted to bring an action for damages against the cartel had requested access to the leniency file of the German Competition Authority. The German national court asked the Court of Justice whether disclosure of leniency-related information was contrary to EU law. In its 2011 judgment, the Court of Justice ruled that in the absence of EU law on the matter, it is for the national court to determine on a case-by-case basis and according to national law the conditions under which disclosure of leniency-related information to victims of a competition law infringement must be permitted or refused. This judgment was followed by considerable uncertainty as to which categories of documents would be disclosable. Such uncertainty is not only detrimental to the parties involved in damages actions, but might more specifically deter cartel participants from cooperating with the Commission and NCAs under their leniency programmes and adversely affect the fight against cartels, which largely relies on leniency applications. Reduced cartel enforcement would detract from the deterrence of public enforcement of competition law.

12. Similar problems exist in relation to **settlement cases,** where the parties acknowledge their participation in a cartel in exchange for a simplified procedure and a reduced fine. The uncertainty regarding disclosure of documents from the file of a competition authority relating to such proceedings might deter companies from cooperating with the competition authorities under the settlements procedure. Finally, disclosure of documents from the file of a competition authority during an ongoing investigation might jeopardise such investigations and thus the capacity of the competition authorities to sanction infringements of EU competition law.

3. THE AVAILABLE OPTIONS

13. ***Identifying the options.*** To remedy the problems described above, to foster an effective right of compensation for victims of breaches of Articles 101 and 102 TFEU and to achieve an optimal balance between public and private enforcement, **four policy options were considered.** They were chosen on the basis of the assessment carried out for the White Paper, which is summarised in an Annex to the

Impact Assessment Report. **The measures that were already ruled out in the White Paper due to a disproportionate cost/benefit ratio have not been reconsidered**. Two examples of such excluded options are multiple (punitive) damages and a wide-ranging system for pre-trial discovery of evidence. Moreover, **all options for EU action (Options 2, 3 and 4) include a non-binding legal framework for quantifying antitrust damages.** This non-binding guidance on one of the most complex and costly issues for all parties to antitrust damages litigation was supported almost unanimously by stakeholders, both in the public consultation on the White Paper, and in a consultation following the publication of a draft Guidance paper in 2011.

14. ***Option 1 — Zero EU action (base-line).*** The first option in the report is the baseline scenario, entailing no action at all at EU level. This involved examining the *status quo* and likely developments in the absence of EU action (prospective analysis).

15. ***Option 2 — Binding act based on the White Paper (including specific collective redress system).*** The second policy option envisages a **legally binding instrument** incorporating the measures that the Commission put forward in its White Paper, including a **competition-specific system of collective redress** that would allow consumers and SMEs to bring their actions jointly. Such an instrument would include: rules on the proportionate **disclosure** of specified categories of evidence; **limited liability** for successful immunity applicants; the **binding effect** of the final infringement decisions of NCAs; a **passing-on** defence for the infringer to show that the damages claimant has passed on the illegal overcharge to its own customers; facilitation of proof for an indirect purchaser as to the scope of the passing-on; and a specific **limitation period** for antitrust damages actions.

16. ***Option 3 — Regulating the interplay between public and private enforcement.*** The third option consists of a binding instrument that partly revises the options put forward in the White Paper to reflect recent developments at national and EU levels in two ways: by referring to a separate **horizontal EU approach to collective redress** instead of regulating a sector-specific mechanism; and by introducing **limitations to access to evidence** aimed at preserving the effectiveness of public enforcement tools. The common ground between these two broad changes is that both reduce to some extent the benefits in terms of effective compensation fostered by Option 2 in order to pursue additional policy objectives, i.e. a horizontal approach to collective redress, as suggested by some stakeholders and by the European Parliament, and in particular better protection for public enforcement following the judgment of the Court of Justice. **The option has thus specifically been designed to assess whether the loss in benefits as regards effective compensation are counterbalanced by reduced costs of litigation and/or by an optimised balance between public and private enforcement.** More specifically, Option 3 differs from Option 2 on the following points:

- As regards **the protection of public enforcement tools**, Option 2 only protects leniency corporate statements from disclosure in actions for damages. Option 3 adds protection from disclosure of settlement submissions, and limits disclosure during investigations by competition authorities. The envisaged protection of public enforcement tools would not make it excessively difficult for victims of a competition law infringement to obtain compensation for the harm they suffered, because of the limited scope of such protection. The protection is thus compatible with the right to effective judicial protection, as laid down in the EU Charter of Fundamental Rights.

- As regards **quantifying antitrust harm**, Option 3 — contrary to Option 2 — provides for a rebuttable presumption relating to overcharge harm in cartel cases. This presumption is based on the findings of an external study, which concluded that **93 % of examined cartels cause harm**. This measure has been introduced to mitigate the impact of claimants having more limited access to some types of evidence that may nonetheless have been useful for proving the harm caused by a cartel. For the same reason, Option 3 contains a rule that the exercise of the claimant's right to damages cannot be rendered practically impossible or excessively difficult by the required level of proof. This option suggests that Member States should allow the judge to estimate the amount of the harm.
- As regards **collective redress**, Option 3 contains no competition-specific measures. While acknowledging the specificities of EU competition law enforcement and the possibility of specific rules, this option relies on a separate, but **horizontal, approach** to collective redress, through initiatives characterised by a broader scope.
- Finally, Option 3 contains measures on **consensual dispute resolution,** which are meant to counterbalance the absence of specific collective redress mechanisms by facilitating other cost-effective procedural means for the parties. These measures would remove existing disincentives to engage in out-of-court settlements to compensate for harm caused by an EU competition law infringement.

17. ***Option 4 — Non-binding EU initiative.*** The fourth policy option (Option 4) consists of a non-binding instrument recommending Member States to implement the measures suggested by policy option 3.

4. THE PREFERRED POLICY OPTION

18. The impact of the four policy options has been assessed in relation to the following benefits and costs:

– Policy options score better in so far as they

(1) ensure full compensation for the entire harm suffered;

(2) effectively protect public enforcement and achieve a balance with damages actions in the overall effective enforcement of Articles 101 and 102 TFEU;

(3) increase awareness, enforcement, deterrence and legal certainty;

(4) allow for better access to justice;

(5) lead to a more efficient use of the judicial system, e.g. by avoiding abuse of litigation and unmeritorious claims;

(6) contribute to a more level playing field in Europe for consumers and businesses alike;

(7) have a positive impact on consumer welfare and on SMEs; and

(8) stimulate economic growth and innovation.

– On the cost side, the report looks into the impact on

(1) litigation costs;

(2) administrative burden;

(3) error costs (i.e. the possibility of national courts issuing a mistaken decision); and

(4) the costs of incorporating the suggested measures into the national legal system.

19. After having assessed the costs and benefits of the four policy options, the report finds that policy option 3 is best at meeting the set objectives at the lowest possible costs. A streamlined overview of the assessment is set out below, together with the main findings explained in the report.

Table (IA Report): Summary of impacts of Policy Options 1-4

Benefits achieved/problem addressed	**Impact compared to base-line (0 to +++)**			
	Option 1	**Option 2**	**Option 3**	**Option 4**
1. Full compensation	0	+ + +	+ +	0 / +
2. Protection of effective public enforcement	0	+ +	+ + +	0 / +
3. Increased awareness, deterrence, enforcement and legal certainty	0	+ + +	+ + +	0 / +
4. Access to justice	0	+ + +	+ + +	0 / +
5. Efficient use of judicial system	0	+ + +	+ +	0 / +
6. A more level playing field	0	+ + +	+ + +	0 / +
7. Positive impact on SMEs and consumers	0	+ + +	+ +	0 / +
8. Stimulating economic growth and innovation	0	+ +	+ +	0
Costs	**Impact compared to base-line (0 to — — -)**			
	Option 1	**Option 2**	**Option 3**	**Option 4**
1. Litigation costs	0	- -	-	0 / — -
2. Administrative burden	0	- -	-	0 / -
3. Error costs	0	-	0 / -	0 / -
4. Implementation costs	0	- -	-	0 / -

20. ***A preference for binding EU action.*** There was a preference for options envisaging EU action. This is because

– as regards optimising the interaction between public and private enforcement of EU competition rules, there is a growing consensus that this is better dealt with at EU level, in particular because of the close connections between the Commission and the national competition authorities;

– as regards improving the procedural conditions for victims of an EU competition law infringement to obtain compensation, experience over recent years has shown that in the absence of EU law, only very few Member States are taking any legislative initiative in this respect. Where something is being done, it covers only some of the obstacles identified by the Commission in its

Green and White Papers, and these initiatives have made the legal landscape even more diverse.

21. Without EU action, the current divergence between national legislation on actions for antitrust damages would persist. That would be problematic in terms of the effectiveness of damages actions. It would also mean that the internal market would remain fragmented in terms of the level of judicial protection, and might encourage forum-shopping (which is usually to the detriment of SMEs and consumers, who are less mobile). This may also result in more complex and thus costly procedures, particularly in cross-border cases. The base-line Option 1 (no EU action) has thus been ruled out. The preference for binding EU action, rather than soft law, analogously led to the exclusion of Option 4.

22. ***A preference for a separate, but horizontal, approach to collective redress.*** In the light of the public consultation and in particular the European Parliament's Resolution of 2 February 2012, a horizontal approach currently appears more appropriate than a competition-specific solution. This is mainly because competition law is not the only field of EU law in which scattered harm frequently occurs and in which it is difficult for consumers and SMEs to obtain damages for the harm they suffered. Similar problems (high litigation costs compared to the individual damage) exist in other fields of law, such as consumer law or environmental law. The basic principles applying to collective redress can, to a large extent, be common to all these fields of law. A horizontal initiative may also foster consistency among the fields where collective redress is considered necessary. However, in so far as specific provisions are considered necessary in relation to competition law, these could be laid down in a separate chapter of the horizontal instrument or in subsequent separate legal instruments.

23. ***A preference for a more balanced system of public and private enforcement.*** Both Options 2 and 3 fulfil to a large extent the policy objectives of the Antitrust Damages Initiative, since both address the main obstacles that currently hinder effective redress for victims of antitrust infringements, building on European legal traditions. Both options also provide safeguards for avoiding abuse of litigation and unmeritorious claims. As such, they have a positive impact on the fundamental right to effective judicial protection laid down in the EU Charter on Fundamental Rights.

24. Option 2 is somewhat stronger as regards ensuring full compensation for the entire harm suffered. However, Option 3 generally provides for a more balanced system. It offers an overall improvement to the possibility of obtaining access to evidence, while offering stronger protection for effective public enforcement, by protecting more documents from competition authorities' files. While satisfying this objective by introducing safeguards, the option still constitutes an improvement in terms of tackling information asymmetry in the sense highlighted by stakeholders in the public consultations. The introduction of a rebuttable presumption in relation to the existence of overcharge harm in cartel cases, and of the possibility to estimate the amount of harm, make it more likely that compensation for damages will be obtained.

25. As regards other measures, such as the passing-on defence, limitation periods and the binding effect of decisions adopted by NCAs, Options 3 and 2 do not differ. In countries where similar provisions are in force, they constitute a significant incentive for claimants. If applied EU-wide, they would improve the chances of effective redress for victims of competition law infringements, and would help attain the

objectives of the current initiative (compensation, access to justice, and ensuring a more level playing field). The binding effect of NCA decisions, in particular, ensures more efficient use of the judicial system.

26. ***Costs.*** In terms of costs, Option 3 scores better than Option 2. Litigation costs are reduced by introducing the rebuttable presumption in relation to quantification of harm and by facilitating consensual dispute resolution. Also, error costs and implementation costs are lower under Option 3, mainly because there is no provision for introducing a sector-specific framework for collective redress. Finally, enhanced protection of public enforcement under Option 3 would reduce the administrative burden.

5. CONCLUSION

27. Option 3 was chosen as the preferred policy option to achieve the objectives of the Antitrust Damages Initiative.

Summary of the contents of the preferred policy option

Full compensation	Any injured party (both direct and indirect purchasers) can claim full compensation for the damage suffered as a result of an infringement of Articles 101 or 102 TFEU. Full compensation includes compensation for the actual loss and the loss of profit, plus interest.
Disclosure of evidence	The preferred policy option provides for a regime of disclosure of specified categories of evidence between the parties to an antitrust damages action. In addition, it provides for safeguards concerning the disclosure of documents from the file of a competition authority.
Limited liability of the immunity recipient	To maintain the attractiveness of the Commission's and the NCAs' leniency programmes, the immunity recipient's liability is limited to its share of the harm caused. The immunity recipient should remain fully liable when injured parties cannot obtain compensation from co-infringers.
Binding effect of NCAs' decisions	National courts dealing with actions for damages are bound by NCA decisions establishing an infringement of the EU competition rules.
Limitation periods	Limitation periods should not impair the right to full compensation. Moreover, victims should effectively be able to bring a damages action after a final decision of a competition authority.
Passing-on of overcharges	The defendant can invoke a passing-on defence against a claim brought by the direct purchaser. Conversely, in order to facilitate claims brought by indirect purchasers, proving pass-on of the overcharge to their level is made easier.
Presumption of harm	Victims of cartels will be able to rely on a rebuttable presumption that a cartel leads to overcharge harm. Furthermore, requirements under national law to quantify the harm suffered must not make it practically impossible or excessively difficult for a claimant to obtain compensation.
Consensual dispute resolution	Consensual dispute resolution is facilitated, as it may constitute a quicker and less costly alternative to court litigation.