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COMMISSION STAFF WORKING DOCUMENT

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COMMISSION STAFF WORKING DOCUMENT

Report from the Commission to the European Parliament and the Council on the implementation of 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

1. THE DAMAGES DIRECTIVE: ITS ORIGINS AND GOALS

Articles 101 and 102 of the Treaty on the Functioning of the European Union (“TFEU”) are the core EU antitrust rules. Infringements of these rules can take various forms, such as the form of cartel agreements, other types of restrictive horizontal agreements and concerted practices as well as vertical restrictions and abuses of dominance. Infringements of Articles 101 and 102 TFEU can also cause various types of harm. Artificially higher prices and loss of profit are only two examples of concrete harm that victims may suffer from infringements of Article 101 and 102 TFEU.

It is against this background that the Court of Justice of the European Union (hereafter “CJEU”) recognized the foundation for the right to full compensation in EU law. In 2001, in *Courage and Crehan*, the CJEU established the principle that:

“The full effectiveness of Article 85 of the Treaty [now Article 101 TFEU] and, in particular, the practical effect of the prohibition laid down in Article 85(1) [now Article 101(1) TFEU] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition.”¹

In a number of subsequent judgments dealing with damages actions, the CJEU referred to this principle,² also clarifying that it applies to infringements of Article 102 TFEU.³ This long established jurisprudence has recognized the right of any citizen, business or public authority to seek full compensation for the harm caused to them by an infringement of the EU antitrust rules.

However, for a long period of time damages actions for infringements of the EU antitrust rules were still relatively rare, as the Commission noted in 2013.⁴ Therefore, the first goal of the 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 (“the

¹ C-453/99 – *Courage and Crehan*, ECLI:EU:C:2001:465, paragraph 26; see also C-295/04 – *Manfredi*, ECLI:EU:C:2006:461, paragraph 60.

² C-295/04 – *Manfredi*, ECLI:EU:C:2006:461, paragraph 60; Case C- 360/09 – *Pfleiderer*, ECLI:EU:C:2011:389, paragraph 28; C-199/11 – *Otis and Others*, ECLI:EU:C:2012:684, paragraph 41; C-536/11 – *Donau Chemie and Others*, paragraph 21; C-557/12 – *Kone and Others*, ECLI:EU:C:2014:1317, paragraph 21.

³ C-637/17 – *Cogeco Communications*, ECLI:EU:C:2019:263, paragraphs 39 and 40.

⁴ For example, out of the 54 final cartel and antitrust prohibition decisions taken by the Commission in the period from 2006 to 2012, actions for damages in one or more Member States followed only 15 of these decisions. In 2013, the Commission was not aware that any action for damages based on a Commission decision had been filed in 20 out of 28 Member States, see the impact assessment, Commission Staff Working document accompanying the proposal for the Damages Directive {COM(2013) 404 final} {SWD(2013) 204 final} (“Impact Assessment”), paragraph 52.

Damages Directive” or “the Directive ⁵”) is to facilitate damages actions in the EU, so that any individual can effectively claim full compensation for the harm suffered as a result of an antitrust infringement.⁶ The second goal of the Damages Directive is to fine-tune the interplay between public and private enforcement of EU antitrust law.⁷ To that end, it includes, for example, rules providing more legal certainty on whether and to which extent documents in the file of a competition authority can be disclosed. Such questions had become increasingly relevant before the adoption of the Damages Directive, and they created a risk of diverging or inconsistent practices across the Member States.⁸

2. SCOPE OF THIS REPORT

Article 20(1) of the Damages Directive requires the Commission to review the Directive and to report to the European Parliament and Council by 27 December 2020. Article 20(2) asks the Commission to include in its report “information on all of the following:

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

Furthermore, Article 20(3) of the Damages Directive provides that, if appropriate, this report shall be accompanied by a legislative proposal.

While the Commission submits this report on the basis of Article 20(1) of the Directive, it notes that sufficient evidence to carry out a meaningful evaluation of the Damages Directive is not yet available. This is particularly due to the following:

As many as 21 Member States implemented the Directive only after 27 December 2016, which was the deadline for the implementation pursuant to Article 21(1) of the Damages Directive.⁹ As Article 22(1) of the Damages Directive requires that the Directive’s substantive provisions “do not apply retroactively”, the national measures implementing the substantive rules of the Directive could generally not apply as of the deadline for the implementation of the Directive, but at the earliest, as of the date when the respective national implementing measures entered into force. In addition, the national rules that Member States have adopted

⁵ 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.

⁶ See Article 3 of the Damages Directive.

⁷ See recital 6 of the Damages Directive.

⁸ See Impact Assessment, paragraph 34.

⁹ Following the opening of infringement proceedings for lack of communication of implementing measures, 18 Member States implemented the Directive in 2017. Three Member States did so in the first half of 2018. All of the infringement procedures for late implementation were successfully closed by January 2019. All of the implementing measures can be found at https://ec.europa.eu/competition/antitrust/actionsdamages/directive_en.html

to implement the rules of the Damages Directive vary appreciably as regards the temporal scope of application. In some situations, rules implementing the Directive might not apply even if the victim lodges the damages action after the date of the respective implementation, for example because the implementing rules in a Member State require that the facts giving rise to liability in damages for the infringement of Article 101 or 102 TFEU have been completed at the time of the implementation of the Directive in that particular Member State.

Even in as far as national implementing rules are applicable *ratione temporis*, only the concrete application of such rules in actual cases would allow a more meaningful analysis of the impact of the Damages Directive. Since it is ultimately the national courts that apply the implementing rules of the Directive in damages actions, it is their judgments in which they apply such rules that provide meaningful operational experience. Furthermore, proceedings for awarding damages are complex and it can take several years until a national court renders a judgment. Moreover, victims of EU competition law infringements often lodge damages actions only after a competition authority has investigated and found an infringement. They may do so, particularly to benefit from the binding effect of such finding in a follow-on damages action.¹⁰ However, in such follow-on actions, it can take a long time from the purchase of the product or service that has been subject to an infringement of Article 101 or 102 TFEU and the first civil judgment. A recent study found that it takes approximately 13 years.¹¹

As a result, sufficient operational experience has not yet accumulated with regard to the application of the rules of the Damages Directive. For this reason, the focus of this report had to be different. While it includes initial indications on the effects of the Directive, this report focuses on giving an overview of the *implementation* of the main rules of the Damages Directive in the Member States and the various actions that the Commission has taken to ensure the effectiveness of the rules of the Directive and to support the development of damages actions in Europe. In addition, this report presents some key developments in the jurisprudence that are expected to further support private enforcement in the EU.

The Commission nevertheless wishes to highlight that it plans to evaluate the Directive and report on such evaluation once sufficient experience from the application of the rules of the Directive has accumulated.

3. FIRST INDICATIONS OF THE IMPACT OF THE DAMAGES DIRECTIVE

On 11 June 2013, the Commission adopted the proposal for a Directive on antitrust damages actions for breaches of EU competition law (hereafter “Proposal for the Directive”).¹² Subsequently, several studies found that the number of damages actions before national courts for competition law infringements had significantly increased after the adoption of the

¹⁰ Follow-on actions are civil damages actions brought after a competition authority has found an infringement. Stand-alone actions are civil actions which do not follow on from a prior finding by a competition authority of an infringement of competition law, Commission, White Paper on Damages Actions for Breach of the EC antitrust rules and its accompanying Staff working paper on 2 April 2008, COM(2008) 165, 2.4.2008 and SEC(2008) 404, 2.4.2008 (“White Paper”), footnote 3.

¹¹ Jean-François Laborde, *Cartel damages actions in Europe: How courts have assessed cartel overcharges* (2019 ed.), November 2019, Concurrences N° 4-2019, Art. N° 92227, page 7.

¹² Proposal for a Directive of the European Parliament and of the Council on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, COM(2013) 404, 11.6.2013.

Proposal for the Directive.¹³ For example, one of these studies indicates that the cumulative number of cases, by date of first judgment, was approximately 50 at the beginning of 2014 and, after a sharp increase, amounted to 239 in 2019.¹⁴ These 239 cases came from thirteen Member States.¹⁵ This shows that following the adoption of the Directive antitrust damages actions became much more widespread, as compared to the concentration of such actions in three Member States before the adoption of the Directive.¹⁶ Based on this initial empirical evidence, it appears that the Damages Directive has enhanced awareness of victims of EU competition law infringements of their right to effectively claim damages for harm suffered as a result of such infringements.

At the same time, national courts have referred to the CJEU an increasing number of questions relating to damages actions for infringements of Article 101 TFEU or 102 TFEU. This can be seen as another indicator that private enforcement of EU antitrust law has become more and more relevant since the adoption of the Damages Directive on 26 November 2014. Since then, the CJEU has delivered six decisions in proceedings relating to references for a preliminary ruling answering questions relating to damages actions for infringements of Article 101 TFEU or 102 TFEU.¹⁷ In addition, five references for a preliminary ruling related to private enforcement are currently pending before the CJEU.¹⁸ Four key rulings are presented at the end of this report. All of the judgments, have triggered legal discussions about private enforcement and the role of the Damages Directive, although the Directive was not applicable *ratione temporis* in these cases.¹⁹ Moreover, since then, for the first time in its

¹³ See Jean-François Laborde, *Cartel damages actions in Europe: How courts have assessed cartel overcharges* (2019 ed.), November 2019, Concurrences N° 4-2019, Art. N° 92227; Lukas Rengier, *Cartel Damages Actions in German Courts: What the Statistics Tell Us*, Journal of European Competition Law & Practice, Volume 11, Issue 1-2, January-February 2020, Pages 72–81; Katharina Sailer, *Update on the development of follow-on damages claims*, <http://www.econ-da.com/post/2019/7/23/update-on-development-of-follow-on-damages-claims-2000-2018>, 23 July 2019.

¹⁴ Jean-François Laborde, *Cartel damages actions in Europe: How courts have assessed cartel overcharges* (2019 ed.), November 2019, Concurrences N° 4-2019, Art. N° 92227, page 4.

¹⁵ Austria, Belgium, Denmark, Finland, France, Germany, Greece, Hungary, Italy, the Netherlands, Poland, Spain, plus the United Kingdom. The same study includes a reference to four more Member States in which national courts had not yet ruled on the merits but in which significant developments could be identified, namely in Lithuania, Malta, Slovakia and Sweden, in addition to Norway and Switzerland

¹⁶ Impact Assessment, paragraph 7.

¹⁷ C-27/17 – *flyLAL-Lithuanian Airlines*, ECLI:EU:C:2018:533; C-595/17 – *Apple Sales International and Others*, ECLI:EU:C:2018:854; C-724/17 – *Skanska Industrial Solutions and Others*, ECLI:EU:C:2019:204; C-637/17 – *Cogeco Communications*, ECLI:EU:C:2019:263; C-451/18 – *Tibor-Trans*, ECLI:EU:C:2019:635; C-435/18 – *Otis and Others*, ECLI:EU:C:2019:1069.

¹⁸ See Request for a preliminary ruling from the Rechtbank Amsterdam (Netherlands) lodged on 6 November 2019, C-819/19 – *Stichting Cartel Compensation and Others*, OJ C 95, 23.3.2020, page 13; Request for a preliminary ruling from the Audiencia Provincial de Barcelona (Spain) lodged on 3 December 2019, C-882/19 – *Sumal*, OJ C 87, 16.3.2020, page 7; Request for a preliminary ruling, C-2/20 – *Daimler*, available at <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=225884&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=4633491>; Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice, C-267/20 – *Volvo and DAF Trucks*, available at <http://curia.europa.eu/juris/showPdf.jsf?text=&docid=229441&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=4632620>; Case C-588/20 – *Daimler* <http://curia.europa.eu/juris/liste.jsf?lgrec=fr&td=%3BALL&language=en&num=C-588/20&jur=C>

¹⁹ See the discussion of the relevance of the rule on joint and several liability (Article 11(1) of the Damages Directive) and the rule on the subject matter, scope and definitions of the Directive (Article 1 of the Damages Directive) in the context of who is liable for damages causally linked to an infringement of Article 101 TFEU, C-724/17 – *Skanska Industrial Solutions and Others*, ECLI:EU:C:2019:204,

history, the EFTA Court has given judgments in requests for advisory opinions on private enforcement of the core antitrust rules of the EEA agreement, namely Article 53 and 54 of the EEA Agreement.²⁰

4. OVERVIEW OF THE MAIN ELEMENTS OF THE DIRECTIVE AND ITS IMPLEMENTATION

Article 1 of the Damages Directive sets out the two goals of the Directive. Article 1(1) highlights that this Directive sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of antitrust law can effectively exercise the right to claim full compensation for that harm. To that end, the Directive includes rules that remove practical obstacles in exercising this right. Article 1(2) highlights that the Damages Directive also aims at fine-tuning the interplay between private damages actions and public enforcement of the EU antitrust rules by the Commission and national competition authorities.

The Damages Directive's substantive scope of application is limited to cover only damages actions and only infringements of Article 101 or 102 TFEU, or of national competition law which is applied in parallel.²¹ It follows from these two limitations that Member States are free to go beyond and extend the scope of the application of the Damages Directive. The most common extension of this sort relates to infringements of only national law and the right to claim compensation on the basis of the rules implementing the Damages Directive also with regards to purely national antitrust infringements. Extensions that are less widespread concern claims other than claims for damages. For example, in Germany and Portugal, the legislation explicitly extends its application to other claims based on infringements of competition law, such as declaratory actions, injunctions and interim measures.

In many Member States, antitrust damages actions are attributed to specific judges although the Directive does not require such an attribution. In Belgium, Germany, Greece, Spain, France, Italy, Portugal, Sweden and Slovakia, antitrust damages actions are heard by specialised sections within the ordinary civil courts, whereas in Denmark, Croatia, Lithuania, Latvia and Romania, they are heard by specialised courts.

4.1. The right to full compensation

Article 3 of the Damages Directive includes rules that clarify the right to full compensation. Whereas this right is based on the compensatory principle that underlies the entire Damages Directive, Article 3 of the Damages Directive restates that victims are entitled to compensation for actual loss and for loss of profit, plus payment of interest²² from the time the harm occurred until compensation is paid.

The majority of the Member States have implemented the general rule on the right to full compensation literally or almost literally and even though certain Member States have not implemented Article 3 of the Damages Directive literally, the principle of full compensation has generally been recognised confirming across the EU this important right for victims of competition law infringements.

paragraphs 33-35, and more generally on the temporal application of the Directive, C-637/17 – *Cogeco Communications*, ECLI:EU:C:2019:263, paragraphs 24-34.

²⁰ Judgments of the EFTA Court of 30 May 2018 in Case E-6/17 – *Fjarskipti hf. V Síminn hf* and of 17 September 2018 in Case E-10/17 – *Nye Kystlink AS Color Group AS and Color Line AS*.

²¹ See recitals 9 and 10 as well as the definitions in Article 2(3) and (4) of the Damages Directive.

²² See C-295/04 – *Manfredi*, ECLI:EU:C:2006:461, paragraph 95.

4.2. Rules on disclosure

Access to evidence is crucial for enabling claimants to bring actions for damages and more generally for ensuring equality of arms between claimants and defendants. Article 5 of the Damages Directive aims at facilitating access to evidence. This Article obliges Member States to empower national courts to order the defendant or a third party to disclose relevant evidence. Particularly to avoid “fishing expeditions”, this Article also includes three safeguards in the form of conditions that must be fulfilled for ordering disclosure. The claim must be plausible, the evidence must be relevant and the request must be proportionate. If these conditions are fulfilled, and provided that measures for the protection of confidential information are in place, national courts can order the disclosure of evidence that contains confidential information.²³

For many Member States, the introduction of such disclosure rules marked an important amendment to their existing legal systems. In light of this, and while the Member States have approached the implementation of these new rules differently to make them fit the structure and language of their legal systems, it should be highlighted that all of the Member States have introduced disclosure rules on the basis of Article 5 of the Damages Directive and the majority of the Member States implemented the provisions of this Article literally or almost literally.

Article 6 of the Damages Directive stipulates additional rules for requests concerning the disclosure of evidence included in the file of a competition authority. The rules in Article 6 of the Damages Directive also constitute a concrete example of the Directive’s goal to strike the right balance between public and private enforcement. They essentially introduce a three level system of protection for documents included in the file of a competition authority. In short, Article 6 of the Damages Directive distinguishes between the protection granted to different types of documents as follows:

- The so-called black list documents: Article 6(6) of the Damages Directive stipulates that national courts can never order the disclosure of leniency statements and settlement submissions for the purpose of actions for damages.²⁴
- The so-called grey list documents: According to Article 6(5) of the Damages Directive, national courts may order the disclosure of specific categories of evidence only after a competition authority has closed its proceedings.²⁵
- The so-called white list documents: Article 6(9) of the Damages Directive confirms that national courts may, at any time, order the disclosure of evidence that is neither a black list nor a grey list document.²⁶

²³ See Article 5(4) of the Damages Directive.

²⁴ As clarified in recital 26 of the Damages Directive, the reasoning behind this rule is to ensure undertakings' continued willingness to approach competition authorities voluntarily with leniency statements or settlement submissions. Therefore, as also clarified in recital 26 of the Damages Directive, “that exemption should also apply to verbatim quotations from leniency statements or settlement submissions included in other documents.”

²⁵ These categories of evidence are (a) information that was prepared by a natural or legal person specifically for the proceedings of a competition authority; (b) information that the competition authority has drawn up and sent to the parties in the course of its proceedings; and (c) settlement submissions that have been withdrawn. As clarified in recital 25 of the Damages Directive, the reasoning behind Article 6(5) of the Damages Directive is essentially the prevention of undue interference with an ongoing investigation.

The Member States have implemented the provisions of Article 6 of the Damages Directive generally in a uniform way, especially as regards the definitions which are used to describe the so called black list, grey list and white list documents. Thus, it is expected that the fine balance the Damages Directive introduced in relation to the disclosure of evidence will be considered across the EU. This consideration is important to ensure that both private and public enforcement remain effective.

Furthermore, the purpose of Article 7 and Article 8 of the Damages Directive is to make sure that the limits to disclosure are complied with, also in situations in which a party to a damages action for infringements of EU competition law may have gained access to evidence via access to file. While all of the Member States implemented rather uniformly the limits on the use of evidence obtained in these scenarios, the range of penalties for the breach of the disclosure rules, such as who can be sanctioned and for which behaviour, vary. The vast majority of the Member States also went beyond the rules of the Directive in that they provided for the imposition of financial penalties and some of them for imprisonment for breaches of disclosure rules.

4.2.1. Evidentiary value of infringement decisions

Article 9 of the Damages Directive does not only enhance the consistent application of EU antitrust law and prevent the relitigation of issues that were already decided in the proceedings before a national competition authority or review court,²⁷ it also supports victims of EU competition law infringements in follow-on damages claims.²⁸ To this end, Article 9(1) of the Damages Directive stipulates that an infringement of competition law found by a final decision of a national competition authority or by a review court is deemed to be irrefutably established before civil courts in the same Member State without prejudice to the rights and obligations of national courts under Article 267 TFEU.²⁹ Such decisions have binding effects that could be considered similar to the effects of an infringement decision of the Commission.³⁰

As regards the implementation of Article 9(1) of the Damages Directive, there is a high degree of uniformity across the Member States. Furthermore, according to Article 9(2) of the

²⁶ This rule is without prejudice to other safeguards, such as those stipulated in Article 5 of the Damages Directive, as mentioned above, and applicable rules governing the protection of confidential information and the legal professional privilege.

²⁷ See White Paper, paragraphs 153-159.

²⁸ According to a recent study taking into account 239 cases, 57% of those cases followed an infringement decision of a national competition authority, 40% followed a Commission decision, and only 2% were stand-alone actions. These shares highlight the importance of infringement decisions, in particular those of national competition authorities, for damages actions seeking compensation for antitrust infringements, see Jean-François Laborde, *Cartel damages actions in Europe: How courts have assessed cartel overcharges* (2019 ed.), November 2019, Concurrences N° 4-2019, Art. N° 92227, page 4.

²⁹ Final infringement decision means an a decision of a competition authority or review court that finds an infringement of competition law and cannot be, or that can no longer be, appealed by ordinary means (see Article 2(12) of the Damages Directive).

³⁰ See White Paper, paragraph 144: As regards infringement decisions of the Commission, the binding effects of such decisions in follow-on damages actions follow from Article 16(1) of Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.1.2003, pages 1-25. This provision states that, when national courts rule on agreements, decisions or practices under Article 101 or Article 102 TFEU which are already the subject of a Commission decision, they cannot take decisions running counter to the decision adopted by the Commission.

Damages Directive, before the courts of other Member States, the final decision of a national competition authority must constitute at least *prima facie* evidence in relation to the finding of an infringement of EU competition law. The implementation of this provision is also rather uniform across the EU in that, in the majority of the Member States, a final decision concerning an infringement of competition law issued in another Member State creates at least *prima facie* evidence that an infringement of competition law has occurred. While the Commission is not aware of any judgment that national courts have rendered on the rules implementing Article 9(2) of the Damages Directive, it should be noted that in two Member States, namely Austria and Germany, the respective national law goes beyond this provision. Already before the implementation of the Damages Directive, the relevant Austrian and German rules explicitly stipulated that the finding of an infringement of EU competition law in the final decision of another Member State's national competition authority has binding effects. In other words, the rules in Austria and Germany do not distinguish which EU competition authority has found the infringement in a final decision.

The implementation of Article 9 of the Damages Directive is expected to further facilitate follow-on damages claims and preserve consistent outcomes in damages claims across the EU.

4.2.2. Limitation periods

Article 10 of the Damages Directive provides for rules governing limitation periods. They aim to ensure that victims of EU competition law infringements have sufficient time to bring an action for damages. More specifically, these rules provide for three main elements as regards limitation periods, namely that they do not start to run before the infringement has ceased and the victim has sufficient knowledge of the behaviour, the fact that it constitutes an infringement and the identity of the infringer (Article 10(2) of the Directive), that their duration is at least five years (Article 10(3) of the Directive), and that they are suspended or interrupted if a competition authority takes action (Article 10(4) of the Directive).³¹

The majority of the Member States implemented rules that generally follow the wording and structure of Article 10 of the Damages Directive. The Damages Directive provides for minimum harmonisation of the applicable limitation rules that varied widely before its adoption.³² It is expected that the rules adopted to comply with the Directive will give claimants sufficient time to lodge their damages actions for infringements of Article 101 or 102 TFEU. Some Member States provide for rules that go beyond this minimum harmonisation. For example, while the Directive requires that the duration of the relevant limitation period is at least five years, Cyprus and Ireland provide for a six-year period and the national law of Latvia for a ten-year period.

4.2.3. Passing-on and quantification of harm

³¹ Article 10(4) of the Damages Directive also stipulates that a suspension of a limitation period shall end at the earliest one year after the infringement decision has become final or after the proceedings are otherwise terminated.

³² See Ashurst, Study on the conditions of claims for damages in case of infringement of EC competition rules, Brussels 2004, available at https://ec.europa.eu/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf, pages 8 and 89.

Articles 12 to 15 of the Damages Directive introduce rules regarding the legal assessment of the passing-on of overcharges.³³ They provide for a defence to raise passing-on as a “shield”, i.e. to argue that purchasers that claim damages from the infringer have passed on an overcharge, entirely or partially, onto their own customers, i.e. indirect purchasers (Article 13 of the Directive). The Directive’s rules also provide for indirect purchasers to use passing-on as a “sword”, [in particular to base their damages actions on the argument that purchasers of an infringer have passed on an overcharge to them (Article 14 of the Directive).] The rules on passing-on have been implemented consistently across the Member States.

These rules may lead to situations in which claimants from different levels in the supply chain claim damages. Article 15 of the Damages Directive takes into account such situations. It refers to means that national courts may use with the goal to avoid over-compensation and under-compensation, as both would run counter the compensatory principle underlying the Directive.³⁴ The majority of the Member States implemented Article 15 of the Damages Directive literally.

Article 17 of the Damages Directive concerns the quantification of harm in antitrust damages actions. To address practical difficulties that national courts might face when they are asked to quantify the harm suffered, Article 17(1) of the Damages Directive obliges Member States to establish the power to estimate the harm suffered. This power allows national courts to strive for an approximation of an amount which is plausible as far as the existence of harm is established. Moreover, Article 17(2) of the Damages Directive introduces a rebuttable presumption that *cartels* cause harm.³⁵ Following the implementation of the Damages Directive, this presumption now applies in the whole of the EU, facilitating compensation for victims of some of the most serious competition law infringements. While this presumption did not oblige Member States to further specify the amount, the laws of three Member States do so. Hungary and Latvia provide for a rebuttable presumption that cartels cause an overcharge of 10% and Romania provides for a rebuttable presumption that cartels cause an overcharge of 20%.

5. THE COMMISSION’S ACTIONS IN THE POST-ADOPTION ERA

Since the adoption of the Damages Directive, the Commission has been committed to ensuring its effectiveness. Some of the key actions that the Commission took in this regard are set out below in more detail. The Commission has also undertaken a number of other types of actions to explain and promote the rules of the Directive. For example, the Commission provided hands-on assistance to Member States that have reached out to it with questions on the Directive, especially during the implementation period. Its services have worked together

³³ According to Article 2(20) of the Damages Directive, ‘overcharge’ means the difference between the price actually paid and the price that would otherwise have prevailed in the absence of an infringement of competition law.

³⁴ Recital 44 of the Damages Directive also states more explicitly and specifically that “[n]ational courts should have at their disposal appropriate procedural means, such as joinder of claims, to ensure that compensation for actual loss paid at any level of the supply chain does not exceed the overcharge harm caused at that level”.

³⁵ The presumption that cartels cause harm is meant to facilitate damages actions, especially since a study prepared for the Commission prior to the adoption of the Damages Directive found that more than 90% of cartels cause a price increase, see Oxera, *Quantifying Antitrust Damages: Towards Non-binding Guidance for Courts* (December 2009), Study prepared for the European Commission.

and cooperated with authorities also outside the EU, for example in the context of the International Competition Network.³⁶

5.1. Completeness and conformity checks

In accordance with the Commission's Better Regulation Guidelines,³⁷ the Commission has conducted a systematic monitoring of the implementation of the Damages Directive, inter alia, by conducting compliance assessments on both transposition and conformity.

Following the expiry of the deadline for the implementation of the Damages Directive, the Commission opened infringement procedures for non-communication of implementing measures in relation to 21 Member States. This was to ensure the timely implementation of the Directive throughout the EU since only seven Member States had implemented the Damages Directive and communicated such implementation to the Commission by 27 December 2016, as Article 21(1) of the Directive required. By the first half of 2018, however, all of the Member States had implemented the Directive, 18 in 2017 and three in 2018. Thus, all of the infringement procedures for non-communication were closed by January 2019.³⁸

Subsequently, the Commission has assessed whether the national implementing rules are compatible with the Directive. This assessment has so far not revealed any systemic conformity issues. The Commission will of course continue to monitor the development of national case-law, submit observations in preliminary ruling references to the CJEU, cooperate with national courts, in particular provide opinions and act as *amicus curiae*, support the training of judges, and engage in advocacy efforts and, more generally promote the private enforcement policy which is enshrined in the Directive. This line of action will be continuously reassessed and does not preclude the launch of infringement proceedings or any other action for non conformity at a later stage.³⁹

5.2. Guidance for national courts and other stakeholders

To provide guidance on specific issues of private enforcement, the Commission has adopted two communications, namely the Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser (hereafter "Passing-on Guidelines")⁴⁰ and the Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law (hereafter "Confidentiality Communication")⁴¹. These Communications are non-binding and do not alter

³⁶ https://ec.europa.eu/competition/cartels/icn/private_enforcement_chapter_en.pdf.

³⁷ SWD(2017) 350 final, available at <https://ec.europa.eu/info/sites/info/files/better-regulation-guidelines.pdf>, pages 42 and 43, see also Better regulation Toolbox, available at <https://ec.europa.eu/info/sites/info/files/better-regulation-toolbox.pdf>.

³⁸ See European Commission - Fact Sheet, January infringements package: key decisions, 24 January 2019, available at https://ec.europa.eu/commission/presscorner/detail/en/MEMO_19_462.

³⁹ Communication from the Commission 'EU law: Better results through better application', C/2016/8600, OJ C 18, 19.1.2017, p. 15.

⁴⁰ Communication from the Commission – Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser, C/2019/4899, OJ C 267, 9.8.2019, p. 4–43.

⁴¹ Communication from the Commission – Communication on the protection of confidential information by national courts in proceedings for the private enforcement of EU competition law, C/2020/4829, OJ C 242, 22.7.2020, p. 1–17.

existing rules under EU law or the laws of the Member States. Their goal is, however, to be a source of inspiration, in particular for national courts that deal with damages actions for infringements of EU competition law.

5.1.1. Passing-on Guidelines

Infringements of EU competition law can cause harm to individuals that are active at different levels of a supply chain. All of these individuals have the right to claim damages, also in situations in which an overcharge has been passed on. As mentioned above, the Damages Directive does not only include specific rules on the passing-on of overcharges but also references to means for national courts to avoid both over-compensation and under-compensation.⁴² The Passing-on Guidelines are meant to help national courts in that respect. They are based on Article 16 of the Damages Directive according to which the Commission shall issue guidelines for national courts on how to estimate the share of the overcharge which was passed on to the indirect purchase. This Article takes into account that the quantification of harm can be a quite technical exercise which can be more complicated in cases in which it is alleged that the overcharge has been partially or fully passed-on. For this reason, the Commission has provided practical guidance to national courts, judges and other stakeholders that face such cases.

The Passing-on Guidelines do not only describe what the passing-on of an overcharge is and set out the legal context, but also explain the role of economic theory, provide an overview of approaches for quantification and give examples of evidence needed for its quantification. They complement the more general guidance on quantification that the Commission had already given before the adoption of the Damages Directive.⁴³ The Passing-on Guidelines therefore contribute to achieving the goals of the Damages Directive, taking into account that the success of an antitrust damages action does not only depend on an effective legal framework for compensation but also on the quantification of the antitrust harm. Although it is too early to conclusively comment on the impact of the Passing-on Guidelines, as there is no accumulated experience yet with the application of the passing-on rules of the Damages Directive, it appears that already now the Passing-on Guidelines provide a useful reference point for national judges when assessing damages.⁴⁴

5.2.2. Confidentiality Communication

More recently, on 22 July 2020, the Commission adopted the Confidentiality Communication to provide practical, non-binding and non-exclusive guidance to national courts in choosing

⁴² See also points 25-29 of the Passing-on Guidelines.

⁴³ See Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, OJ C 167, 13.6.2013, p. 19; Commission, Staff Working Document — Practical Guide on Quantifying Harm in Actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, 11.6.2013, SWD(2013) 205.

⁴⁴ For example, in its judgment in *Sainsbury's v Visa and Mastercard*, the UK Supreme Court specifically referred to the Passing-on Guidelines and the explanations provided therein, see *Sainsbury's Supermarkets Ltd (Respondent) v Visa Europe Services LLC and others (Appellants), Sainsbury's Supermarkets Ltd and others (Respondents) v Mastercard Incorporated and others (Appellants)* [2020] UKSC 24.

effective measures to protect confidential information when ordering disclosure of relevant evidence in the context of damages actions.

In private enforcement, due to the asymmetry of information between claimants and defendants, an increasingly significant part of the litigation process focusses on the disclosure of relevant information. Given that much of the concerned information is deemed confidential, national courts are faced with the high burden of managing the disclosure of such information, while applying adequate protective measures. It is very important that national courts strike the right balance between the right to access relevant evidence and the right to protect confidential information.

To this end, the Confidentiality Communication presents a number of specific measures that judges may order to be put in place to protect confidential information throughout the procedure (e.g. redactions, confidentiality rings, appointment of experts, closed hearings, etc.). It also describes how and when such measures could be effective. National judges may decide to order such measures to be put in place depending on their national procedural rules and considering the specific circumstances of the case, the type of information requested, the extent of the disclosure, the parties and relationships concerned, as well as any administrative burdens and cost implications.

This way the Confidentiality Communication aims to further facilitate the handling of an ever-increasing number of damages claims before national courts by expediting disclosure of evidence to the benefit of both claimants and defendants, while respecting the right to confidentiality.

5.3. Key CJEU rulings in the area of private enforcement since the adoption of the Directive

Since the adoption of the Damages Directive, the CJEU continued to play a crucial role in shaping the framework for private enforcement in the EU. In a series of references for a preliminary ruling made by national courts, the CJEU has clarified important legal questions in this field.

One of the key clarifications in this regard relates to the case *Cogeco Communications*.⁴⁵ In this case, the CJEU answered important questions on the temporal application of the Damages Directive and the relationship between Article 102 TFEU and national rules on limitation periods. While it confirmed that the Damages Directive was not applicable *ratione temporis*,⁴⁶ the CJEU highlighted elements for the analysis of whether certain national limitation regimes comply with EU competition law and the principle of effectiveness. These elements concern an overall assessment of the duration of a limitation period, its starting point and the possibility of a suspension or interruption.⁴⁷ The Damages Directive addresses all of these elements, provides for minimum harmonisation and thereby additional value, as the Advocate General pointed out in her opinion.⁴⁸ The CJEU's judgment in *Cogeco* contributes to ensuring that victims of infringements of EU competition law have sufficient time to lodge their claims. The Commission therefore welcomes this judgment.

⁴⁵ C-637/17 – *Cogeco Communications*, ECLI:EU:C:2019:263.

⁴⁶ C-637/17 – *Cogeco Communications*, ECLI:EU:C:2019:263, paragraph 33.

⁴⁷ See C-637/17 – *Cogeco Communications*, ECLI:EU:C:2019:263, paragraphs 47-55.

⁴⁸ See Advocate General Kokott, C-637/17 – *Cogeco Communications*, ECLI:EU:C:2019:32, paragraphs 79-86.

In *Skanska Industrial Solutions and Others*, the CJEU rendered a landmark judgment.⁴⁹ This case concerned a cartel for which the Finnish Supreme Administrative Court had fined seven Finnish asphalt companies and which triggered damages actions against successors of the legal entities that took part in the collusion. In these damages actions, the Finnish Supreme Court referred to the CJEU questions on *who* is liable for infringements of EU competition law. In its response, the CJEU held that, when companies which participated in an infringement of EU competition law are acquired by other companies which have dissolved the former companies and continued their commercial activities, the acquiring companies could be held liable for the damage caused by the cartel in question.⁵⁰ The Commission welcomes this judgment as, in its opinion, this judgment confirms that the EU concept of undertaking, which the CJEU had established in public enforcement, also applies in the context of private enforcement.⁵¹ In any case, the CJEU's judgment in *Skanska* helps victims of infringements of EU competition law to obtain full compensation for the harm they suffered as a result of such an infringement also from legal and or economic successors.

The case of *Tibor-Trans* raised important questions on jurisdiction according to Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters ("Brussels I Recast Regulation"),⁵² particularly the interpretation of the "place where harmful event occurred" (see Article 7(2) Brussels I Recast Regulation).⁵³ The CJEU distinguished between the immediate consequences of an infringement of Article 101 TFEU and subsequent consequences, which may be felt practically anywhere.⁵⁴ The CJEU held that damage resulting from additional costs incurred because of artificially high prices is a direct damage falling within the first category, which, in principle, provides a basis for the jurisdiction of the courts of the Member State in which it occurred.⁵⁵ Article 7(2) of Regulation No 1215/2012 had to be interpreted as meaning that, in an action for compensation for damage caused by an infringement, consisting, inter alia, of collusive arrangements on pricing and gross price increases, 'the place where the harmful event occurred' covers the place where the market which is affected by that infringement is located, that is to say, the place where the market prices were distorted and in which the victim claims to have suffered that damage, even where the action is directed against a participant in the cartel at issue with whom that victim had not established contractual relations.⁵⁶

This ruling helps victims of infringements of EU competition law, in particular since it allows indirect purchasers under certain circumstances to claim damages before the courts of the Member States where they made the relevant purchases. It therefore complements the

⁴⁹ C-724/17 – *Skanska Industrial Solutions and Others*, ECLI:EU:C:2019:204.

⁵⁰ C-724/17 – *Skanska Industrial Solutions and Others*, ECLI:EU:C:2019:204, paragraph 51.

⁵¹ See C-724/17 – *Skanska Industrial Solutions and Others*, ECLI:EU:C:2019:204, paragraph 47 ("It follows that the concept of 'undertaking', within the meaning of Article 101 TFEU, which constitutes an autonomous concept of EU law, cannot have a different scope with regard to the imposition of fines by the Commission under Article 23(2) of Regulation No 1/2003 as compared with actions for damages for infringement of EU competition rules").

⁵² Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2012] OJ L 351, 20.12.2012 1–32.

⁵³ C-451/18 – *Tibor-Trans*, ECLI:EU:C:2019:635.

⁵⁴ C-451/18 – *Tibor-Trans*, ECLI:EU:C:2019:635, paragraph 27.

⁵⁵ C-451/18 – *Tibor-Trans*, ECLI:EU:C:2019:635, paragraph 31.

⁵⁶ C-451/18 – *Tibor-Trans*, ECLI:EU:C:2019:635, paragraph 32-37.

Commission's policy on indirect purchaser claims, as set out in the Directive and the Passing-on Guidelines.

Another important preliminary ruling of the CJEU in the area of private enforcement was *Otis and Others*.⁵⁷ This judgment strengthens the right of victims of EU antitrust infringements to effectively seek damages for the harm suffered, particularly in factually complex cases. In *Otis and Others*, a public body lodged a damages action against members of the elevators and escalators cartel. In accordance with its housing development policy, this public body had granted loans at a discounted interest rate to construction companies that bought cartelized elevators and escalators. The damages action was based on the argument that the public body could have invested parts of the funding more profitably, absent the cartel. This argument led to the question of whether the alleged harm was caused by the cartel. In its answer to the request for preliminary ruling, the CJEU concluded that national rules on causation cannot exclude anyone *a priori* from claiming such damages.⁵⁸ Moreover, it clarified that this conclusion must also apply even when a person who is not active as supplier or customer on the market is affected by a cartel.⁵⁹

In all of these preliminary references, the Commission submitted observations to ensure that the CJEU would take into account the effects that a particular judgment would have on the Commission's private enforcement policy and, even if not applicable in a given case, on the interpretation of the Damages Directive and the rights of victims in the EU.

6. CONCLUSION

In light of the goals of the Damages Directive, which are to facilitate damages actions for EU competition law infringements and to strike the right balance between public and private enforcement, the Commission can, at this stage, draw a positive conclusion as regards the consistent implementation of the rules of the Directive across the EU. The Commission takes note of the fact that the Damages Directive has required Member States to make quite substantial changes to their legal systems. While the effectiveness of the implementing measures will greatly depend on their actual implementation by the national courts, it already appears that the rights of victims of antitrust infringements have been substantially strengthened in all Member States. The Commission intends to continue to monitor the developments in the Member States in this area with a view to carrying out an evaluation of the Directive, once sufficient experience from the application of the new rules has accumulated.

⁵⁷ C-435/18 – *Otis and Others*, ECLI:EU:C:2019:1069.

⁵⁸ See C-435/18 – *Otis and Others*, ECLI:EU:C:2019:1069, paragraph 27; see also C-557/12 – *Kone and Others*, ECLI:EU:C:2014:1317, paragraphs 33 and 37.

⁵⁹ See C-435/18 – *Otis and Others*, ECLI:EU:C:2019:1069, paragraph 34.