



**Implementation of Directive 2014/104/EU 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 into national law**

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Since its foundation in 2002, the CDC Cartel Damage Claims (**CDC**) group has become the European pioneer in the field of private enforcement.<sup>1</sup> Based on a genuinely European approach rooted in the common legal principles of the Member States CDC has brought some of the largest competition law damage actions so far. On the basis of damage claims purchased from a multitude of damaged companies, mainly SMEs, CDC has initiated six actions before courts in Germany, the Netherlands and Finland. In addition, CDC has litigated in relation to fundamental EU law questions such as access to evidence, the international jurisdiction of courts in cross-border damage cases and the content of publicly available infringement decisions by the European Commission. CDC has successfully concluded several complex out-of-court settlements, many of them totalling tens of millions of Euros. While ensuring a fair compensation for the victims, the settlements also result in a significant reduction of the risk exposure of the settling cartel member against the background of its joint and several liability.

Based on its day-to-day experience, CDC would like to share some practical aspects that should be taken into account in the context of the Implementation of Directive 2014/104/EU.

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<sup>1</sup> For details see <http://www.carteldamageclaims.com>.

## Executive summary

1. On 26 November 2014, the Directive 2014/104/EU on damages actions for breaches of EU competition law (**Directive**)<sup>2</sup> has entered into force. Member States need to implement the Directive into their legal order by 27 December 2016. The Directive covers many important subjects of private enforcement of competition law. It not only contains detailed provisions which provide for a certain minimum standard in this regard all over Europe. Article 4 also generally prescribes that, in accordance with the principle of effectiveness, 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 (also see Recital 11). Indeed, there are still essential issues that arise in the practice of complex cross-border litigation characterizing private enforcement of competition law, which are not expressly covered by the Directive. The implementation of the Directive therefore provides an opportunity, if not obligation, to consider additional measures at the national level, in order to ensure the right to obtain full compensation and avoid unnecessary litigation and costs for all parties involved.
2. The Member States must ensure that the Directive is fully effective and achieves an outcome consistent with the objective pursued by it which is the strengthening of private antitrust enforcement.<sup>3</sup> This implies the amendment of existing national legal provisions whose application in antitrust damages cases could undermine the right to obtain full compensation. Regarding the entry into force of the national implementation provisions, one should note that the Directive is already applicable inasmuch it merely codifies the Union (case) law requirements, and does not expand the liability for competition damages.<sup>4</sup>
3. Based on the practical experience of CDC, this paper focuses on aspects that national legislators should take account of in addition to the express provisions of the Directive.
4. The findings can be summarized as follows:
  - A. National legislators should adopt a unique set of provisions for all antitrust infringements, irrespective of whether the infringement concerns EU or national law. Such unique set not only prevents difficulties and uncertainties stemming from separate provisions which are applicable in parallel, but in particular prevents an inland discrimination in cases which are not governed by Articles 101 or 102 of the Treaty on the functioning of the European Union (**TFEU**).
  - B. National competition authorities should be obliged to publish meaningful decisions, containing at least the constitutive elements of a competition infringement. The publication should take place in due time after the adoption of the decision, in order to prevent unnecessary court proceedings for access to evidence. Moreover, such publication would help to avoid unnecessary lit-

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<sup>2</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 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 (OJ L 349, 5.12.2014, p. 1–19). **All Articles and Recitals mentioned in this paper are those of the Directive unless stated otherwise.**

<sup>3</sup> Judgment of the CJEU of 10 October 2013 in Case C-306/12, *Spedition Welter GmbH*, para. 30.

<sup>4</sup> According to its Recital (12), the Directive reaffirms the *acquis communautaire* on the right to compensation for harm caused by infringements of Union competition law.

igation and unmeritorious claims. Publishing meaningful decisions is also prerequisite for the proper functioning of the Directive's rules on disclosure of evidence and on limitation periods.

- C. The information concerning the operation of an infringement of competition law is primordial for potential claimants to substantiate the damage and causality. As a consequence such information should never be protected as confidential or business secret. Moreover, national legislators should provide guidance on the scope of confidential information in order to avoid lengthy disputes on confidentiality claims and prompt effective judicial protection.
- D. A pre-trial discovery procedure should be put in place. This procedure would prevent that premature damage actions are initiated with the expectation to obtain evidence relevant for the substantiation of the claim. The availability of a mechanism to obtain substantive information relevant for the evaluation of a claim would help to ensure that only meritorious claims are initiated in court. Such mechanism would help to create a level playing field between claimants and defendants as cartels are typically of a clandestine nature. It would also favour early amicable settlements between the parties.
- E. National legislators should clarify that an infringement decision by a competition authority becomes final against an infringer who did not lodge an appeal against the decision, irrespective of whether an appeal by another addressee of the decision, who might also be defendant in the civil proceedings, is still pending. As a consequence Article 6(5) is applicable and national courts may order to disclosure of documents relating to the administrative proceedings.
- F. In light of the judgments of the Court of the European Union (CJEU) in Cases *Pfleiderer* and *Donau Chemie* Article 6(6) has to be interpreted narrowly. In addition, in accordance with Article 6(8) partial disclosure of leniency documents and settlement submissions should be possible, if only such disclosure would enable the damaged parties to obtain the evidence needed to establish or to further substantiate a claim. According to the CJEU an absolute refusal to grant access to leniency documents is liable to undermine the effective application of Article 101 TFEU and the rights that provision confers on individuals.
- G. Limitation periods should only start running once a victim of a secret cartel can be reasonably expected to know (i) the behaviour and the facts that constitute an infringement of competition law, (ii) the identity of the infringers, and especially (iii) the fact that the infringement of competition law caused harm to it. This is typically only the case after the publication of a meaningful infringement decision is published. Moreover, limitation periods should be interrupted by a written notice in which the claimant unequivocally reserves his right to claim damages.
- H. Unreasonable cost risks should not prevent or dissuade claimants from enforcing their rights. Adverse costs risks should be capped and third party interventions should be limited. Claimants should not be exposed to adverse costs in relation to third party interventions on the defendants' side motivated by contribution proceedings at a subsequent stage.
- I. Additional guarantees from a claimant, such as insurances, upfront payments of fees or legal registrations, should not be required only because a claim was transferred to the claimant. A damage claim resulting from an infringement of competition law is protected property. Moreo-

ver, the right to full compensation should not be altered when the claim transferred is disputed before a court.

- J. The Directive confirms the private joint and several liability of all undertakings participating in an infringement of Articles 101 or 102 TFEU. In order to avoid inland discrimination, national legislators should therefore ensure that the concept of ‘undertaking’ is also applied in purely domestic situations. The exceptions foreseen in the Directive from the principle of joint and several liability depart from both Union law and the legal traditions of the Member States. These exceptions should therefore be interpreted narrowly.
- K. In accordance with binding EU law, interest as essential part of compensation accrues from the time the harm occurred until full compensation is paid. Given that damages sustained in relation to competition law are of commercial nature, interest should be compounded, and a higher rate than the general legal interest rate should be applied. Interest for delay, at a dissuasive interest rate, should also be available.
- L. The burden of proof of a defendant relying on the so-called ‘pass-on defence’ should not be limited to the fact and the scope of the pass-on of overcharges to indirect purchasers, but should entail as well the non-existence of countervailing volume effects on the side of the direct purchasers.
- M. In order to facilitate out-of-court settlements, national legislators should define a single objective criterion for the determination of the share of the settling infringer in the total harm caused by a competition law infringement. Due to its practical relevance, this criterion should be the purchase or sales volumes of the cartel. With regard to damages not related to existing volumes (e.g., loss of profit, umbrella claims), a subsidiary rule stipulating per capita allocation among the infringers should be added. Such approach would provide legal certainty for all parties involved and significantly favour early settlements.
- N. Potential victims of competition law infringements across the EU should be informed by the European Commission (**Commission**) and/or the respective national competition authorities (**NCA**) on any established infringement of Articles 101 and 102 TFEU. NCA should ideally send the original version of its decision together with an English summary thereof to the Commission for a publication on the official website of Directorate General for Competition. In addition, Member States should communicate to the Commission any (important) judgment in the field of private damages actions.
- O. A system of specialised courts or chambers should be put in place in order to ensure effective and timely decisions in these often legally and economically complex matters. The use of evidence and data in electronic form would further help to overcome unnecessary burdens.

#### A. Uniform legal standard for inland and cross-border antitrust infringements

***Different rules on (i) damages for infringements that affect trade between Member States and (ii) for damages from infringements of purely national competition law would result in additional difficulties for all parties involved in already complex litigation. The existence of a double legal standard would create legal uncertainty and per se undermine the effectiveness of the Directive. National legislators should therefore consider a unique set of solutions for all antitrust infringements, not at least to avoid discrimination against their own nationals.***

5. Due to the often unclear cross-border nature of competition law infringements, competition authorities and/or claimants in damage actions often refer to Articles 101 or 102 TFEU in conjunction with the equivalent provisions under national law.<sup>5</sup> The EU legislator therefore deems it necessary to harmonize certain rules governing actions for damages in cases when national and Union law are applied together. Only actions for damages resulting from purely national infringements of competition law, which do not affect trade between Member States, are excluded from the scope of the Directive.
6. However, a double legal standard depending on whether national law is applied in parallel with, or independent from, Union law might result in additional difficulties for all parties involved in complex damages cases. The Member States should therefore consider a unique set of solutions for all competition law infringements in order to avoid discrimination against their own nationals or any distortion of competition. As evident from the CJEU judgments in *Vergers du Vieux Tauves*<sup>6</sup> and *Foggia*<sup>7</sup>, national legislators and courts can take account of Union law regarding damages actions for losses resulting from national antitrust infringements.

#### B. Ex ante availability of sufficient information for proper functioning of disclosure rules

***NCA's should be obliged to publish meaningful decisions, containing at least the constitutive elements of a competition infringement. The publication should take place in due time after the adoption of the decision, in order to prevent unnecessary court proceedings for access to evidence. Moreover, such publication would help to avoid unnecessary litigation and unmeritorious claims. Publishing meaningful decisions is also prerequisite for the proper functioning of the Directive's rules on disclosure of evidence and on limitation periods.***

7. Access to evidence is crucial in enabling the effective enforcement of competition rules by victims of anticompetitive behaviour. Articles 5 to 8 provide for a court-controlled access to documents. It is, however, already foreseeable that these rules, which aim to prevent non-specific or overly broad searches for information, will result in lengthy disputes before the courts of the Member States<sup>8</sup>. Many such disputes could be avoided, if the Commission, as well as NCAs, published decisions which already take due account of the right of victims to effectively bring follow-on damage claims and of the existing need for information symmetry in such cases. Indeed, Recital 21, which recognizes a common approach for strengthening private antitrust enforcement within the Union, is usefully

<sup>5</sup> See Article 3 of Regulation (EC) No 1/2003.

<sup>6</sup> Judgment of the CJEU of 22 December 2008 in Case C-48/07, *Les Vergers du Vieux Tauves SA*, para. 27

<sup>7</sup> Judgment of the CJEU of 10 November 2011 in Case C-126/10, *Foggia - Sociedade Gestora de Participações Sociais SA*, para. 21.

<sup>8</sup> Indeed, Article 5 provides that a national court can order a party or a third party to disclose relevant evidence which lies in their control when the (i) claim for damages is already plausible, (ii) evidence is proved to be relevant for substantiating the claim, (iii) categories of evidence are defined as precisely and narrowly as possible, and (iv) scope of disclosure is proportionate.

complemented by Recital 24 providing that Articles 5 to 8 do not prevent competition authorities from publishing their decisions in accordance with applicable Union or national rules. In that regard, it is important to underline that the EU General Court recently confirmed that the material facts of antitrust infringements do not constitute protected information and should be published.<sup>9</sup>

8. Against the above, national rules should ensure that victims of anticompetitive conduct are in a position to assess *ex ante* and on due time (i) whether they are both affected and harmed by a specific infringement, (ii) against whom they might claim for compensation, and (iii) which court has competence to hear an action. Publishing meaningful decisions would also help to avoid unnecessary and time-consuming proceedings for access to the administrative file, disclosure procedures as well as the filing of unjustified damage actions before national courts. Importantly, it would also ensure the proper functioning of the disclosure of evidence rules, and improve the overall efficiency of the administrative and judicial system.

### **C. Guidance on unprotected information to prevent lengthy disputes on confidentiality claims**

***The information related to the functioning of an infringement of competition law should never be considered as confidential. Such information has to be published or at least disclosed to any interested party in due time at no unreasonable costs. The balancing of interests' tests should only be applied to requests for disclosure of protected information.***

9. The absence of sufficient information on the infringement makes damage actions more difficult and enables infringers to conceal their wrongdoing and to keep their illegal gain. In practice, infringers try to avoid the publication of details of the infringement by arguing that they amount to business secrets or confidential information. The Commission and NCAs tend to prematurely agree with this argumentation, not least to avoid lengthy conflicts.<sup>10</sup> Thus, without specification of the scope of protected information, infringers will continue to undermine attempts of the Commission or NCAs to disclose information that might help harmed persons to substantiate their damages claims. Thus, clear guidance on what specific information could be protected under (strict) conditions would be highly beneficial in terms of administrative and judicial efficiency.
10. National legislators should therefore specifically clarify that the following information can never be confidential and should therefore be disclosed to claimants in due time at no unreasonable costs:

#### ***(i) Legal entities participating in the infringement and addressees of the administrative decision***

All legal entities that are addressees of the administrative decision and are therefore part of the 'undertaking' in terms of Article 101 TFEU, which has participated in the infringement, should be disclosed. This is also true in the event that the authority does not impose a fine (e.g. due to limitation periods or inability to pay), as entities may still be liable under civil law. In addition, the seat of

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<sup>9</sup> Judgments of the EU General Court of 15 July 2015 in Cases T-462/12, *Pilkington Group Ltd* and T-465/12, *AGC Glass Europe and Ors* and of 28 January 2015 in Cases T-345/12, *Akzo Nobel and Ors* and T-341/12, *Evonik Degussa GmbH*. This case law militates in favour of publishing meaningful decisions in order to have, if any, less quantitative and more qualitative requests for documents from cartel victims before courts or public administrations.

<sup>10</sup> See Policy and Regulatory Report (PaRR) of 24 July 2014 where the lack of resources of the Commission to address the cartelists' broad confidentiality requests was referred to.

each entity establishes an alternative jurisdiction under the rules of Regulation (EU) No 1215/2012 (**Brussels I bis**).

In particular, all parent companies that exercised decisive influence over the entities directly participating in the infringement should be easily identifiable. According to settled case law, such parent companies are part of the ‘undertaking’ and thus directly responsible for the infringement. For example, it is already recognized by courts in the Netherlands that the seat of a parent entity may establish jurisdiction under Brussels I bis.

**(ii) Definition of the affected product and geographic market**

A precise description of the products and/or product categories affected by the infringement allows victims to identify which products and which volumes were affected by the cartel and thus enables victims to fulfil their obligations to substantiate a (potential) damage claim.

The geographic area in which the infringement took place allows victims to identify transactions affected by the infringement. This is particularly important for victims who purchased an affected good in several Member States. Without this information victims would risk either foregoing justified claims or bringing a partly unsubstantiated action.

Finally, the identification of the affected product and geographic market(s) is also relevant for the identification of the applicable law. According to Article 6(3) Regulation (EC) No 864/2007 (**Rome II Regulation**), ‘[t]he law applicable to a non-contractual obligation arising out of a restriction of competition shall be the law of the country where the market is, or is likely to be affected’.

**(iii) Precise duration of the infringement for each participant**

The precise period of participation in the infringement for each legal entity is compulsory in order to substantiate a claim against a specific participant and thus avoids the risk of bringing an inadmissible or unsubstantiated action that could result in a potentially high adverse cost ruling. Exact information regarding the participation of each legal entity in the infringement is also necessary for the assessment of limitation periods.

**(iv) Dates and places where the infringement was committed**

All places and dates where the infringement was committed, e.g. all places and dates where cartel meetings took place. Under the rules of Brussels I bis and general tort law principles, each place where an illicit act occurred establishes an alternative jurisdiction where victims may bring a damage action.<sup>11</sup> In addition, the Member States where the infringement took place and/or had effects are relevant for the identification of the applicable law (see Article 6(3) Rome II Regulation).

**(v) Precise description of the infringement, including individual cartel meetings, prices, quotas, capacities etc. agreed**

Although potential victims can rely on the binding effect of decisions for the establishment of an infringement, they still have to prove the existence of damage and a causal link between the infringement and the damage. This is typically done by specifying the ‘but-for price’ which expresses the hypothetical competitive price in the absence of the infringement. In order to establish a credi-

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<sup>11</sup> This was recently confirmed by the CJEU in Case C-352/13, *CDC Hydrogen Peroxide*.

ble and convincing ‘but-for’ scenario, it is imperative to have detailed knowledge about the operation and the functioning of the infringement, namely:

- Competitive factors that were the subject of the anticompetitive agreements: In addition to the general type of infringement (e.g. price fixing, market sharing, bid rigging, customer sharing, capacity reductions, submission of cover quotes), it is important to know the content of the specific agreements reached. E.g. knowledge of the operation and the functioning along with the content of the cartel agreements makes the development of the hypothetical ‘but-for’ scenario significantly easier and more precise.
- Existence of monitoring and/or punishment mechanisms and how deviations from the cartel agreements were detected (e.g. retaliation resulting in a price decrease).
- Implementation of the anticompetitive agreements or the lack thereof.
- Content of each individual cartel meetings, providing an overall history of the cartel and describing the agreements reached between the cartel members.
- The role of the individual undertakings in the infringement and their participation in individual agreements and/or meetings.

In this context it is important to note that according to EU law, details of anticompetitive practices, such as the price increases agreed in cartel meetings do not amount to business secrets or confidential information. It is therefore common practice of the European courts to publish them in judgments (see e.g. judgment T-566/08 *Total Raffinage Marketing* of 13 September 2013).

**(vi) Information on price developments on the affected market**

General information on price developments on the relevant market (e.g. from industry studies) can be very helpful in order to (i) estimate price effects, and (ii) evidence a causal link between the infringement and price effects.

**D. Establishment of a pre-trial discovery procedure to ensure that only meritorious claims are pursued**

**National legislators should provide for a pre-trial discovery procedure which would serve as filtering mechanism of unfounded damages actions. Such procedure which would precede the initiation of a civil lawsuit would allow all parties concerned to have knowledge of the evidence on which a claim could be based and the prima facie meritorious character thereof.**

11. Obtaining evidence is not only a major obstacle to antitrust damages actions, but also a complex issue faced by judges willing to ensure that claimants are given fair possibility to obtain full compensation for their loss, while defendants are protected from unjustified fishing expeditions. Under the *statu quo* many damages actions, often preceded by unsuccessful requests for access to administrative documents, are initiated to interrupt limitation periods with the expectation to obtain evidence for the very existence of a claim at a later stage. As a consequence, unmeritorious claims are brought to court simply because claimants are not in a position to have a sufficiently detailed knowledge of the infringement. This situation results in unnecessary burden and costs not only for claimants and defendants, but also for the administrative and judicial systems of the Member States. In the absence of concrete practical indications in the Directive, additional measures are needed at

the national level in order to provide judges with efficient tools allowing them to control the access to evidence efficiently and at no unreasonable costs for all parties concerned.

12. The introduction of a pre-trial discovery procedure prior to the initiation of a civil lawsuit would allow all parties concerned to have full knowledge of the evidence on which a claim could be based and the prima facie meritorious character thereof. In order to be prompt and thus fully effective, such procedure should ideally be court-governed, possibly within confidentiality rings between the parties concerned or their lawyers. An example would be to disclose the relevant parts of an administrative fining decision in order to establish the key facts required for a meritorious claim, e.g. the duration, the object and the participants of the competition law infringement. Moreover, a pre-trial discovery procedure against one infringer should not prevent a claimant to subsequently seek damages, on the basis of the information obtained, from another or all of the jointly and severally liable infringers.

**E. Inapplicability of Article 6(5) to requests for disclosure of evidence in actions against non-appealing infringers**

*If an infringer decides not to appeal the fining decision, the decision becomes final and the limitation periods for bringing actions for damages are no longer suspended or interrupted. National legislators should therefore clarify that categories of evidence under Article 6(5) should be disclosed to the claimant acting against the non-appealing infringer, independent of any pending action seeking the annulment of the decision from another addressee who could also be a defendant in the civil proceedings.*

13. Article 6(5) provides for the disclosure of some categories of evidence only after a competition authority, by adopting a decision or otherwise, has closed its proceedings. In accordance with the latest Union courts case law, proceedings are in principle not closed before the last judicial appeal is decided.<sup>12</sup> Against this background, due account should be taken, when implementing Article 6(5) into national law, of the Commission observations of 18 February 2014 to the United Kingdom Supreme Court pursuant to Article 15(3) Regulation (EC) No 1/2003.<sup>13</sup> On this occasion, in the context of a follow-on action for antitrust damages, the Commission had specified that in cartel cases a decision becomes final, and therefore limitation periods for bringing actions for damages are no longer suspended or interrupted, for claims against an infringer who did not appeal the competition authority decision.
14. It is therefore compulsory that the information necessary to substantiate a claim of a person seeking damages from the non-appealing infringer is fully accessible independent of any pending action seeking the annulment of the fining decision by a co-tortfeasor. Moreover, since EU law does not preclude it, Member States could consider, in line with the judgment of the EU General Court in Case *CDC Hydrogene Peroxide* that the investigation is regarded as closed once the final decision is adopted, irrespective of whether that decision might subsequently be annulled by the courts.<sup>14</sup>

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<sup>12</sup> See e.g. judgment of the EU General Court of 7 October 2014 in Case T-534/11, *Schenker AG*, para. 72.

<sup>13</sup> Commission observations are available at [http://ec.europa.eu/competition/court/amicus\\_curiae\\_morgan\\_crucible\\_observations\\_en.pdf](http://ec.europa.eu/competition/court/amicus_curiae_morgan_crucible_observations_en.pdf).

<sup>14</sup> Judgment of the EU General Court of 15 December 2011 in Case T-437/08, *CDC Hydrogene Peroxide*, para. 62.

**F. Narrow interpretation of Article 6(6) and partial access to leniency materials if required for the substantiation of damage claims**

***The prohibition under Article 6(6) has to be interpreted narrowly as it has to be reconciled with the CJEU's judgments in Pfleiderer and Donau Chemie. While leniency documents and settlement submissions should not be disclosed integrally, partial disclosure of specific parts relevant thereof for the substantiation of a claim should remain available in accordance with Article 6(8).***

15. According to Article 6(6), leniency statements and settlement submissions can never be disclosed to claimants. It is, however, questionable whether such absolute denial of access to documents is, in line with the case-by-case balancing test advocated by the CJEU in its *Donau Chemie* judgment.<sup>15</sup> According to the CJEU an absolute refusal to grant access to leniency documents would undermine the effective application of Article 101 TFEU and the rights that provision confers on individuals. In light of this case law Article 6(6) has to be interpreted narrowly.
16. Furthermore, the main arguments for the protection of leniency statements and settlement submissions in form of ensuring the attractiveness of public leniency programmes, do not stand:
  - (i) To date the alleged conflict in the form of a chilling effect of access to leniency documents on leniency applications is not supported by empirical studies or any evidence;
  - (ii) It is doubtful that leniency applicants are the 'preferential target of litigation' as asserted in Recital 34. Plaintiffs regularly sue several cartel members jointly, regardless of their leniency status. Also, the place of establishment and thus the jurisdiction of a cartel member is typically a much more decisive factor for targeting an infringer.
17. Moreover, Article 11(4) and (5) provide for far-reaching benefits for successful leniency applicants in form of a limitation of their joint and several liability and the cartel-internal allocation of liability under contribution rules. In addition, it seems very questionable whether settlement statements deserve the same level of protection as leniency statements. While leniency statements are necessary in order to unearth a secret cartel, this is clearly not the case for public settlements. The incentive for many cartel members to renounce their rights of defence under the settlement procedure is not triggered by the additional 10 percent reduction of the fine, but by the fact that decisions based on this procedure contain substantially less information on the infringement and in some cases none at all.<sup>16</sup>
18. Thus, in accordance with Article 6(8) at least partial access also to leniency statements and settlement submissions or information contained therein should be possible for claimants on a case-by-case basis, as long as they do not concern business secrets or other confidential information.

**G. Publication of a meaningful decision as starting point of limitation periods in cartel cases**

***The publication of a meaningful decision is the only objective way to allow potential victims to know about the anticompetitive conduct, the fact that it constitutes an infringement of competition law, the identity of the infringers and most importantly that it may have been affected by the infringement. Disclosing to the wider public the full operation of a secret cartel is an objective and***

<sup>15</sup> Judgment of the CJEU of 6 June 2013 in Case C-536/11, *Bundeswettbewerbshörde v Donau Chemie AG and Others*.

<sup>16</sup> See e.g. www. <http://blog.handelsblatt.com/rechtsboard/>, 14 February 2014.

***transparent way to fulfil the criteria of the reasonably expected knowledge for the starting point of limitations. Moreover, national legislators should specify that a written letter addressed to the infringer in which the harmed person unequivocally reserves his right to claim damages should interrupt limitations or at least suspend them for a certain period of time.***

19. According to Article 10(2), limitation periods do not begin to run before the infringement of competition law has ceased and the claimant knows, or can reasonably be expected to know (i) of the behaviour and the fact that constitutes an infringement of competition law, (ii) of the fact that the infringement of competition law caused harm to it, and (iii) the identity of the infringer. In that regard, it is relevant to underline that in cases of secret cartels, a claimant cannot be reasonably expected to have such knowledge before a meaningful sanctioning decision has been published. Press releases of the Commission or NCAs typically lack this basic information, and merely stating that a fine has been imposed is not sufficient. This is also clearly reflected in Union documentation and case law related to the conduct of the administrative procedure leading to the finding of an illegal behaviour. The importance to observe the principle of effectiveness as regards, in particular, the necessity to have knowledge about the facts establishing the infringement before a limitation period may start to run was already highlighted by the CJEU in its landmark judgment *Manfredi*.<sup>17</sup> The publication of a non-confidential meaningful decision on the infringement of EU competition law is there the most transparent and fully objective way to allow potential claimants to have knowledge or to be reasonably expected to know, at no unnecessary cost, the facts enabling them to exercise their rights to claim compensation. Only under these objective conditions, limitation periods may start running.
20. Moreover, in case a decision is considered as final as regards an infringer who did not lodge an appeal, a written notice to the infringer in which the claimant unequivocally reserves his right to claim damages should interrupt limitations or at least suspend them until the decision becomes final for all jointly and severally liable tortfeasors. Such possibility for an interruption exists under Dutch law, for example.

#### **H. Level playing field as regards costs for effective legal protection**

***Access to justice could be severely undermined if cost rules are not adapted to the reality of private enforcement of competition law. A claimant incurs significant own costs. In addition claimants have to account for the adverse cost risk. In most cases infringers are artificially increasing these costs by strategies aiming to delay the proceedings or by issuing a large number of third party notifications. For the effective application of competition law in the private sphere, cost rules should allow claimants to initiate an effective action for damages against all jointly and severally liable infringers by (i) capping the adverse cost risks, (ii) limiting third party interventions in the proceedings and (iii) excluding adverse costs risk in relation to third party interventions on the defendants' side justified by subsequent contribution proceedings. In addition, insurance policies which cover the potential adverse costs (so called 'After the Event Insurances') should be recognised.***

21. Recital 4 provides that each Member State is required to have procedural rules ensuring the effective exercise of the right to compensation and thus the effective legal protection in accordance

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<sup>17</sup> Judgment of the CJEU of 13 July 2006 in joined Cases C-295/04 to C-298/04, *Manfredi and Others*.

with Article 47 of the Charter of fundamental rights of the European Union (**Charter**). As emphasized by the Commission in its White Paper on damages actions<sup>18</sup>, depending on the jurisdiction, incalculable cost risks could represent a major obstacle to private enforcement actions, even where an infringement has been established by a competition authority. Costs and cost risks can differ to a very significant extent between Member States. In Germany, for example, claimants in large damage actions have to pay upfront court fees of approx. EUR 330,000 for the first instance, while in other Member States no, or only very low, court fees are due. Similarly, some Member States provide for effective caps regarding reimbursable legal fees under the 'loser pays' rule, while other Member States do in principle have no such caps, resulting in a high adverse cost risk for potential claimants. Cost rules therefore play a key role in making jurisdictions attractive venues and thus strengthen the position of a Member State in the ongoing competition between judicial systems.

22. As cartels *per se* consist of a multitude of infringers, cost risks between a claimant and defendants are typically unequal. In practice these cost risks are often further artificially increased by means such as procedural delays or third party notifications. For example, massive third-party interventions took place in most of the civil proceedings against members of illegal cartels in Germany, The Netherlands, Austria, and the UK. These interventions caused significant delays in the judicial procedure. More significantly, in cases of numerous third party interventions on the infringers' side, the costs of the claimant increase while the intervening parties typically only have to bear their own costs. This creates significant disincentives for injured parties to pursue their claims, in particular as a claimant faces already significant own costs (e.g. data collection, economic and legal analysis, expert opinions, lawyer and court fees, etc.).
23. One practical solution to mitigate the cost risk in complex competition cases are so called 'After the Event' ('ATE' Insurances). ATE Insurance is an insurance which covers the legal costs and expenses involved in the litigation. Typically ATE Insurance policies cover the legal costs which a claimant must pay to the defendants when a claim is unsuccessful. In practice, the insurance company issues an insurance policy to the benefit of the respective adverse party in which they guarantee the payment of the reimbursable legal costs in case the insurance holder loses the case. This practical solution is used widely in damage actions in the UK, and insurance companies offer ATE Insurances also for actions in other jurisdictions.
24. Against the above, specific provisions at the national level should be introduced to set a level playing field for claimants and defendants regarding cost risks, in particular in follow-on damage cases where an infringement has been proven. In order to avoid an abuse of third party intervention rights, national legislators should ensure interveners should in principle bear their own cost risk. Moreover, in order to take account of the particularities of cartels as multi-party infringements with typically a multitude of possible defendants and interveners in follow-on actions, national legislators should consider capping the cost risk of a claimant at the amount to which it would be entitled to in case it prevails. This would result in an equal cost risk of the claimant and the jointly and severally liable tortfeasors. In parallel, in accordance with the principle of good administration of justice, forced or voluntary interventions on the defendant's side must be limited to entities with proven actual and direct interest in the dispute (e.g. under principles of joint and several liability). In any event, legislators should ensure that claimants do not have to bear adverse costs in relation to third

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<sup>18</sup> COM(2008) 165 final, p. 9.

party interventions on the defendants' side which are justified by subsequent contribution proceedings. Finally, if not already the case, ATE Insurances should specifically be allowed in the context of the provision of security for costs.

#### I. Removal of barriers for the assignment and bundling of damage claims

***An antitrust damage claim is protected property. National rules which limit the full exercise of this right should be repealed. This applies to rules which preclude the transfer of a claim, require additional guarantees only because a claim is transferred or alter the right of full compensation when the claim transferred is litigious.***

25. Articles 2(4) and 7(3) recognize the standing to initiate antitrust damages actions before national courts of legal successors or persons who purchased a claim. The transfer of damage claims resulting from competition law has played a very important role in the practice of private enforcement in Europe. In almost all major cases brought across the EU (at least on the continent), some form of bundling, often in form of the transfer to claims to a specialised entity, takes place. This practice has been specifically recognized by courts in the Netherlands<sup>19</sup>, Germany<sup>20</sup>, Austria<sup>21</sup> and Finland<sup>22</sup>. This is also in line with the case law of the European Court of Human Rights which by judgment of 20 November 1995 in Case *Pressos compania* had established that tortuous claims are transferrable assets protected by property rights under Article 1 Protocol 1 of the Convention.<sup>23</sup> The right of property is reflected in Article 17 of the Charter as well with the significant difference that the latter legal instrument could provide more extensive protection of rights rooted in Union law than the Convention on Human Rights.
26. In line with this established case law, the CJEU's Advocate General (AG) Jääskinen<sup>24</sup> has recently stated that damage claims resulting from competition law are assets that persons affected by the prohibited behaviour have significant difficulties to assert. AG Jääskinen adds that bundling of such claims by assignment is an effective alternative to group actions and that professional claim consolidators play an important role due to the existing practical challenges: *'The emergence of players on the judicial scene, such as the applicant in the main proceedings, whose aim it is to combine assets based on claims for damages resulting from infringements of EU competition law, seems to me to show that, in the case of the more complex barriers to competition, it is not reasonable for the persons adversely affected themselves individually to sue those responsible for a barrier of that type.'*
27. Against the above, it clear that for the full effectiveness of the Directive and the fundamental rights guaranteed by the Convention, the implementation of Articles 2(4) and 7(3) requires the abolishment of national law requirements which effectively hinder the transfer of damage claims under national law. Accordingly, some Member States might have to repeal existing national provisions or case-law which would prevent a transfer of a damage claim (e.g. the rules of champerty and maintenance in the UK) or which render the exercise of the right to obtain full compensation by way of a claims transfer excessively difficult (e.g. uncodified requirement for upfront security for costs in case of the transfer of claims).

<sup>19</sup> Judgment of the Amsterdam Court of Appeal of 7 January 2014, Ref. 200.122.098/01 – *EWD v KLM and Others*, recital 2.10.

<sup>20</sup> Judgment of the Federal Supreme Court of 28 June 2011, Ref. KZR 75/10 – *ORWI*, recital 2.

<sup>21</sup> Judgment of the Supreme Court of 14 February 2012, Ref. 5 Ob 35/11p.

<sup>22</sup> Interlocutory judgement 36492 of the District Court Helsinki of 4 July 2013, Ref. 11/16750.

<sup>23</sup> Judgment of 20 November 1995 in Case 38/1994/485/567, *Pressos Compania Naviera S.A. and Others v. Belgium*.

<sup>24</sup> Opinion of Advocate General Jääskinen, delivered on 11 December 2014 in Case C-352/13.

**J. Confirmation of the joint and several liability of all ‘undertakings’ participating in an infringement and narrow interpretation of exceptions foreseen in the Directive**

***The Directive confirms the civil joint and several liability of all undertakings participating in an infringement of Articles 101 and 102 TFEU. In order to avoid inland discrimination, national legislators should therefore ensure that the concept of ‘undertaking’ is also applied in purely domestic situations. The exceptions foreseen in the Directive from the principle of joint and several liability depart from both Union law and the legal traditions of the Member States. These exceptions should therefore be interpreted narrowly.***

28. In Article 11(1), the Union legislator recognized the principle acknowledged within the legal orders of the Member States that joint tortious behaviour leads to joint and several liability for the compensation of the entire harm (i.e. victims are free to claim full compensation for the harm suffered as a result of violations of competition law from each and every of the cartel members). Further, Article 2(2) specifies that the infringer who is jointly and severally liable for the damage resulting from the competition law infringement is the ‘undertaking’ or ‘association of undertakings’.<sup>25</sup>
29. In EU competition law, the concept of ‘undertaking’ must be understood as designating an economic unit, even if in law that economic unit consists of several persons, natural or legal. When such an economic unit infringes the competition rules, it falls, according to the principle of personal responsibility, to that economic unit to answer for that infringement. In the landmark judgment *Akzo Nobel* the CJEU held that particularly a parent company, which is part of an economic unit, is regarded as jointly and severally liable with the other legal persons (e.g. subsidiaries) making up that unit for infringements of competition law.<sup>26</sup> In order to avoid inland discrimination, national legislators should therefore ensure that the established EU law concept of ‘undertaking’ is also applied in purely domestic situations.
30. The Directive contains two exceptions from the principles of joint and several liability of the undertakings participating in an infringement of competition law. Firstly, Article 11(2) privileges infringers which are small and medium size enterprises ‘pursuant to the definition in Commission Recommendation C(2003) 1422’.<sup>27</sup> Secondly, Article 11(4) deals with the limited liability of the immunity recipient, including all entities comprising the undertaking. In both cases, liability is limited to the harm caused to direct or indirect purchasers or, in case of purchasing cartels, to direct and indirect providers. These exceptions are not in line with national rules which in principle do not offer particular protection to joint and severally liable tortfeasors. Most importantly, such an approach is also at odds with the established case law of the CJEU according to which each undertaking shall compensate the harm resulting from the illegal behaviour as a whole, independent of its status as immunity recipient or SME.<sup>28</sup> The exceptions to the principle of joint and several liability foreseen in the Directive should therefore be interpreted narrowly.

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<sup>25</sup> As confirmed by the judgment of the CJEU of 21 May 2015 in Case C-352/13, *CDC Hydrogen Peroxide*, para. 33.

<sup>26</sup> Judgment of the CJEU of 10 September 2009 in Case C-97/08 P, *Akzo Nobel and Others*, paras. 54-56 and 77.

<sup>27</sup> Commission Recommendation of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises (Text with EEA relevance) (notified under document number C(2003) 1422) available at <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32003H0361&from=EN>

<sup>28</sup> Judgment of the CJEU of 11 July 2013 in Case C-444/11 P, *Team Relocations*, paras 49 et seq; judgment of the EU General Court of 28 April 2010 in Case T-452/05, *BST*, paras. 31 et seq.

**K. Accrual of interest from the date of the harm until full payment of compensation**

***According to binding EU law interest is essential part of compensation and is due from the time when the harm occurred until the time when compensation is paid. Compounding of interest and the use of higher interest rates should be possible at least in relation commercial claims. In addition, interest for delay should be foreseen to prompt the obtainment of full compensation.***

31. Article 3(2) and Recital 12 codify the CJEU's case law that not only the heads of damages (actual loss and loss of profit plus interest), but also the dates from which, and until when, compensation is due are determined by Union law and not national law. Further, the Directive confirms that, according to EU law, interest is an essential component of compensation to make good the damage sustained and should be due from the time when the harm occurred until the time when compensation is paid. Moreover, it is specified that for the purpose of compensation, Union law does not distinguish between compensatory or default interest or whether interest is a constituent part of actual loss or loss of profit. Indeed, this was left to the Member States to decide.
32. It is clear from the above that national rules according to which interest starts accruing either from the date of the notification of the claim to the adverse party, the date of the filing of the lawsuit or even from the date of the decision on the merits, do not comply with Union standards. The same is true for provisions which are too broad as to leave margin of discretion to national judges to consider that interest should accrue subsequent to the occurrence of the harm. Such national provisions should therefore either be amended or clarified in order to comply with already binding EU law principles.
33. In contrast, other aspects of interest calculation which were not explicitly dealt with by the Directive are less obvious. These include, *inter alia*, national rules precluding the calculation of interest on a compound basis or the rigid applications of low interest rates. In that regard Recital 12 provides, in line with binding case law, that 'full compensation shall place a person who has suffered harm in the position in which that person would have been had the infringement of competition law not been committed'. Restoring the situation that existed prior to a competition infringement is an objective that also lies behind the recovery of unduly received state aid.<sup>29</sup> In that regard, it resorts from Regulation 794/2004<sup>30</sup> that interest accrues from the date when the aid was granted with a rate applied on (annually) compound basis<sup>31</sup> until the date of full recovery. Furthermore, in accordance with CJEU's case law on recovery of amounts levied by Member States in breach of Union law, compounding of interest is not precluded.
34. It follows that Member States are in principle entitled to set effective statutory rules that would allow automatic compounding of interest in antitrust damages cases. If not, national legislators must nevertheless repeal any ban that would prevent claimants from considering such a method of calculation as appropriate. For commercial claims, a compound rate of interest could serve as an appro-

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<sup>29</sup> Indeed, under certain circumstances, compound interest is necessary to ensure effective enforcement of Union law. In C-89/14, *A2A SpA v Agenzia della Entrate*, Advocate General Wathelet issued his Opinion on 25 March 2015, where he said that the compound rate of interest is a better means of ensuring an effective remedy.

<sup>30</sup> Commission Regulation 794/2004 implementing Council Regulation 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty.

<sup>31</sup> With some specific exceptions: see e.g. Case C-480/98, *Spain v Commission* [2000] ECR I-8717. Different interest rates apply for each Member State.

appropriate measure of compensation for the loss sustained.<sup>32</sup> In the same vein, national rules that preclude reliance on a higher interest rate which would better suit the purpose of obtaining full compensation (e.g. ROI – Return on Investment of the harmed company) would undermine the principle of effectiveness and thus be contrary to Union law. It is therefore clear that national rules must be flexible enough for the calculation of interest in antitrust damages cases and that claimants should be entitled to plead for a given method or rate of calculating interest.

35. It is important to underline an independent interest for delay is foreseen in most national legal orders. Such interest aims at ensuring prompt payments of unduly retained monetary amounts. Thus, in the process of implementing the Directive, higher interest rates should be explicitly foreseen for antitrust damages cases. This interest at a higher rate could accrue either from the date of the notification of the claim or the date of the submission of the writ of summons. It is evident that interest on delayed payments should also apply as regard amounts determined by a court.
36. Against the above, national legislators must specify that interest on antitrust damage amounts start accruing from the date the harm occurred and do not end before the compensation is paid in full. Ideally, rules on compounding of interest in relation at least to commercial claims should also be adopted. Moreover, higher interest rates for delayed monetary amounts would serve as appropriate disincentive for defendants to artificially prolong judicial proceedings with the objective avoiding paying compensation. This would also favour early amicable settlements between the parties. Finally, national rules that could bar claimants from relying on interest calculation models that correspond better to their economic reality must be repealed by the national legislators.

#### **L. Clear rules on the passing-on defence in order to avoid perpetuation of unjust enrichment**

***Clear rules in relation to the passing-on defence should avoid that infringers of competition rules may keep their illegal gain. Defendants relying on the passing-on defence should therefore also proof the non-existence of (countervailing) volume effects. In line with the wording, the systematic and the intention of the Directive it should be clarified that the rebuttable presumption of passing-on in Article 14(2) only applies in favour of indirect purchasers actively pursuing a damage action.***

37. The Directive recognises the standing of indirect purchasers to bring damage actions (Article 14), while recognising at the same time the passing-on defence by the infringer against the direct purchaser (Article 13). At first sight, there seems to be a ‘necessary corollary’ between these two issues.
38. However, unbalanced recognition of the passing-on defence may result in a situation where infringers may keep their illegal gain. They can, on the one hand, successfully argue that the direct purchaser passed on some of the overcharge to the next level of the supply chain. On the other hand, potential damage claims of indirect purchasers are typically of low-value and dispersed nature. Indirect purchasers therefore refrain from bringing damage claims, in particular if the costs and risks involved are higher than the potential compensation. At the same time, an unspecified recognition of the passing-on defence would deter direct customers from bringing damage actions in the first place, although they are typically the better placed claimants (e.g. regarding evidence and pur-

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<sup>32</sup> In the judgment *Littlewoods Retail and others v Her Majesty's Revenue for Customs and Excise*, [2014] EWHC 868 (Ch), para. 420, the UK judge decided, following the response to the preliminary questions, that only compound interest will suffice to satisfy the claimants' Union law right to interest.

chase data). This would result in a perpetuation of the unjust enrichment of the infringers, contradicting the overall goal of the Directive and competition policy, namely the eradication of hardcore cartels by making them economically unattractive. The prevention of the unjust enrichment by the infringer, and not the often unspecified fear of ‘overcompensation’ should be the guiding principle when implementing the provisions of the Directive. In fact, under its Article 12(1), Member States shall not only avoid – more theoretical – overcompensation, but also – practically much more relevant – absence of liability of the infringer.

39. Against the above, national legislators might consider the *ORWI* judgment of the German Federal Court of Justice<sup>33</sup> according to which (i) the infringement has to be causal for the passing-on, and (ii) the passing-on should not be offset by loss of profit of the claimant. This approach is also in line with recent case law in the Netherlands.<sup>34</sup> Such legislative clarification would ensure that the passing-on defence would only be argued in cases where it is economically and legally justified. Since the Directive only provides for a minimum standard and therefore does not preclude additional clarifications by the national legislator, such complementary provision could be implemented at the national level.
40. Another solution could be the ‘Canadian way’. In its judgment *Pro-Sys Consultants v Microsoft* of 31 October 2013 the Canadian Supreme Court has specifically recognised the standing of indirect purchasers to bring antitrust damage actions. However, in relation to damage claims by direct purchasers, a reduction of the harm to be compensated as a consequence of a passing-on to the next market level should only be taken into account, if purchasers from the next market level really bring a separate damage action for these indirect damages, so that the tortfeasor has to compensate for the entire damage caused. If this is not the case, infringers should in line with general legal principles not benefit from its illegal act (*nullus commodum capere potest de injuria sua propria*).
41. In line with the wording of Article 14(2) (‘the indirect purchaser shall be deemed to have proven’), its systematics (Article 14(2) refers to paragraph 1 of Article 14 and thus an action by an indirect purchaser) and the intention of the Directive, the national legislators should clarify that the rebuttable presumption of a passing-on foreseen in Article 14(2) only applies in favour of indirect purchasers which pursue a damage action. Otherwise there is a risk of a misinterpretation and infringers could try to rely on the presumption in the context of damage actions by direct purchasers.

#### **M. Providing for an effective settlement and ADR mechanism**

***National legislators should provide for legal certainty regarding and thus facilitate early settlements. This can be done by defining objective criteria for determining ‘the share of the harm’ caused by a settling infringer as precisely as possible. In line with common practice across the EU, the standard criterion should be the purchase or sales volumes. With regard to damages not related to existing volumes (e.g., loss of profit, umbrella claims), a subsidiary rule should stipulate a per capita allocation among the infringers.***

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<sup>33</sup> Federal Supreme Court, judgment of 28 June 2011 – KZR 75/10 – *ORWI*. This judgment has been the first judgment in the EU which specifically deals with the passing-on defence and is thus seen as landmark judgment also for courts in other jurisdictions, eg Austrian Supreme Court, judgment of 2 August 2012 – 4 Ob 46/12m.

<sup>34</sup> Rechtbank Gelderland, judgment of 10 June 2015, ECLI:NL:RBGEL:2015:3713.

42. Articles 18 and 19 provide for a settlement and alternative dispute resolution (**ADR**) mechanism. Such mechanism can be a key element of an effective private enforcement system and help to prevent unnecessary litigation. Out-of-court settlements are particularly interesting for leniency recipients. Besides the administrative fine, they have a genuine interest in also finding a solution for their exposure to private compensation claims, allowing them to draw a final line under their overall liability.
43. Article 18 rightly identifies the fear of cartel members to be involved in lengthy contribution claims by their co-cartelists as one of the main obstacles to out-of-court settlements. However, the current wording of the Directive fails to provide for a mechanism which is effective in practice and provides for the required final legal certainty of settling parties.
44. Article 19(1) provides that ‘following a consensual settlement, the claim of the settling injured party is reduced by the settling co-infringer’s share of the harm.’ This provision intends that the settling infringer shall not contribute to his non-settling co-infringers when the latter have paid damages to the injured party, while not unduly affecting those co-infringers with a settlement to which they were not a party. For this reason, the ‘share of the harm’ shall be determined in accordance with the same rules used to determine the contributions among infringers (Recital 38), namely Article 11(5). The share in terms of Article 19(1) thus depends on the ‘relative responsibility’ of the settling infringer for the harm caused by the infringement. For defining this relative responsibility, the Directive refers to the ‘applicable national law’, but also offers some ‘relevant criteria, such as turnover, market share, or role in the cartel’, itself (Recital 37).
45. According to the Directive, the claim for damages shall as a consequence of a settlement be reduced by an amount determined on the basis of a whole array of different criteria. This approach, however, does not allow the settling parties to realistically predict for what exactly they settle. In practice, cartel members and victims willing to settle damage claims at an early stage rather face the risk that they settle for a too high or too low amount. This uncertainty adversely affects the victim of a cartel in particular. The non-settling co-infringers defending themselves against his remaining claim for damages after the settlement will try everything to increase the share of the settling infringer in order to minimise that claim.<sup>35</sup> In responding to this attempt, the injured party fights an uphill battle as it has naturally less, if any, information on the relevant criteria determining each cartel member’s ‘relative responsibility’ for the cartel-caused harm. Any dispute on the settling infringer’s share will significantly complicate the enforcement of damages claims by the victims. Overall, Article 19(1) therefore results in a disincentive for settlements, instead of promoting them.
46. In line with the reference to the applicable national law in Recital 37, the current shortcomings of Article 19(1) can, however, easily be remedied in the implementation process at national level. In this respect national legislators should specify default criteria for the definition of the ‘share of the harm’. In line with common practice in settlement agreements across the EU, the most objective criterion which all parties concerned (i.e. the victims, the settling infringer and the non-settling co-infringers) could easily determine and agree on, are the sales or purchases affected by an infringement. For example, a damaged purchaser and a settling cartel member can easily identify the volumes of the cartelised product over the cartel period and thus reach an agreement regarding the

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<sup>35</sup> With a view to contribution rights, an infringer is normally not interested in supporting high shares of his co-infringers. However, according to Article 19(2), the non-settling infringers cannot recover contribution from the settling co-infringer anyway. So, their natural interest here is to reduce the total value of their responsibility.

compensation for the affected sales. The advantage of such objective criterion is that it does not change over time and is not subject to uncertainty as alternative criteria such as the ‘relative responsibility’. In addition, it ties to the core of the compensation claim in form of the price overcharge paid for the purchased goods or services as a consequence of the infringement. The determination of a standard default criterion for the ‘share of the harm’ would also provide for legal certainty in cross-border cases, as different national laws may apply on one infringement in parallel (e.g., in case of a Union-wide cartel). Similarly, in the US the allocation of the overall damage between a multitude of tortfeasors is also based on just a few, objective criteria.<sup>36</sup>

47. Against the above, **the volumes of the affected purchases or sales, which already today are in practice the most relevant issue in legal actions or settlement negotiations, are the most appropriate criterion for determining the ‘share of the harm’.** Both the injured party and the settling infringer are able to identify the relevant volumes in their bilateral commercial relationship. Similarly, the non-settling co-infringers can identify their share of the harm on the basis of their respective sales/purchases vis-a-vis the victim. The reference to volumes would also be in line with Article 11(4) and 11(5) respectively (‘amount of the harm it caused to its own direct or indirect purchasers or providers’). With regard to damages not related to existing volumes (e.g., loss of profit), a subsidiary rule stipulating *per capita* allocation among the infringers may be added. This *per capita* rule is in line with the general principles across many EU Member States and takes account of the fact that at least in multi-party infringements such as cartels, each infringer is equally responsible for the implementation and thus the ‘success’ of the anticompetitive agreements.

**N. Central register of all cartel decisions published by NCAs and for all national judgements in the field of private damage actions**

***Decisions sanctioning infringements of Articles 101 or 102 TFEU alone or in conjunction with the national prohibition provisions should be disclosed to potential claimants in the entire EU. The most efficient way consists of providing an English summary of the decisions together with the original text to Directorate General for Competition of the European Commission thereof which will then be published on its website. Moreover, important national judgments in the field of private damages actions should be communicated to the Commission, ideally with an executive summary, also in view of the preparation of the Commission’s report on the Directive to the European Parliament and the Council by 27 December 2020. These documents should also be disclosed to the general public.***

48. Cartel activities are clandestine by nature. Typically, victims are therefore not aware of such hardcore infringements. Establishing a central website on which all cartel decisions by the Commission and NCAs are published would be a helpful tool in order to increase the awareness across the Union. This would allow victims to identify those cases by which they may be affected and enable them to substantiate their potential compensation claims within the applicable limitation periods.

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<sup>36</sup> In the US, the Antitrust Modernization Commission (AMC) suggests an alternative allocation scheme in its 2007 Report and Recommendations, chapter III., p 254, which is also based on just a few, but certain variables: ‘Adoption of a rule providing for claim reduction and for contribution requires a method of allocating shares of liability for purposes of determining the plaintiffs’ claims remaining after a settlement. The Commission recommends that each defendant’s allocated share of liability, for either claim reduction or contribution, be equal to each defendant’s market share or gain from the antitrust violation. Allocation based on market share should be relatively easily accomplished in the substantial majority of multiple-defendant cases, such as price-fixing conspiracies, and should not significantly increase litigation costs. For those cases in which market share would not be an appropriate basis for allocating liability, use of relative gain makes for an appropriate substitute that is also reasonably straightforward to calculate.’

49. The website would ideally contain meaningful public versions of the cartel decision in the respective language together with an English summary. Such project could easily be implemented in the context of the European Competition Network (ECN).<sup>37</sup> The Commission and the NCAs already cooperate regarding cartel investigations, particularly in cross-border cases resulting in an infringement of Article 101 TFEU. This cooperation could be extended to the establishment of common standards for public versions of cartel decisions and a joint website acting as the central point of information.
50. Such central website would ideally also contain the judgments of national courts in the field of private damage actions relating to competition law infringements, possibly with a short summary of the most important facts and decisions in English. As the issues and arguments put forward by claimants and defendants before national courts are often identical across the EU, a central website with relevant court precedents would help judges to identify relevant case law and see how courts in other Member States decided on the same or similar questions of law.

**O. Effective, accessible and independent judicial system of specialised courts or chambers and evidence in electronic form**

51. Overall the Directive is an important step towards a more effective private enforcement of competition law across the Union. It is now up to the Member States and their courts to ensure that the rights granted by the Union legislator and the CJEU do not merely remain on paper, but can be enforced in practice. This can of course best be achieved by an **effective, accessible and independent judicial system**.<sup>38</sup> Due to the complexity and the specific subject matter of antitrust damage actions the constitution of **specialised courts or chambers** with knowledge in competition law and economics seems advisable. In the same context the use of **evidence and data in electronic form** should be foreseen in the respective procedural provisions in order to allow judges and economic experts to reach a conclusion on the damage caused by the infringement at hand.

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<sup>37</sup> For detailed information on the ECN's activities see [http://ec.europa.eu/competition/ecn/index\\_en.html](http://ec.europa.eu/competition/ecn/index_en.html).

<sup>38</sup> Recital (7) Directive usefully anticipated the CJEU's judgment and AG's opinion in CDC HP on the application of Article 5(3) Regulation Brussels I in antitrust damages Cases by stating that '*As injured parties often choose their Member State of establishment as the forum in which to claim damages, the discrepancies between the national rules lead to an uneven playing field as regards actions for damages and may thus affect competition on the markets on which those injured parties, as well as the infringing undertakings, operate*'.