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IMPACT ASSESSMENT REPORT

Damages actions for breach of the EU antitrust rules

Accompanying the proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

**on certain rules governing actions for damages under national law for infringements of
the competition law provisions of the Member States and of the European Union
(Text with EEA relevance)**

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1. THE SUBJECT-MATTER OF THE IMPACT ASSESSMENT

1. Since 2001 the Court of Justice ("the Court") repeatedly stated that, as a matter of EU law, any individual must be able to claim compensation for the harm suffered as a result of an infringement of the EU competition rules.¹ More than 10 years later, most victims of a competition law infringement are still not able to effectively exercise that EU right to compensation. This is largely due to a lack of appropriate national rules governing actions for damages. Even where such rules exist, they are so different from Member State to Member State that it results in an uneven playing field for both infringers and victims of the illegal conduct. More recently, a new issue has arisen, showing that the EU right to compensation can sometimes be at odds with the effectiveness of public enforcement of the EU competition rules. For example there exists legal uncertainty as to whether information that a competition authority had obtained in the course of its enforcement of the EU competition rules, is disclosable in damages actions before national courts. Such disclosure could be particularly detrimental for the effectiveness of the leniency programmes and hence for the effectiveness of the fight against secret cartels.²
2. To remedy these two gaps in the enforcement of the EU competition rules, the current Antitrust Damages Initiative has two primary objectives:
 - (i) to maintain effective public enforcement of the competition rules by regulating some key aspects of the interaction between public enforcement of competition law by the Commission and national competition authorities and private enforcement of competition law through actions for damages before national courts; and
 - (ii) to ensure an effective exercise of the EU right to compensation.

¹ Case C-453/99, *Courage and Crehan*, [2001] ECR I-6297, and joined cases C-295/04 to C-298/04, *Manfredi*, [2006] ECR I-6619.

² Case C-360/09, *Pfleiderer AG v Bundeskartellamt*, [2011] ECR I-5161.

The result of this initiative should be an effective system of public and private enforcement of competition law that contributes to fostering growth and innovation throughout the EU.

2. PROCEDURAL ISSUES AND CONSULTATION OF INTERESTED PARTIES

2.1. Background

3. On 19 December 2005 the Commission adopted a Green Paper on damages actions for breach of the EC antitrust rules, identifying the main obstacles to effective compensation.³ The public consultation met a wide response⁴ and also institutional stakeholders issued their opinion. The European Parliament ('the Parliament') adopted a Report and a Resolution in 2007,⁵ in which it called on the Commission to prepare a White Paper with detailed proposals to facilitate actions for damages.
4. The Commission met a group of experts from the Member States on two occasions in autumn 2007, in preparation of the White Paper. Experts represented the Ministries of Justice, Ministries of Economic Affairs and national competition authorities ('NCAs'). Representatives of the EFTA and its members were present. The Commission also met a delegation of judges of national supreme courts, courts of appeal, courts of first instance and specialist competition tribunals from 12 Member States⁶ to discuss specific issues related to antitrust damages actions.
5. Commission staff participated in a large number of events (conferences, expert panels, etc.) to discuss more effective EU antitrust damages actions and their implications. DG Competition, in particular, repeatedly met a wide range of stakeholders and experts, notably consumer associations, business representatives, lawyers and academics.
6. On 2 April 2008 the Commission adopted a White Paper on damages actions for breach of the EC antitrust rules⁷, that put forward suggestions for specific measures that would ensure the effective exercise of the right to compensation of antitrust harm. The White Paper was accompanied by an Impact Assessment ('IAWP').⁸

2.2. Public consultation on the White Paper

2.2.1. Civil society

7. The White Paper was the object of an intense debate. A large number of public authorities and stakeholders from almost all Member States submitted comments.⁹

³ COM(2005)672. The Green Paper was prepared by a 2004 study on the conditions under which private parties can bring actions for antitrust damages ('the Comparative Study'). Page numbers quoted in this report refer to the electronic version of the Comparative Study: http://ec.europa.eu/comm/competition/antitrust/others/actions_for_damages/study.html.

⁴ The submissions on the Green Paper are available at: http://ec.europa.eu/comm/competition/antitrust/actionsdamages/green_paper_comments.html.

⁵ [2006/2207\(INI\)](http://ec.europa.eu/comm/competition/antitrust/actionsdamages/green_paper_comments.html). The Resolution of the European Parliament is available at <http://www.europarl.europa.eu/oeil/file.jsp?id=5378362>.

⁶ Invitations were issued via the Association of European Competition Law Judges, the European Network of Councils for the Judiciary and the Network of the Presidents of the Supreme Judicial Courts of the EU.

⁷ COM(2008)165 and the accompanying Commission Staff Working Paper (SEC(2008)404) ('the 2008 Staff Working Paper').

⁸ SEC(2008)405. See also the Executive Summary of the Impact Assessment (SEC(2008)406).

⁹ The more than 170 submissions on the White Paper are available at http://ec.europa.eu/competition/antitrust/actionsdamages/white_paper_comments.html.

Very few respondents questioned the idea underpinning the White Paper that in most cases victims of competition law infringements in practice do not obtain the compensation they are entitled to under EU law. Most agreed that something needs to be done to remedy this situation. Many respondents explicitly welcomed the approach of the White Paper to pursue, as a primary policy objective, the aim of effective compensation of victims (rather than punishment or deterrence of infringers) and to seek solutions that are balanced and rooted in the European legal traditions. Divergent opinions emerged as to the need for an initiative at EU level, the consequences in terms of increased litigation, the interaction with public enforcement, and the means by which the goal of more effective compensation can be most appropriately achieved.

8. Different groups of stakeholders belonging to civil society expressed different opinions on the White Paper and its suggested measures. Below is a summary of the opinions of the three groups of stakeholders that submitted most replies.

(a) *Businesses and Business Associations*

9. Among civil society, business associations were generally negative both on the need for a Commission initiative and on the substance of the proposals. However, proposed measures which are favourable to the position of defendants, such as the passing-on defence and protection of corporate statements from disclosure in actions for damages, were received positively by the business community.
10. There are two groups of exceptions to the generally negative opinion of the business associations. The first exception is that of business associations representing *only* small and medium sized enterprises. These associations generally welcomed the focus on SMEs, which often suffer harm from anticompetitive behaviour that they are not able to recover, and expressed an overall positive view on the White Paper.
11. The second exception is given by a number of companies that had allegedly been victims of anticompetitive conduct, such as customers of cartels in the beer, the paper and the elevator cartel. The submissions of these companies are broadly supportive of the White Paper's proposals, and in some cases even encourage the Commission to advance broader proposals (for instance by loosening the conditions to obtain a disclosure order).

(b) *Consumer Associations*

12. Consumer associations fully endorsed the White Paper's proposals. They supported the White Paper's objectives and suggestions and supported the idea of a legislative proposal from the Commission. In some cases, they even encouraged the Commission to do more in order to set up a truly effective framework for antitrust damages actions.
13. Consumer associations identified the following issues as main obstacles to an effective right to compensation for victims of antitrust violations: (i) lack of collective redress mechanisms and (ii) difficulties in obtaining disclosure orders. Consumer associations argued that the preservation of public enforcement (and leniency programmes in particular) does not justify a restriction on the rights of the victims and were against any form of limitation of liability for immunity recipients. They largely contested the need for protection of corporate statements, while claiming broader rules on access to the files of competition authorities.

(c) *Lawyers, Law firms and Bar associations*

14. The submissions received from law firms and lawyers' associations presented a broad range of views, often influenced by the legal culture they come from and by whether they generally represent claimants or defendants. As a general trend, there was wide agreement on the need to establish rules on the protection of corporate statements. Respondents also urged the Commission to exclude from disclosure documents covered by legal privilege. Apart from these issues, submissions from the legal community were very heterogeneous.

2.2.2. Institutional stakeholders

15. The Parliament¹⁰ welcomed the White Paper and stressed that EU competition rules and their enforcement require that victims of breaches of those rules should be able to claim compensation for the damage suffered. It also stressed that individual consumers and small businesses are often deterred from bringing individual actions. In particular the Parliament stressed the "need for the Commission to propose legislation, without watering it down unnecessarily, to facilitate individual and class-action claims for effective compensation for damages resulting from breaches of EU antitrust law."¹¹

16. The EESC¹² also welcomed the White Paper and stressed the need to promote people's access to effective judicial protection as a fundamental right laid down in the European Charter of Fundamental Rights ('the Charter'). It considered that a legal framework was necessary and provided detailed comments on different aspects.

2.3. Public consultation on the quantification of damages

17. One of the suggestions made in the White Paper was to "provide pragmatic, non-binding assistance in the difficult task of quantifying damages in antitrust cases, both for the benefit of national courts and the parties."¹³ In 2009, an external study on the quantification of damages was prepared for the European Commission.¹⁴ The results of the Quantification Study were taken into account in the Draft Guidance Paper on the quantification of damages which the Commission submitted to public consultation in 2011.¹⁵ This draft paper set out insights into a range of methods and techniques used to quantify harm in damages actions and explains strengths and weaknesses of these methods.

18. Institutional and other stakeholders generally welcomed the idea of issuing non-binding guidance on quantifying harm caused by antitrust infringements.¹⁶ The

¹⁰ European Parliament resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules (2008/2154(INI)): <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2009-0187+0+DOC+XML+V0//EN>.

¹¹ See paragraph 15 of the European Parliament resolution of 20 January 2011 on the Report on Competition Policy 2009 (<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&reference=P7-TA-2011-0023&language=EN&ring=A7-2010-0374>).

¹² Opinion of the EESC on the White Paper on damages actions for breach of the EC antitrust rules, OJ C 228 22.9.2009, p. 40.

¹³ 2008 Staff Working Paper, paragraph 199.

¹⁴ 'Quantifying antitrust damages - Towards non-binding guidance for courts' ('the Quantification Study'). Page numbers quoted in this report refer to the electronic version of the Quantification Study: http://ec.europa.eu/competition/antitrust/actionsdamages/quantification_study.pdf.

¹⁵ The draft Guidance Paper on quantifying harm in actions for damages based on breaches of the EU antitrust rules (June 2011) can be found at http://ec.europa.eu/competition/consultations/2011_actions_damages/draft_guidance_paper_en.pdf.

¹⁶ The 37 written submissions can be found at http://ec.europa.eu/competition/consultations/2011_actions_damages/index_en.html.

Commission organised two workshops on the topic with a number of renowned economists¹⁷ and sought the advice of specialised judges from the Member States.

2.4. Public consultation on a coherent approach to collective redress

19. In response to the Parliament resolution on the White Paper calling for an integrated approach to collective redress, the Commission held in 2011 a public consultation on a coherent approach to collective redress in different areas of EU law.¹⁸ The purpose of this consultation was, *inter alia*, to identify common legal principles on collective redress in all areas of EU law and to examine how such common principles could fit into the EU legal system and into the legal orders of the Member States. The consultation also explored in which areas different forms of collective redress (injunctive and/or compensatory) could improve the enforcement of EU legislation or the protection of victims' rights.
20. The consultation attracted more than 300 replies from a wide range of stakeholders and over 18,000 replies from citizens supporting the position of consumer organisations. 15 Member State governments replied, of which 10¹⁹ favoured a binding EU instrument on collective redress, while 5²⁰ preferred a non-binding approach. 6²¹ Member States supported policy-specific legislation at EU level, explicitly mentioning competition policy, while 4²² preferred horizontal initiatives. While consumers were strongly in favour of binding EU measures on collective redress, the majority of businesses were opposed.
21. Almost all stakeholders agreed with the following basic parameters of a collective redress system: it should be capable of (i) effectively resolving a multitude of individual claims which raise the same or common issues and relate to a single infringement of EU law; (ii) delivering legally certain and fair outcomes within a reasonable timeframe, while respecting the rights of all parties involved; and (iii) providing for safeguards against abusive litigation and avoiding any economic incentives to bring abusive claims.
22. The public consultation showed that there is a consensus across all stakeholder groups that private collective redress and enforcement by public bodies are two different instruments that pursue different objectives. Business tends to put greater emphasis on the role of public enforcement. Other stakeholder groups are generally of the view that both instruments are in principle equally important and that they should be independent and complementary mechanisms.
23. Most stakeholders agree that in policy fields where public enforcement plays a major role – particularly in competition – specific rules are required to ensure a smooth interplay between public enforcement and private collective redress. Many replies mention rules on the binding effect of infringement decisions by national competition authorities for follow-on collective actions, limitation periods for bringing follow-on

¹⁷ The workshops were held on 26 January 2010 and on 27 September 2011. The contributions can be found at http://ec.europa.eu/competition/antitrust/actionsdamages/economist_workshop.html.

¹⁸ For further information on the public consultation "Towards a coherent European approach to collective redress", see http://ec.europa.eu/competition/consultations/2011_collective_redress/index_en.html.

¹⁹ Bulgaria, Denmark, Greece, Italy, Latvia, the Netherlands, Poland, Portugal, Sweden and the UK.

²⁰ Austria, the Czech Republic, France, Germany and Hungary.

²¹ Bulgaria, Greece, Poland, Portugal, Sweden and the UK.

²² Austria, the Czech Republic, Denmark and the Netherlands.

actions and protection of the effectiveness of public enforcement (specifically leniency programmes).

24. The Parliament resolution on collective redress²³ recognizes the importance of collective redress in ensuring effective compensation for victims of EU law infringements. The resolution favours a separate horizontal EU framework including a common set of principles over a sector-specific approach towards collective redress. Nevertheless, the resolution acknowledges that there can be a need for certain competition law specific provisions on collective redress, which could be laid down in a separate chapter of a horizontal instrument or in a separate legal instrument.

2.5. Inter-service consultation

25. The Directorate-General for Competition is the lead service on the current Antitrust Damages Initiative, with the involvement of the Secretariat-General, the Legal Service, DG Economic and Financial Affairs, DG Enterprise and Industry, DG Internal Market and Services, DG Health and Consumers and DG Justice. An Impact Assessment Inter-Service Group was set up on 26 September 2008. It met two times in 2008 to discuss earlier drafts of the Impact Assessment report and met once in 2012 to discuss the present draft, which takes account of the additional public consultations held in 2011, of the views expressed by the Parliament since 2008 and of recent developments at the European Courts.

2.6. The Impact Assessment Board

26. A draft of the present Impact Assessment was submitted to the Impact Assessment Board on 21 November 2012. Responding to the resulting recommendation in the Board's first opinion of 20 December 2012, a revised draft was submitted in January 2013. The Board issued a second, positive opinion on the resubmitted report on 28 February 2013, with further suggestions for improvement. The Board expressed the following main recommendations, which were considered in the present report:

- (1) Better substantiate the problem definition;
- (2) Report in more detail the stakeholder response to the public consultation on the White Paper;
- (3) Clarify the objectives of the initiative;
- (4) Improve the presentation of the options;
- (5) Clarify the differences between Options 2 and 3;
- (6) Better present the analysis of impacts and the comparison of options;
- (7) Further define the monitoring criteria.

For (1), the first part of the Report has been further elaborated to provide more concrete evidence of the problems targeted. Quantitative data from an external impact study on compensation foregone by victims of a competition law infringement have been quoted. The interaction between public and private enforcement has been further clarified, and its background is explained in three

²³ European Parliament resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress' (2011/2089(INI)):

<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2012-21>

annexes on the functioning of the leniency programmes, the *Pfleiderer* case-law and initiatives currently considered at Member State's level. The problem has further been specified by increased analysis of the baseline scenario of no EU action, also through reference to Member States' legislation and the inefficiencies of the current legal framework, as well as the current lack of comparably efficient alternatives to leniency programmes in the detection of secret cartels.

For (2), extensive reference has been made to stakeholders opinions throughout the document. A summary overview on the public consultation on the 2008 White Paper has also been added (Annex 8).

For (3), the formulation of the objectives has been made more clear. All the objectives and sub-objectives are currently discussed with the same structure, including an introduction where detailed reference is made to the relevant sections of part 3, to allow the reader to clearly link the targeted objectives to the problems addressed by the initiative. The objective of fostering full compensation while avoiding over-compensation has been clearly defined.

For (4), the assessed Options have been re-ordered to start from the base-line scenario of zero EU-Action (Option 1), and then the different forms of action proposed. As regards collective redress, Option 2 builds on the 2008 White Paper and assesses two different collective redress mechanisms (opt-in group actions and representative actions), whereas Option 3 and Option 4 are based on the assumption that collective redress is dealt at EU level in a horizontal framework that is yet to be determined. Therefore, the current impact assessment does not address the issue of collective redress for these two options. The assessment of the role of collective redress in the field of competition law enforcement and its relationship with a possible horizontal initiative on collective redress is separately discussed as part of the assessment of the Policy Options.

For (5), the differences between Option 2 and 3 have been spelled out more clearly. In particular, the Report explains why certain safeguards or additional measures compared to the White Paper options have been assessed as a bundle in Option 3.

For (6), the analysis of impacts has been explained in more detail. Options are also clearly and independently assessed against the base-line scenario. The pitfalls of the options already excluded in the IAWP, which have not been reconsidered in the current exercise, are recalled in an Annex, which details the risks of a number of solutions chosen in other jurisdictions and not fully in line with European legal traditions. In order to improve readability and comparison of the options, the scoring system has also been simplified.

For (7) the chapter on monitoring and evaluation has been enriched with reference to more specific criteria to assess the progress achieved through the initiative.

In addition to the above, a glossary of technical terms used in the text is added as Annex 7 to make the report more accessible to non-specialist readers.

3. PROBLEM TO BE ADDRESSED

27. The Antitrust Damages Initiative addresses two key issues, namely (a) the interaction between public and private enforcement of the EU competition rules and (b) the difficulties for victims of competition law infringements to obtain compensation. In case the baseline scenario of no action at the EU level is followed (see further the description of the baseline scenario or option 1 in section 5.3 below), the problems described in sections 3.1 until 3.3 will continue to exist or deteriorate, and the costs described in section 3.4 will be incurred.

3.1. The interaction between public and private enforcement remains unclear under the current legal framework

28. The EU competition rules are a matter of public policy. They are primarily enforced by the Commission and NCAs, which have a number of investigative and enforcement powers, including the power to impose fines on undertakings for the infringement of these rules.²⁴ This type of enforcement, which is exercised by competition authorities in the public interest, is generally referred to as "public enforcement". In addition, the EU antitrust rules – Articles 101 and 102 TFEU – have direct effect, which means that they create rights for individuals that can be enforced before national courts. This type of enforcement is generally referred to as 'private enforcement'. Among these rights is the EU right for victims of an infringement of EU competition law to be compensated for the harm they have suffered. The means by which the right to compensation is put into practice are civil damages actions brought before national courts. Given the subject-matter of this initiative, the notion of private enforcement in this report is used in the narrower sense of antitrust damages actions.

29. The two kinds of procedures – private enforcement actions under national civil law and public enforcement by competition authorities – are complementary tools serving the objective of an effective enforcement of the EU competition rules. There is a consensus among all stakeholder groups that responded to the public consultations on the White Paper and on collective redress (consumers, business and business representatives, legal experts and public authorities such as Member States and competition authorities) that public and private enforcement are two different instruments that pursue different objectives. All stakeholder groups apart from business are generally of the view that both instruments are in principle equally important and must hence be independent and complementary mechanisms.

30. Given that antitrust damages actions are often triggered by a competition authority's investigation and are brought either while an investigation is pending or, more typically, after an infringement decision had been adopted (in the latter case referred to as 'follow-on' actions), the interaction between public and private enforcement can be significant. A smooth interplay is vital to ensure maximum effectiveness of both tools. This can be best achieved by regulating certain key aspects of the interplay, such as access to information held by competition authorities (the disclosure of certain documents from the competition authorities's files could negatively affect the effectiveness of public enforcement), binding effect of infringement decisions (to

²⁴ The Commission has the powers foreseen in Regulation 1/2003 for the application of Articles 101 and 102 TFEU. The NCAs have the powers foreseen in national law and may adopt the decisions listed in Article 5 of Regulation 1/2003.

avoid re-litigation of the finding of an infringement) or limitation periods (to ensure that they do not expire while potential follow-on claimants are waiting for an infringement decision). The need to provide for rules ensuring a smooth interplay between the public and private enforcement of competition law was confirmed by most stakeholders responding to the public consultation on collective redress.²⁵

31. Stakeholders generally regard the need to regulate the public/private interface as particularly acute in the case of documents linked to leniency programmes.²⁶ In the public consultations on the White Paper and on collective redress, business representatives, legal experts and public authorities warned against undue disclosure of leniency related documents for the purpose of antitrust damages actions. They held in particular that the protection of corporate statements is an essential condition for the success of leniency programmes. Only a few submissions (mainly by consumer associations) contested the need to protect leniency corporate statements.

The Pfleiderer judgment

32. In June 2011, the Court held in *Pfleiderer* that – in the absence of EU law – it is for a national court to determine on a case-by-case basis and according to national law the conditions under which disclosure of leniency-related information to victims of a competition law infringement must be permitted or refused.²⁷ Therefore, leniency applicants cannot know in advance whether documents submitted to competition authorities in the context of a leniency application might be disclosed to claimants in antitrust damages actions and if so, what categories of documents would be disclosable. Although one cannot bring direct evidence that the *Pfleiderer* judgment has had or will have a negative impact on the number of leniency applications (as it is impossible to know how many leniency applications would have been received without the judgment), the current legal uncertainty could affect the willingness of cartel participants to cooperate with the Commission and NCAs under the leniency programmes and thus negatively affect the public enforcement of competition law.²⁸ More generally, the lack of legal certainty as to the (non-)disclosability in antitrust damages actions of leniency-related documents and other information from competition authorities' files is detrimental for all involved parties, including claimants and the competition authorities.
33. It should be noted that in *Pfleiderer* the Court reached its conclusion on the case-by-case application of divergent national laws "in the absence of binding regulation under European Union law on the subject", i.e. in the absence of any "common rules on leniency or common rules on the right of access to documents relating to a leniency procedure".²⁹ A common EU standard providing for an appropriate protection of leniency documents would remove both the uncertainty for potential leniency applicants and the diversity of national rules on the subject. NCAs agree to this solution and they have therefore been urging the Commission to introduce

²⁵ See para 0 above.

²⁶ See Annex 1 for a more detailed description of the functioning of the Commission's leniency programme.

²⁷ See Annex 2 for a more detailed description of the *Pfleiderer* case.

²⁸ Case C-360/09, *Pfleiderer AG v Bundeskartellamt*, [2011] ECR I-5161, 20-23: "the view can reasonably be taken that [cartel participants] would be deterred from taking the opportunity offered by such leniency programmes, particularly when, pursuant to Articles 11 and 12 of Regulation 1/2003, the Commission and the national competition authorities might exchange information which that person has voluntarily provided".

²⁹ *Ibidem*

without delay an EU rule that would protect their leniency programmes. The Heads of the European Competition Authorities have repeated this message in a recent resolution.³⁰ Also European businesses have called for such a rule to ensure legal certainty in this regard.

Legal uncertainty and risks for public enforcement

34. Under the baseline scenario of no EU action, the legal uncertainty and the risk of negative consequences on the public enforcement of EU competition law would continue to exist. This is due to the persisting risk of diverging or inconsistent court practice between different Member States or even within the same Member State with regard to disclosability of leniency related documents from the file of competition authorities. Such divergence in national judgments is already visible to date: whereas in Germany the first instance court protected in *Pfleiderer* all leniency documents from disclosure³¹, the Düsseldorf Appeal Court³², in a different case, was not ready to protect the information contained in leniency documents in so far as that information was referred to in the infringement decision. In the UK, the High Court in the National Grid case found that partial disclosure of certain documents (such as a reply to the Statement of Objections and replies to Requests for Information) is justified and some parts of the confidential verions of the Commission decision are to be disclosed, whereas documents specifically prepared for the purpose of the Commission's leniency programme should not be disclosed.³³ If more national courts are required to make the case-by-case assessment as described in *Pfleiderer*, the likelihood of diverging rulings on the disclosability of documents from the file of a competition authority increases. As stated in paragraph 33 above, a common EU standard providing for an appropriate protection of such documents would remove both the uncertainty for undertakings potentially involved in proceedings before competition authorities and the diversity of judgments by national courts on the subject.
35. In the absence of adequate protection of leniency programmes, the negative consequences arising from the uncertain legal framework outlined above cannot be offset by efficient alternatives. In particular, it would not be possible to offset the negative effects of impaired leniency programmes by increased *ex-officio* investigations into suspected infringements by the Commission or NCAs. Such an attempt would not only be more costly both for public enforcers and undertakings alike, but would not enable public enforcers to uncover comparably useful evidence with a view at proving infringements. On the one hand, leniency programmes allow the Commission and NCAs to pursue a targeted enforcement on conducts where the likelihood to find an infringement is much higher, and free resources for the pursuit of *ex officio* cases while maintaining an adequate degree of deterrence. On the other hand, divesting resources from leniency cases in order to pursue more *ex officio* cases would impose a significant administrative burden on businesses, as there would be a higher chance of being subject to an investigation while no infringement is later

³⁰ Resolution of the Meeting of the Heads of the European Competition Authorities of 23 May 2012, Protection of leniency material in the context of civil damages actions, available at http://ec.europa.eu/competition/ecn/leniency_material_protection_en.pdf.

³¹ *Amtsgericht Bonn* (Local Court Bonn), decision of 18-January-2012, case No 51 Gs 53/09 (*Pfleiderer*).

³² *Oberlandesgericht Düsseldorf* (Düsseldorf Appeal Court), decision of 22 August 2012, case No B-4 Kart 5/11 (OWi) (*roasted coffee*).

³³ *High Court of Justice* (UK first instance court), judgment of 04 April 2012, case No HC08C03243 (*National Grid*).

found. Moreover, because of the higher costs and administrative burdens of *ex officio* cases, in the absence of cooperation from leniency applicants and of the targeted evidence they provide, the number of secret cartels uncovered would be significantly lower.

Other issues in the interaction between public and private enforcement

36. Apart from leniency programmes, the regulation of access to information held by competition authorities is also needed to safeguard the effectiveness of other public enforcement tools. As stakeholders to the public consultations on the White Paper and on collective redress confirmed, the importance of ensuring the willingness on the part of undertakings to produce voluntary statements acknowledging their participation in an infringement is equally relevant in the context of a settlement procedure; therefore, settlement submissions need to be protected in the same way as corporate statements that are made for the purpose of leniency programmes.
37. Moreover, to ensure that disclosure of information does not unduly interfere with an ongoing investigation, it is appropriate to allow the disclosure of documents prepared specifically for the purpose of such investigation only after the investigation by a competition authority has been closed. By protecting the effectiveness of public enforcement in this way, the effectiveness of private damages actions is also strengthened, given that the majority of these are follow-on actions relying on an infringement finding by a competition authority.
- 3.2. The current legal framework for damages actions in cases of competition law infringements is ineffective as victims experience major difficulties to obtain compensation**
38. To date, citizens and businesses encounter difficulties in obtaining compensation for the harm they have suffered because of an infringement of the EU competition rules. Stakeholders have identified the following main obstacles standing in the way of obtaining compensation more effectively: difficult access to the evidence that is necessary for proving a case, absence of effective collective redress mechanisms, lack of clear rules on the passing-on defence (i.e. a defence against a direct purchaser's damages claim, relying on evidence showing that the overcharge resulting from a cartel was passed on – fully or partially - by the direct purchaser to its own customers further down the distribution chain), no uniform rules on the binding effect of infringement decisions adopted by an NCA, legal uncertainty about limitation periods, the calculation of damages and the rules concerning the costs of a damages action.³⁴
39. As a consequence, a large number of victims of infringements of competition law remain uncompensated and see their right to damages under EU law frustrated. There is therefore a clear deficit in terms of compensatory justice. This is difficult to reconcile with the fundamental right to access to effective judicial protection.³⁵ The divergence in national legislation may also affect the decision of undertakings to use the freedom of establishment, the free movement of goods or the freedom to provide

³⁴ For details on each of these issues, see paragraph 2 of the White Paper and paragraph 51 of the IAWP.

³⁵ Article 47, first paragraph of the Charter: "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article." and Article 19(1), second subparagraph, TEU: "Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law."

services, avoiding those Member States where the right to compensation is most effectively enforced.

40. Furthermore, the Comparative Study on the conditions of damages claims has shown that the differences between national legal systems cause legal uncertainty at several levels. For a number of important legal issues, e.g. the availability of the 'passing-on defence',³⁶ existing national law is unclear about which rule applies in the specific context of antitrust damages cases. Additional legal uncertainty stems from the significant differences between the procedural and substantive rules governing actions for damages in the different Member States (e.g. with regard to access to evidence, limitation periods and the binding effect of NCA decisions). These are described in the 2004 Comparative Study on the conditions of damages claims and in the 2008 Commission White Paper on antitrust damages actions and its accompanying Impact Assessment.³⁷
41. The marked differences (described as "astonishing diversity" in the 2004 Comparative Study)³⁸ continue to exist in relation to many of the topics to be addressed in this policy initiative:
- As regards the **binding effect** of an NCA's finding of an EU competition law infringement on national courts in a subsequent antitrust damages action, legislation in only one Member State (Germany) recognises the binding effect of final NCA decisions of both the domestic and other European NCAs. In 10 other Member States only the final decision of the domestic NCA is binding on national courts. In the remaining 16 Member States, NCA decisions have no binding effect. In those Member States their evidential value ranges from a rebuttable evidentiary presumption of an infringement to normal evidential value or even to being regarded as just a view on the facts and the law.
 - As regards the **limitation period** for bringing an antitrust damages action, some Member States provide for specific limitation periods allowing for follow-on cases. In the vast majority of Member States, however, there are no specific rules on limitation periods for follow-on cases. In these Member States, expiry of the ordinary limitation period before a competition authority renders an infringement decision can form an important obstacle preventing follow-on action from being instituted. The specific limitation periods in some Member States are either based on a suspension of the ordinary limitation period during an investigation by the authorities, in combination with an ensured time period to bring an action after the suspension finishes or a specific limitation period for follow-on cases. The length of these limitation periods differs from 6 months to 5 years.
 - As to the **passing-on defence**, it should be noted that in most Member States there is no legislative provision or case-law on the topic. It is therefore yet to be established if and under which conditions the passing-on defence is available. In those few Member States where the legislator or the judiciary has pronounced on the passing-on defence, judgments vary between explicit acceptance and explicit prohibition of the defence. In those Member States

³⁶ See Comparative Study, pp. 1-78 to 1-80, 1-111 to 1-112 and 1-127 to 1-129.

³⁷ See Comparative Study, pp. 1-26 to 1-102; White Paper, section 1 and para. 2.2 (access to evidence), 2.3 (binding effect of NCA decisions) and 2.7 (limitation periods); and IAWP, section 2.1.

³⁸ See Comparative Study, Executive Summary, para. I. Introduction, p. 1.

where it is allowed, the burden of proving the defence varies. On one side of the spectrum, there are Member States (such as France) where passing-on of overcharge from the direct to the indirect purchasers is presumed to be a common commercial practice and where, as a consequence, the direct purchasers will have to prove that no passing-on has taken place.³⁹ On the other side of the spectrum there are Member States such as Germany, that allow the passing-on defence only under specific conditions and in case the defence does not lead to an unjust benefit for the defendant.⁴⁰

- Finally, as regards **disclosure of evidence**, the overwhelming majority of Member States' legal systems provide for some form of disclosure, varying between a system whereby the required documents have to be precisely described (such as Germany) to one which allows for the disclosure of classes of documents (such as the UK). Some Member States also limit the possibilities to request disclosure to parties to the proceedings, excluding third parties, or require separate proceedings.

42. The described differences have even increased since 2004. While the rules applicable to antitrust damages actions have not changed in the majority of Member States, a few Member States have adopted amendments, such as the 2007 amendment to the Danish Competition Act, including a new statute of limitation periods for antitrust damages claims; the 2008 amendment to the Hungarian Competition Act, introducing a rebuttable presumption that a hard-core cartel has caused a 10% price increase on the market; or the 2008 amendment to Bulgaria's Law on the Protection of Competition, making final infringement decisions by NCAs binding on national courts in private actions.
43. In addition, proposals to modify some of the national rules on antitrust damages actions are currently pending in Austria, Germany and the UK. As regards the topics covered by the current policy initiative, the Austrian proposal contains rules on the binding effect of NCA decisions and on the suspension of the limitation period during an investigation of the competition authorities. The German proposal does not directly concern any of the topics of the policy initiative. As regards the interaction of the public and private enforcement of competition law, the UK Government decided not to intervene because it expects measures to be adopted on this issue at the EU level. An overview of the main features of the Austrian, German and UK proposals are contained in Annex 3.
44. This diversity and legal uncertainty leads to ineffective enforcement of the competition rules. The diversity in the legal systems is not only a problem for victims. Also defendants may suffer disadvantages in terms of imponderability and costs, mainly because they risk being sued for damages in different Member States or in the Member State where the substantive or procedural rules are most favourable for claimants, which is not necessarily their place of establishment (but for example the domicile of a co-infringer).⁴¹ For these reasons, a more level playing field is in the interest of both potential victims and potential defendants.

³⁹ *Cour de Cassation* (French Court of Cassation), judgment of 15 May 2012, case No 11-18495, (Synthetic lysine cartel - Ajinomoto Eurolysine case).

⁴⁰ *Bundesgerichtshof* (German Supreme Court for Civil Matters), judgment of 28 June 2011 case No KZR 75/10 (Carbonless paper cartel).

⁴¹ See Article 2 of Regulation 44/2001 and Article 6(3)(b) of Regulation 864/2007.

45. The above factors, combined with the fact that antitrust cases, by nature, often require an unusually high level of very costly factual and economic analysis and present specific difficulties for claimants regarding access to crucial pieces of evidence that are often kept secret in the hands of the defendants, deter many victims from bringing actions as they consider the risk/reward balance to be negative.⁴²
46. In that context, many stakeholders (both in response to the public consultation on the White Paper and in response to the 2011 public consultation on collective redress) have – besides remedying the obstacles to effective private enforcement as identified above – insisted on the importance of **encouraging consensual dispute resolution mechanisms**.
47. If the baseline scenario of no EU action applies, this situation would not change. The diversity between the rules applicable to actions for damages in the Member States as described above would persist and even increase should some Member States adopt new legislation. Due to the continued existence of important obstacles which prevent victims of EU competition law infringements from obtaining full compensation, the current situation of undercompensation of victims and their problematic access to justice would equally persist. Since the situation has not significantly changed since the adoption of the Green Paper in 2005, there is no reason to believe that – in the absence of any EU action in the field – significant improvements will be made.
48. In the baseline scenario, undercompensation of victims of EU competition law infringements is the main problem. Risks of overcompensation have not been observed in any EU Member State. Despite this, stakeholders from the business community responding to public consultations contended that an EU initiative on actions for damages may lead to a risk of unmeritorious or abusive litigation or overcompensation. Any initiative to facilitate actions for damages should contain the necessary safeguards to avoid such undesirable side effects.

3.3. The current legal framework could endanger the proper functioning of the internal market

49. The EU competition rules are a matter of public policy, which lie at the heart of the functioning of the internal market.⁴³ Shortcomings in the effective enforcement of Articles 101 and 102 hinder not only the achievement of the goals of workable competition, such as better allocation of resources, greater economic efficiency, increased innovation and lower prices. They also have a direct impact on the functioning of the internal market, which relies on a system of undistorted competition. In this context, Article 3(3) of the Treaty on European Union ("TEU") provides that the internal market shall be based on "a highly competitive social market economy".
50. Sections 3.1 and 3.2 explain that overall effective enforcement of EU competition law consists of its effective public and its effective private enforcement. It is

⁴² See the external Impact Study of 21 December 2007, 'Making antitrust damages actions more effective in the EU: welfare impact and potential scenarios' ('the Impact Study', available at http://ec.europa.eu/comm/competition/antitrust/actionsdamages/files_white_paper/impact_study.pdf), Part II, section 1.1 for a general model of incentives to sue and section 3.2 for the specific issue of access to evidence. Deficits regarding reparation of harm resulting from an infringement of directly effective EU rules may also exist in other areas of law. In the field of competition, however, the size of the uncompensated harm and the problems encountered are particularly big.

⁴³ Protocol Nr 27 on competition and internal market, Case C-126/97, *Eco Suisse*, [1999] ECR I-3055, 36, and joined cases C-295/04 to C-298/04, *Manfredi*, [2006] ECR I-6619, 31.

furthermore explained why private enforcement of competition law is currently not effective and how certain aspects of the private enforcement of competition law risk negatively affecting the effective functioning of public enforcement. As set out in section 3.2, the marked differences between Member States regarding the rules governing actions for damages concerning infringements of national or EU competition law that were already described in the 2004 Comparative Study, in the 2008 White Paper and its accompanying Impact Assessment have further increased due to developments in legislation and jurisprudence in a limited number of Member States, as opposed to the lack of developments in other Member States.

51. The primary example of divergence, also with an impact on the functioning of the internal market, is given by the different national rules applying to access to evidence. With the exception of a few Member States (most notably the UK), the lack of adequate rules on *inter partes* disclosure of evidence in court means that there is no effective access to evidence for victims of a competition law infringement seeking antitrust damages. Also the differences concerning access to information held by competition authorities are significant (e.g., in Austria such information is in practice entirely exempted from access). Other examples concern rules on passing-on (differences having major implications for the ability of direct/indirect purchasers to claim damages effectively and, in turn, for the defendant's chances of avoiding the obligation to compensate for harm caused), the binding effect of NCA decisions (only Germany acknowledges the binding effect of infringement decisions by the NCAs from all Member States), or on issues relevant for the quantification of antitrust harm (e.g. the existence of a rebuttable presumption of harm, or the power of judges to estimate the amount of damages).
52. The fact alone that, according to the Commission's knowledge,⁴⁴ the vast majority of large antitrust damages actions are currently being brought in 3 European jurisdictions – namely in the UK, followed by Germany and the Netherlands – indicates that the rules applicable in these Member States are considered by claimants to be much more suitable for effectively bringing such claims than in other Member States. Out of the 54 final cartel and antitrust prohibition decisions taken by the Commission in the period 2006-2012, only 15 were followed by one or more follow-on actions for damages in one or more Member States. In total, 52 actions for damages were brought in only 7 Member States. In the 20 other Member States, the Commission is not aware of any follow-on action for damages based on a Commission decision. Among those 7 Member States where actions were brought, the vast majority was brought in the 3 above mentioned Member States. The relative preference for a legal system in order to bring an action, or the relatively higher likelihood of victims of competition law infringements to claim compensation in the UK, Germany and the Netherlands depend on more effective procedural rules for antitrust damages actions. Thus, successful measures from these jurisdictions such as the binding effect of NCA decisions or mechanisms for evidence disclosure are included in the options considered in the present report.⁴⁵
53. These differences lead to inequalities and uncertainty concerning the conditions under which injured parties can exercise the right to compensation deriving from the

⁴⁴ The figures contained in this paragraph are based on evidence gathered by the Commission services. As there is no reliable complete overview available nor does a public register of actions for damages brought in national courts exist, these data can only be taken as a rough indicator.

⁴⁵ See Section 5.3.

Treaty and may affect the substantive effectiveness of this right. As injured parties often choose the forum of their Member State of establishment to claim damages (one reason being that consumers and smaller businesses cannot afford to choose a possibly more favourable jurisdiction of another Member State), the discrepancies between the rules of the different Member States risk leading to an uneven playing field as regards actions for damages and may affect competition on the markets on which these injured parties operate. The existence of this risk is, by way of example, demonstrated by the fact that the vast majority of the 52 known actions for damages following a Commission decision in the field of competition are brought by large undertakings.

54. Similarly, these differences in applicable rules mean that undertakings established and operating in different Member States are exposed to significantly different risk of being held liable for infringements of competition law. This uneven enforcement of the EU right of compensation may result in a competitive advantage for some undertakings that breached Articles 101 or 102 TFEU, and a disincentive to the exercise of the rights of establishment and provision of goods or services in those Member States where the right to compensation is more effectively enforced. As such, the differences in the liability regimes applicable in the Member States may negatively affect competition and risk to appreciably distort the proper functioning of the internal market.
55. It is necessary to ensure a more level playing field for undertakings operating in the internal market and to improve the conditions for injured parties, in particular citizens and small businesses, to make use of the rights they derive from the internal market. This more level playing field will not be realised when applying the baseline scenario of no EU action in the field, as explained in section 3.2. It is therefore appropriate to increase legal certainty and to reduce the differences that exist between the Member States as to the national rules governing actions for damages by harmonising certain relevant key rules applicable to actions for damages such as access to evidence, passing-on and the binding effect of NCA decisions. These measures would avoid divergence of applicable rules, which risks to appreciably distort the proper functioning of the internal market.

3.4. Scope and costs of the uncertainty relating to the interaction between public and private enforcement and the ineffectiveness of the legal framework for actions for damages

56. The scope of both the problem of the uncertainty relating to the interaction between public and private enforcement of competition law and the problem of the ineffectiveness of the legal framework for actions for damages is considerable.

3.4.1. Scope and cost: ill-regulated interface between public and private enforcement

57. The potential effect on public enforcement (ongoing as well as future investigations) applies in all Member States: the Commission as well as all Member States⁴⁶ have cartel leniency programmes, which have proven to be of great importance in the detection and prosecution of cartels. Leniency programmes grant immunity from and reduction of fines to those cartel participants who actively cooperate with the

⁴⁶ All EU Member states already have a working leniency program, with the exception of Malta which is currently implementing one.

competition authority.⁴⁷ Because of the secret nature of cartels, the vast majority of cartels is discovered on the basis of a leniency application of one of the cartel participants. As regards Commission cases, when looking at the period 2008 to 2011, 21 out of 24 decisions (i.e. 88% of decisions) were based on leniency applications. In these years, a total amount of fines of €7,3 billion was imposed on cartel infringers, of which around 83% was imposed in cases based on leniency applications. When looking at the NCAs represented in the ECN, in 2010 18 out of 30 and in 2011 13 out of 21 cartel decisions, imposing a significant amount of fines, were based on leniency applications.⁴⁸

58. The uncertainty concerning the interface between public and private enforcement has been revealed quite recently, through the 2011 judgment of the Court in the *Pfleiderer* case, and in its various offsprings at national level. If the EU legislator were not to act on this problem, substantial problems for the public cartel enforcement could ensue. Fewer leniency applications would mean more undetected cartel activity and would lead to a welfare loss across the EU.
59. The importance of settlements in cartel cases is also increasing. From June 2008 (introduction of the Settlement Notice) until 2011, 5 cartel cases have been settled. In broadly the same period (2008-2011) the Commission took 24 cartel decisions.
60. If the baseline option of no EU action in the field would be followed, there is a risk that less leniency applications are submitted and less cartels are thus discovered and fined. Equally, undertakings may be less willing to cooperate with the competition authorities in settlement procedures. If these negative effects materialize, this would lead to a lower discovery rate for of EU competition law infringements, less effective public enforcement and, overall, less cases being dealt with. The effectiveness of public enforcement of EU competition law would thus be at stake, with a negative knock-on effect on private enforcement by further reducing the possibilities for and the likelihood of follow-on actions for damages.

3.4.2. *Scope and cost: ineffective legal framework for compensation*

61. As to the second problem, the ineffectiveness of the legal framework for antitrust damages actions is observed in every Member State, although to differing degrees as the applicable national rules differ significantly. Infringements of competition law, be they hardcore cartels, other infringements of Article 101 TFEU or abuses under Article 102 TFEU, occur in almost every sector of the economy.⁴⁹ The problem concerns both actions for damages brought following a decision by a competition authority and actions brought on a stand-alone basis.
62. The lack of an effective compensation mechanism means that the costs of competition law infringements are currently borne by the victims: in the case of harm in the form of a price overcharge, this means that there is a direct transfer of money to the infringers, which they would keep if they do not have to compensate the harm caused by the infringement. In case of a loss of profit because of the infringement (for instance in the case of a competitor illegally foreclosed from a market), the law-abiding undertaking – to which no compensation is paid – has to bear the price of the

⁴⁷ See Annex 1 for a more detailed description of the functioning of the Commission's leniency programme.

⁴⁸ These numbers are based on the cases reported to the Commission, or published by NCAs or the press.

⁴⁹ See, for instance, the Commission's Annual Reports on Competition Policy at: http://ec.europa.eu/competition/publications/annual_report/index.html.

infringement while the infringer benefits from his illegal act. While fines imposed by competition can serve as a deterrent for infringements, they cannot alter these effects. In the baseline scenario of no EU action, these problems would persist.

63. The ineffective legal framework especially affects SMEs and large groups of consumers: as they are often at the end of the distribution chain, they face particular difficulties in identifying and proving the harm they suffered (causal link and quantum). They often perceive the uncertainties, risks and costs of a damages action as disproportionate to potential benefits.⁵⁰
64. Even though the absence of reliable empirical data makes precise quantification impossible, there is general agreement that infringements of competition law cause substantial harm to consumers and undertakings. Looking alone at hardcore cartels with effects across the EU,⁵¹ the Impact Study estimates that the annual direct cost to consumers and other victims in the EU ranges from approximately €13 billion (on the most conservative assumptions) to over €37 billion (on the least conservative).⁵² This estimate comprises both the harm resulting from consumers and other victims having to pay a higher price due to the illegal conduct of the cartellists (the “overcharge”) and also the economic benefits forgone by consumers and other victims who do not purchase, or purchase a smaller quantity, due to the unlawfully inflated price (the “deadweight loss”). It therefore covers the direct costs of cartels to consumers and other victims. It takes no account of more indirect macro-economic effects, such as the absence of greater allocative, productive and dynamic efficiency, which contribute to growth and employment, but are extremely difficult to estimate.
65. If one adds to the figures on EU-wide cartels the annual cost to consumers and other victims of *domestic* hardcore cartels, the total annual cost for hardcore cartels in the EU can be estimated to range from approximately €25 billion (on the most conservative assumptions) to approximately €69 billion (on the least conservative).⁵³ Expressed as a proportion of the EU’s gross domestic product, the negative consumer welfare impact of all these hardcore cartels is estimated as ranging from 0.20% to 0.55% of the EU’s GDP in 2011,⁵⁴ which does not include the harm caused by abusive practices and infringements of Article 101 TFEU other than hardcore cartels. More effective redress would lead to a larger percentage of this harm being

⁵⁰ See Impact Study, Part III, section 2.1.

⁵¹ Hardcore cartels are agreements between competitors to fix prices or allocate markets. The estimates do not cover other infringements of Article 101 such as vertical restraints nor abuses under Article 102.

⁵² This estimate is based on the total amount of fines imposed by the European Commission on cartels (annual average for the period 2002 to 2007) and the finding that, on average, the total overcharge applied by these cartels is approximately 50% of the fine. Assuming a given detection rate of cartels (10% on the least conservative assumptions and 20% on the most conservative), the total overcharge applied by undetected EU-wide cartels can be calculated. Another constituent of harm to consumers is the “deadweight loss”. Assuming a set relation to the overcharge applied (50% on the least conservative assumptions and 10% on the most conservative), the total deadweight loss is calculated and then added to the total overcharge in detected and undetected cartels. For further explanations of the method and for data underlying these assumptions plus extensive references to research in this area, see Impact Study, Part I, section 3.1.2.

⁵³ This estimate is based on the figures for (at least) EU-wide cartels, and on the assumption that domestic cartels imply harm to consumers equivalent to 88.4% of the harm resulting from EU-wide cartels; for details on the methodology and underlying assumptions, see Impact Study, Part I, section 3.2.1.

⁵⁴ See for these estimates and the underlying analysis Impact Study, Part I, section 3.2.1 (Table 10). See for 2011 GDP figures: http://www.economic-growth.eu/English/updated_data/data2011.html.

compensated to the victims, whereas application of the baseline scenario would at best lead to a continuation of the current situation.

66. However, even in the most effective system of private enforcement, not all the harm to consumers and other victims reflected in the above estimates will be compensated. This is, amongst others, because a considerable number of antitrust infringements will remain undetected. For hardcore cartels, the detection rate is generally assumed to be somewhere between 10% and 20%.⁵⁵ For other infringements, the detection rate is higher, but the 'conviction' rate (i.e. the rate of successful damages actions) is likely to be much lower, since claimants often find it very difficult to produce proof that the contested conduct produced actual anti-competitive effects.⁵⁶ It also has to be assumed that some victims do not come forward to claim compensation, for instance because they prefer not to disrupt an ongoing business relationship with the infringer. Moreover, in some instances, victims will find it rather difficult to convince courts of a sufficiently close causal link between the damage and the infringement.⁵⁷
67. Any realistic estimate of how much compensation victims could expect under a more effective legal framework for antitrust damages actions is therefore necessarily lower than the total harm to consumers and other victims from detected and undetected infringements estimated (for cartels) above. The Impact Study assesses the potential benefit of a more effective compensation system in the EU by comparing the current ineffective legal framework in Europe with a legal system where private enforcement of competition rules by means of damages actions is very effective, i.e. where victims of antitrust infringements no longer encounter the same obstacles to claiming compensation in court for the damage suffered.⁵⁸ On this basis, the Impact Study estimates that the total amount of compensation (single damages plus pre-judgment interest) that victims of antitrust infringements are currently forgoing ranges from approximately €5.7 billion (on the most conservative assumptions) to €23.3 billion (on the least conservative) each year across the EU.⁵⁹ These estimates relate to all types of infringements of Articles 101 and 102 TFEU. They provide an approximate idea of the amount of compensation that victims are currently forgoing and do not provide a precise calculation of the magnitude of future antitrust damage awards.
68. Effective remedies for private parties would not only increase the likelihood that infringers are held liable, but would also increase the likelihood of detection of illegal restrictions of competition. Therefore, improving the effectiveness of the legal framework for actions for damages would also produce beneficial effects in terms of deterrence of future infringements and greater compliance with EU antitrust rules,⁶⁰ as the Court emphasised.⁶¹ If more effective compensation mechanisms were to lead

⁵⁵ See Impact Study, Part I, sections 2.1.1 and 3.1.1.1.

⁵⁶ See Impact Study, Part I, section 4.1.

⁵⁷ Comparative Study, pp. 1-72 to 1-75 and 1-110.

⁵⁸ The empirical data used by the Impact Study in this comparison are mostly from the USA, where an enhanced system of antitrust damages actions is available. A range of refinements were, however, made to these data. In particular, the figures mentioned above are not based on treble damages as customary in the USA, but rather single damages with pre-judgment interest, to reflect the predominant legal situation in many Member States (on average, single damages with pre-judgment interest can be said to equate roughly to double damages without pre-judgment interest, see Impact Study, Part I, section 6).

⁵⁹ See Impact Study, Part I, section 6.

⁶⁰ See also Impact Study, Part I, section 2.1.

⁶¹ Case C-453/99, *Courage and Crehan*, [2001] ECR I-6297, 27 and case C-360/09, *Pfleiderer AG v Bundeskartellamt*, [2011] ECR I-5161, 29: "the existence of such a right [to claim damages] strengthens the working of the Community competition rules and discourages agreements or practices, frequently

to a reduction of hardcore cartels by, for example, 5%, the negative consumer welfare impact would be reduced by €1.25 to €3.45 billion per year.

covert, which are liable to restrict or distort competition. From that point of view, actions for damages before national courts can make a significant contribution to the maintenance of effective competition in the European Union". The complementary function of private enforcement has been stressed by the Court as early as 1963, see case 26/62, *van Gend en Loos*, [1963] ECR 1 (Eng. Spec. Ed.): "(...) the vigilance of individuals to protect their rights amounts to an effective supervision in addition to the supervision entrusted to the diligence of the Commission and of the Member States."

4. OBJECTIVES

69. This section sets out the general policy objectives pursued, along with several more specific underlying objectives. Section 6.1 sets out and explains a set of specific assessment criteria that make it possible to measure, in qualitative terms, to what extent the various policy options considered are capable of contributing to achieving the general and specific objectives pursued.

4.1. General objectives

70. This policy initiative has two primary objectives:

- (i) In order to address the problems described in section 3.1 and avoid the costs and effects described in section 3.4.1, this policy initiative aims to ensure that the Commission and NCAs can apply a policy of strong public enforcement of competition law, without this public enforcement being unduly affected by the private enforcement before national courts. One of the key elements is to protect leniency and settlement programmes as well as ongoing investigations of the Commission and NCAs. This requires a strict judge-controlled system for access to evidence, which also protects the files of competition authorities. In order to achieve this purpose, common rules should be established relating to the key aspects of the interaction between public and private enforcement.
- (ii) In order to address the problems described in sections 3.2 and 3.3 and to avoid the costs and effects described in section 3.4.2, this policy initiative aims to ensure that victims of infringements of EU competition law have access to truly effective mechanisms for obtaining full compensation for the harm they suffered. By pursuing this objective, the Commission wishes to guarantee, in every Member State, certain standards allowing victims to effectively obtain full compensation from the infringers of Articles 101 and 102 TFEU, thereby giving full effect to such provisions. More effective compensation will ensure that the costs of infringements of competition law are borne by the infringers, and not by the victims, by compliant businesses and, indirectly, by society as a whole. This is in line with the competitiveness objectives for the EU.

4.2. Specific objectives

71. To allow for a more systematic and thorough assessment of whether the general objectives are fulfilled, the latter can be split up in the following specific objectives.

- *Protection of effective public enforcement*

As described in section 3.1, there is a risk that private enforcement of EU competition law by national courts may unduly affect the currently strong public enforcement of these rules, especially in relation to certain important enforcement tools like the leniency and settlement programmes. Stakeholders have confirmed the existence of this risk and have called for a solution. Therefore, one of the specific objectives of this policy initiative is the protection of effective public enforcement. The following elements shall be taken into account in the context of this specific objective:

- Ensuring effective public enforcement of competition law by the Commission and NCAs by regulating the key aspects of interaction between public enforcement and actions for damages before national courts. Leniency and settlement programmes as well as ongoing investigations of the Commission

and NCAs should be appropriately protected in all Member States in order to ensure the effective public enforcement of competition law.

- Providing for specific liability rules for immunity recipients in actions for damages before national courts, in order to foster the leniency programmes of the Commission and NCAs.
- *Full compensation*

As indicated in section 3.2, there is an EU right to full compensation for the harm suffered as a result of infringements of EU competition law. Section 3.2 also states that, currently, a large number of victims of EU competition law infringements remain uncompensated. Nevertheless, as also indicated in section 3.2, stakeholders (predominantly businesses) have equally stated that abusive litigation and overcompensation should be avoided. Overcompensation within the meaning of a systematic burden to pay compensation in excess of the harm caused, can effectively be avoided by excluding punitive or multiple damages awards. However, if overcompensation is defined as a case-specific risk of a damages award higher than the harm actually suffered, it must be borne in mind that a trade-off exists between a higher chance of full compensation and a risk of overcompensation, but that the latter risk is offset by the risk of undercompensation resulting from the lack of action or from the absence of appropriate substantive and procedural rules governing damages actions. It must also be borne in mind that the distinction between full compensation and under- or overcompensation in the latter sense may be difficult if not impossible to establish in a given case: in the absence of an empirical measure of the harm suffered, the actual harm suffered is given by definition through reference to the damages obtained from a court.

In conclusion, the objective of full compensation consists of two elements:

- Ensuring an effective system of compensation of harm, thereby allowing full compensation for the entire harm suffered. In particular, the damage awards should include pre-judgment interest in order to compensate the victims for the real value of the harm suffered.
- Need to avoid over-compensation: measures put forward as a result of this initiative should not lead to victims systematically receiving damages higher than the entire loss suffered.
- *Greater awareness of the rules and deterrence, increased enforcement and improved compliance, to the benefit of Europe's competitiveness*

As described in section 3.1, public and private enforcement of the EU competition rules coexist as complementary tools serving the objective of an effective enforcement of these rules. Both mechanisms need to function effectively to achieve optimal deterrence and compliance with the EU competition rules. Currently, private enforcement of competition law is not functioning effectively (as described in section 3.2): strengthening this enforcement strand will have important positive effects on the overall effective enforcement of and compliance with the EU competition rules. Raising awareness is necessary in order to ensure that victims of competition law infringements make use of their right to full compensation and, hence, contribute to achieving the purpose of an effective private enforcement of competition law. Therefore, the following elements are to be taken into account under this objective:

- Increasing victims' awareness of their entitlement to damages and of the conditions for bringing a claim to court.

- Increasing (potential) wrongdoers’ awareness of the rules governing actions for damages and clarifying the conditions for their liability.
- Improving compliance with the EU competition rules and deterrence by increasing the likelihood of civil suits being brought, thus rendering more credible the risk that infringers will have to compensate the victims of their illegal behaviour.
- At the same time, avoiding that this policy leads to over-deterrence, where the risk of claims for damages prevents undertakings from engaging in lawful conduct or where damages are to be paid by undertakings which have engaged in lawful conduct or where such companies face high costs to defend themselves against unmeritorious claims.
- Reinforcing European competitiveness by means of greater compliance with the EU competition rules.
- *Access to justice*

As described in section 3.2, the fact that a large number of victims of infringements of competition law currently remain uncompensated and see their right to damages under EU law frustrated, leads to a clear deficit in terms of compensatory justice and cannot be reconciled with the fundamental right to access to effective judicial protection. In order to guarantee the respect of this EU fundamental right, access to justice should be facilitated, while at the same time putting in place safeguards to avoid abusive litigation. Under this specific objective, the following elements shall be taken into account:

- Guaranteeing effective access to the courts and an effective remedy for all victims, as required by Article 47, first paragraph of the Charter and Article 19(1), second subparagraph, TEU, including for those who suffered scattered low-value damage, such as SMEs and consumers.
- Ensuring that potentially high costs do not deter victims from bringing their legitimate claims.
- Facilitating access to the relevant evidence in a case, thus overcoming information asymmetry.
- Ensuring that meritorious claims can effectively be brought, and be successful, despite the complexity of antitrust damages cases.
- At the same time, avoiding abusive litigation and ensuring that unmeritorious claims do not lead to the award of damages.
- *Appropriate and efficient use of the judicial system*

As indicated in section 3.2, the high level of very costly factual and economic analysis required in antitrust cases constitutes a factor deterring many victims from bringing actions for damages, as they consider the risk/reward balance to be unfavorable. Next to measures which aim at optimising this risk/reward balance, an effective possibility to engage in consensual dispute resolution would equally reduce these costs and thus serve the effective private enforcement of competition law. In order to ensure optimal effectiveness of the private enforcement of competition law, it is necessary not to overburden courts and to avoid procedural abuses. The following elements relating to the use of the judicial system will be taken into account:

- Streamlining handling of antitrust damages cases by the courts by means such as joining or grouping identical or similar claims.
- Reducing the costs of litigation by improving the conditions for settlements: settlements can be cost-efficient and, when fair and swift, are to be preferred to court actions. However, as settlements are voluntary, attainment of this objective presupposes the existence of a credible court alternative if no settlement is reached. A credible court alternative will also serve as a benchmark leading to improvement of the quality of the settlements.
- Limiting procedural abuses: while the victims should have better access to the courts, it is important that law-abiding undertakings do not bear the costs and burden of abusive litigation. It is therefore necessary to have appropriate safeguards to prevent abuses.
- Limiting the risk of multiple litigation on identical or similar issues: re-litigation of issues already settled should be avoided since they entail unnecessary costs and delays plus the risks of a diverging outcome.
- *A more level playing field and increased legal certainty for businesses operating throughout Europe*

Sections 3.2 and 3.3 describe the currently existing diversity in national legal systems in relation to the conditions under which actions for damages can be brought. This diversity causes an uneven playing field both for victims, who seek to exercise their right to full compensation, and for infringing companies, who should be held liable for their infringing behaviour. Furthermore, this diversity could endanger the proper functioning of the internal market. Section 3.1 describes the current legal uncertainty, resulting from the Pfleiderer judgment, in relation to the disclosure of evidence from the file of a competition authority in actions for damages and the risk of negative effects on the strong public enforcement of EU competition law. In order to ensure the proper functioning of the internal market, the following elements shall be taken into account:

- Ensuring a more level playing field in Europe so that businesses across Europe compete on an equal footing and that EU citizens and undertakings can rely on a minimum standard to enforce the rights conferred upon them by the EU Treaties.
- At the same time, respecting national legal traditions and values: a more level playing field should not be achieved without taking due account of the national legal systems and the balance struck over time by each Member State in its national rules.
- Increasing legal certainty for businesses operating throughout Europe through common standards for their liability for infringements of competition law.
- Increasing legal certainty as to which documents from the file of a competition authority can be disclosed as evidence in actions for damages.
- *Providing benefits for SMEs*

The studies conducted on demand of the Commission have widely shown how SMEs often suffer from the difficulties in recovering antitrust damages. As described in section 3.2, this is caused by obstacles to effective compensation such as the lack of legal certainty and an unfavourable balance between benefits expected from an action for damages and costs incurred. Individual SMEs might even be less likely to

claim damages if they have to engage in litigation with an actual contractual partner, with whom the business relationship should be continued after the proceedings (fear of retaliation). In order to improve the situation of SMEs and put them in a position where they are realistically able to claim damages for competition law infringements, thus also contributing to the objective of full compensation, the following elements should be taken into account:

- Improving the evidentiary position of SMEs in litigation, especially as regards the quantification of the damages. In the framework of the public consultation, SMEs and their associations have explicitly welcomed such measures.
- Improving the possibilities for collective redress.
- *Stimulating economic growth and innovation*

In order to provide for the initiative which maximises the functioning and overall enforcement of the EU competition rules as well as the functioning of the internal market, the policy initiative should maximise its long term benefits on growth, productivity and innovation. The following elements play a role in this context:

- Improving the possibilities for SMEs by putting them in a position where they are realistically able to claim damages for competition law infringements.
- Providing for a balanced initiative providing for both effective public and effective private enforcement of EU competition law.
- Ensuring the proper functioning of the internal market by providing for harmonised minimum standards across the Member States in relation to the essential features of actions for damages.

5. CONTENTS OF THE CURRENT ANTITRUST DAMAGES INITIATIVE

72. The impact assessment of the current Antitrust Damages Initiative builds on the assessment carried out in the 2008 IAWP and should therefore be read in conjunction with it. Annex 4 to this impact assessment offers a summary of the 2008 IAWP. Four Policy Options are analysed in this Chapter, focusing both on their substantive content and on the more general issue of the type of action required. The appropriate choice of the instrument will be addressed in Chapter 0.
73. In order to better understand the four Policy Options set out in section 5.3 below, an overview of the main results of the 2008 IAWP is presented in section 5.1, while the scope of the assessment of the current Antitrust Damages Initiative is presented in section 5.2.

5.1. The 2008 IAWP and the choice of the 'Preferred Option'

74. The 2008 IAWP assessed different bundles of several specific measures aimed at ensuring the effectiveness of the victims' right to compensation guaranteed by the EU Treaties. These policy options ranged from the baseline option of no action at the EU level to legislative measures maximising facilitation of claims and incentives for victims, as recalled by Table 12 in Annex 5 hereto.
75. The 2008 IAWP led to the elaboration of a Preferred Option, put forward in the White Paper. Its main elements were as follows: full single damages; disclosure of specified categories of evidence, based on fact-pleading and proportionality; indirect purchasers' standing allowed; passing-on defence allowed, accompanied by a facilitation of proof of passing-on in favour of indirect purchasers; binding effect of NCA decisions across EU; rebuttable presumption of fault (once an infringement is established); collective redress in the form of opt-in collective actions and representative actions; rules on limitation periods concerning follow-on actions; and rules on interaction with leniency, namely protection of corporate statements from disclosure and limitation of immunity recipients' civil liability. For a detailed overview of the 2008 IAWP Preferred Option see Table 13 in Annex 6 hereto.

5.2. The current Antitrust Damages Initiative - scope of the assessment

76. In order to address the problems identified in Chapter 3 and to achieve the objectives referred to in Chapter 4, it is necessary to assess different policy options that imply a different degree of intervention at EU level. The Commission put forward in the White Paper a policy approach to overcome the current inefficiencies of antitrust damages actions. Stakeholders widely acknowledged and endorsed this general approach.
77. On the basis of the input of other EU institutions, in particular the Parliament, and after a further round of consultations and studies, the current Antitrust Damages Initiative considers a number of adjustments to the White Paper's policy approach. Those adjustments are meant to address the problems identified in Chapter 3 and to further the objectives referred to in Chapter 4 in a cost effective manner.
78. In addition, the current Antitrust Damages Initiative aims at clarifying the relationship between private and public enforcement of the EU competition rules, in particular the balancing between the protection of leniency programmes and the need for an appropriate access to evidence to ensure efficient compensatory redress. This is reflected in the options discussed below.

5.3. Description of the Policy Options assessed in the current initiative

79. The baseline scenario, presented below as Option 1, considers no EU action at all in the field of antitrust damages actions (neither soft law nor legislation). Option 2 aims at codifying the measures suggested in the White Paper in a legislative instrument. Option 3 builds on Option 2, while taking due account both of the main comments received during the public consultations since the White Paper and of recent legislative and jurisprudential developments in the EU and in the Member States. It therefore includes additional safeguards for access to evidence, provides for a rebuttable presumption as to the existence of harm in cartel cases and provides for an effectiveness requirement in relation to the quantification of harm by the claimant. Option 4 considers the adoption at the EU level of non-regulatory measures only. Options 2 to 4 must be all read together with the provision of a non-binding framework on the quantification of damages, as explained below at 5.4.
80. When considering an appropriate legal framework for antitrust damages actions, experience in other jurisdictions shows that more far reaching measures are available than those considered in this report. These measures are, in particular: multiple damages, extensive discovery among the parties, automatic fee-shifting, opt-out class actions brought by any individual. These measures have been assessed in the IAWP. The result of that assessment was that they were excluded in view of an unsatisfactory cost/benefit ratio (high costs entailed in exchange for a higher rate of achievement of the objectives), as summarised in Annex 4. For these reasons, the above-mentioned measures have been excluded also from the spectrum of available policy options in the present exercise. As a result, all measures included in policy options 2 to 4 contemplate less costly means means to achieve the set objectives.

Table 1: Overview of the Policy Options assessed in the current Antitrust Damages Initiative

	Option 1 (baseline scenario)	Option 2	Option 3	Option 4
Damages	No EU action	Full single (no multiple damages)		Soft law recommending full single damages
Access to evidence	No EU action	Rules on disclosure of specified categories of evidence, based on fact-pleading and proportionality Protection from disclosure of corporate statements made in the context of leniency programmes	Rules on disclosure of specified categories of evidence, based on fact-pleading and proportionality No access to corporate statements and settlement submissions. Access to other categories of information only after closure of public proceedings	Soft law recommending rules on disclosure of specified categories of evidence, based on fact-pleading and proportionality Soft law recommending not to give access to corporate statements and settlement submissions and recommending access to other categories of information only after closure of public proceedings
Limitation of civil liability of Immunity recipient(s)	No EU action	limitation of liability of the immunity recipient to claims by its direct and indirect contractual partners		Soft law recommending limitation of liability of the immunity recipient to claims by its direct and indirect contractual partners
Indirect purchaser	No EU action	Standing allowed		Soft law recommending that standing is allowed
Passing-on	No EU action	A passing-on defence for the infringer that shows that the damages claimant has passed-on part or the whole of the illegal overcharge, as well as a rebuttable passing-on presumption in favour of the indirect purchaser		Soft law recommending a passing-on defence for the infringer that shows that the damages claimant has passed-on part or the whole of

				the illegal overcharge, as well as a rebuttable passing-on presumption in favour of the indirect purchaser
Rebuttable presumption of harm	No EU action	No presumption	Rebuttable presumption of existence of harm caused by cartels	Soft law recommending a rebuttable presumption of existence of harm caused by cartels
Effect of NCA decisions	No EU action	Binding effect for the final infringement decisions of NCAs		Soft law recommending binding effect for the final infringement decisions of NCAs
Fault (once infringement established)	No EU action	Rebuttable presumption; exoneration for excusable errors.	No EU action	No EU action
Limitation period	No EU action	A specific limitation period for damages actions that rely on an infringement decision by a competition authority		Soft law recommending a specific limitation period for damages actions that rely on an infringement decision by a competition authority
Cost rule	No EU action	No legislative measure	No EU action	No EU action
Consensual dispute resolution	No EU action	No legislative measure	Rules on suspensive effect of consensual dispute resolution, effect of settlements on other injured parties and on subsequent actions for damages	Soft law recommending rules on suspensive effect of consensual dispute resolution, effect of settlements on subsequent actions for damages
Collective redress	No EU action	Two different collective redress mechanisms: opt-in group actions and representative actions	No competition-specific EU action, separate horizontal initiative on collective redress which is outside the scope of this impact assessment	No recommendations on this topic in the competition-specific soft law

5.3.1. *Option 1: the baseline scenario of no EU action in the field of antitrust damages actions*

81. Option 1 contains the baseline scenario, entailing no action at all at EU level regarding antitrust damages actions. Some respondents in the public consultation on the White Paper, as well as in the 2011 public consultation on collective redress have suggested to follow this option on grounds of general inappropriateness for EU action in an area that is mostly governed by national substantive and procedural rules. The assessment of the impact of Option 1 examines the *status quo* and likely developments in the absence of EU action (prospective analysis).

5.3.2. *Option 2: adopting the White Paper's suggested measures through a legislative instrument*

82. Option 2 envisages a legislative instrument incorporating the measures that the Commission has put forward in its White Paper. Such instrument would include: a confirmation that compensation of full single damages can be obtained; two different collective redress mechanisms (opt-in group actions⁶² and representative actions);

⁶² The White Paper and the IAWP referred to 'opt-in collective actions'. In the framework of the public consultation on collective redress it has been observed that this terminology might lead to confusion between collective actions and collective redress mechanisms in general. Therefore, in the following, 'opt-in collective actions' will be referred to as 'opt-in group actions'.

rules on disclosure of specified categories of evidence, based on fact-pleading and proportionality; a limitation of liability of successful immunity applicants; binding effect for the final infringement decisions of NCAs; standing for the indirect purchaser; a passing-on defence for the infringer that shows that the damages claimant has passed-on part or the whole of the illegal overcharge, as well as a rebuttable passing-on presumption in favour of the indirect purchaser; minimum requirements for limitation periods for damages actions, also when they are brought after an infringement decision by a competition authority; and a rebuttable presumption regarding fault once the infringement has been established, unless the infringer can prove that the infringement was due to an excusable error. To avoid the risk that enhanced damages actions might have a negative impact on public enforcement activities, in particular on the functioning of leniency programmes, Option 2 suggests protecting from disclosure corporate statements made in the context of leniency programmes.

5.3.3. *Option 3: legislative proposal based on the White Paper and additional safeguards*

83. Option 3 consists of a legislative instrument that is still based on the White Paper (i.e. Option 2), while optimising the relation between public and private enforcement and introducing a number of other modifications. Option 3 contains the following measures: the right to full single damages; rules on disclosure of specified categories of evidence, based on fact-pleading and proportionality with an enhanced protection for documents from the file of a competition authority; a limitation of liability of successful immunity applicants; binding effect for the final infringement decisions of NCAs; standing for the indirect purchaser; a passing-on defence for the infringer that shows that the damages claimant has passed-on part or the whole of the illegal overcharge, as well as a rebuttable passing-on presumption in favour of the indirect purchaser; rules on the beginning of limitation periods as well as a specific rule for limitation periods after the finding of infringement by a competition authority or a review court; a rebuttable presumption relating to harm in cartel cases; and measures facilitating consensual dispute resolution.
84. Whereas Option 2 does not include any legislative measures on consensual dispute resolution, Option 3 foresees rules meant to facilitate such outcome and to remove legal uncertainties existing about it, for instance on the effect of settlements on subsequent actions for damages.
- (a) *Access to evidence: special rules concerning access to the file of a competition authority*
85. After the 2011 *Pfleiderer* ruling of the Court, Member States, NCAs and representatives of the business and legal community asked explicitly for an EU-wide clarification of the interaction between public enforcement (in particular through leniency programmes) and private damages actions, where access to evidence plays a key role. Option 3 provides for such clarification by suggesting further safeguards concerning the disclosure of documents in the file of a competition authority. It is suggested never to disclose corporate statements and settlement submissions, because disclosure of those documents would jeopardise enforcement instruments at the disposal of the competition authorities (particularly the leniency programme and the settlement programme). To protect ongoing public investigations, it is also suggested to allow the disclosure of documents that were especially prepared for the purpose of public enforcement proceedings only once those proceedings are finished. All other information (called 'pre-existing information') would remain disclosable. In

doing so, Option 3 provides for an appropriate protection of effective public enforcement, while allowing claimants to obtain the information required to successfully bring a damages action.

86. An alternative regime would have been to leave it to the discretion of the national court whether or not to disclose corporate statements or settlement submissions in the context of a damages action that is brought after public enforcement proceedings are closed. That option, however, would not have given the undertakings that want to engage in leniency or settlement discussions with the competition authority, the desired upfront legal certainty regarding the disclosibility of the said documents. That absence of legal certainty would be to the detriment of the success of those public enforcement instruments and is thus not offering an appropriate balance between protecting both public and private enforcement of the EU competition rules. This alternative regime is therefore not further considered. The benefits and costs of this *status quo* option are shown in tables 2 and 3 below.

(b) *Rebuttable presumption as to the existence of harm in cartel cases*

87. The studies and consultations referred to in section 2 have shown that proving harm and the quantification thereof often constitutes an important barrier for effectively obtaining compensation for the harm caused by a competition law infringement. To remedy these evidentiary problems of the claimant associated with the quantification of harm, Option 3 considers the introduction of a rebuttable presumption of the existence of harm in cartel cases. The defendant, who is most likely to possess the evidence that is necessary to prove whether or not the cartel caused harm, is free to rebut the presumption. The presumption would thus respect the principle that an information advantage of one party should lead to that party holding the burden of proof. Option 3 considers to limit the rebuttable presumption to cartels because of their secret nature which makes it more difficult for parties to obtain the necessary evidence to prove harm.

88. Studies in relation to overcharge in cartel cases support the introduction of such rebuttable presumption as to the existence of harm. The Quantification Study⁶³ and a study by Connor and Lande⁶⁴ conclude that the average overcharge in cartel cases is respectively 20% and 23%. Moreover, a study conducted by Boyer and Kotchoni⁶⁵ in which a meta-analysis of cartel overcharge estimates is carried out in reaction to potential errors and biases in the model used by Connor and Lande, came to a corrected mean overcharge in all cartel cases of 17,5% with a median of 14%. The studies hold that there are some cartel cases (around 5%) in which no overcharge harm is caused. However, as the presumption is rebuttable and the evidence of the absence of harm is likely to be in possession of the defendant, this small percentage of cases, where the presumption could be rebutted, do not prevent its introduction.

89. After the existence of harm has been established, the claimant still has to prove the amount of that harm. The burden of proof for the quantification of harm normally lays with the claimant. To further facilitate this burden, one could consider introducing a rebuttable presumption that cartels lead to an overcharge of X% (with

⁶³ Quantification Study, p. 91.

⁶⁴ J.M. Connor and R.H. Lande 'Cartel Overcharges and Optimal Cartel Fines', in S.W. Waller (ed.), *Issues in Competition Law and Policy*, volume 3, ABA Section of Antitrust Law.

⁶⁵ Marcel Boyer and Rachidi Kotchoni, *The Econometrics of Cartel Overcharges*, Scientific Serial, Montréal, 10 August 2011.

'X' being a figure supported by the studies referred to above). However, such a specific presumption risks becoming a disincentive for victims of a cartel to engage in further quantification of the harm suffered. Such presumed overcharge figure may thus paradoxically lead to structural under-compensation of harm, in particular when it is at the lower end. That negative effect is increased by the fact that defendants will invest heavily into rebutting, i.e. defending the presumption, depending on whether they caused a lower or a higher overcharge harm. Therefore, this option would not even reduce litigation costs.

90. To ensure the effectiveness of the right to claim damages and to keep litigation costs low, Option 3 considers a rebuttable presumption of harm (without mentioning any figure), combined with the general principle of effectiveness, according to which the burden and level of proof required for the quantification of the harm cannot render the exercise of the claimant's rights to damages practically impossible or excessively difficult. In that context, it is also suggested that Member States should enable the national judge to estimate the amount of the harm.

(c) *Introduction of provisions on consensual dispute resolution*

91. Option 3 also foresees the introduction of some provisions removing existing obstacles to effective consensual dispute resolution between injured parties and undertakings having infringed competition law. Such provisions relate to the suspension of limitation periods for bringing actions for damages if parties prove that they are or were engaged in consensual dispute resolution, the suspension of pending proceedings for the duration of consensual dispute resolution. They also require that damages paid through consensual settlements should be taken into account in determining the amount of compensation or contribution that a settling infringer needs to pay following a subsequent action for damages.

92. Further modalities to facilitate consensual dispute resolution have not been considered. For instance, the requirement of an attempt of consensual dispute resolution before having access to a court has not been considered because it may unduly prolong litigation and it can constitute a violation of the fundamental right of access to a judge.⁶⁶ Also the possibility to oblige non-settling infringers to contribute to the damages paid in the context of a consensual settlement or the possibility to release settling infringers from contributing to the damages paid in a subsequent damages action, have not been retained, because they would violate the basic freedom of all parties to settle or not, and thus the fundamental right of a party to resolve a dispute via court proceedings.

(d) *Detailed comparison with Option 2 and policy issues underpinning the measures*

93. The third option consists of a binding instrument that partly revises the options put forward in the White Paper in order to keep account of more recent developments at national and EU level in two ways, namely by referring to a separate horizontal EU approach to collective redress instead of regulating a sector-specific mechanism, and by introducing limitations to access to evidence aimed at preserving the effectiveness of public enforcement tools. The provisions on fault, which were particularly criticised by some business respondents within the public consultation, have also been removed. All these broad changes have in common that they reduce to some

⁶⁶ See also paragraph 25 of the European Parliament resolution of 2 February 2012 on 'Towards a Coherent European Approach to Collective Redress (see footnote 23 above)

extent the benefits in terms of effective compensation fostered by Option 2 in order to pursue additional policy objectives, i.e. a horizontal approach to collective redress as suggested by some stakeholders and by the European Parliament and a higher protection of public enforcement following the *Pfleiderer* judgment of the Court of Justice. The option has thus specifically been designed in order to assess whether the loss in benefits as regards effective compensation are counterbalanced by reduced costs of litigation and/or by an optimised balance between public and private enforcement of the EU competition rules. More specifically, Option 3 differs from Option 2 in the following points:

- As regards the protection of public enforcement tools, Option 2 only protects leniency corporate statements from disclosure in actions for damages. Option 3 adds to that the protection from disclosure of settlement submissions, in which undertakings acknowledge their participation in a cartel to obtain a simplified procedure and a reduction of the fine. Moreover, Option 3 protects on-going investigations of the competition authorities by limiting disclosure during those investigations. With these measures, Option 3 seeks to provide for a more appropriate protection of effective public enforcement. However, because of its limited scope, claimants could still obtain the information required to successfully bring a damages action. The envisaged protection of public enforcement tools is therefore considered not to make it excessively difficult for victims of a competition law infringement to obtain compensation for the harm they suffered. The protection is thus compatible with the right to effective judicial protection, as it is laid down in the EU Charter of Fundamental Rights.
- As regards quantification of antitrust damages, Option 3 - contrary to Option 2 - provides for a rebuttable presumption relating to the existence of harm in cartel cases. This presumption is based on the findings of an external study which concluded that 93% of examined cartels cause harm. This measure has been introduced in order to reduce the adverse impact of the more limited access by claimants to some types of evidence that may nonetheless have been useful in view of proving the harm created by a cartel. For the same reason, Option 3 contains a rule that the exercise of the claimant's right to damages cannot be rendered practically impossible or excessively difficult by the required level of proof. In that context, this option suggests that Member States should enable the judge to estimate the amount of the harm. With these rules, option 3 seeks to enhance the effectiveness of the right to claim damages and to keep litigation costs low.
- As regards collective redress, Option 3 does not contain any competition-specific measures. While acknowledging the specificities of EU competition law enforcement and the possibility of specific rules, this option relies on the possibility of a separate, but horizontal approach to collective redress, through initiatives characterised by a broader scope. Finally, in order to partially counterbalance the absence of a specific collective redress mechanism, and to facilitate other kinds of cost-effective procedural means for the parties, Option 3 contains measures on consensual dispute resolution. This would remove existing disincentives to engage in out-of-court settlements to compensate for harm caused by an EU competition law infringement.

5.3.4. *Option 4: non-regulatory measures*

94. Policy Option 4 entails no legislative measures at EU level but would identify, mainly from the experience in Member States, a range of useful solutions and best practices. These non-binding recommendations would be inspired by the measures as proposed under Option 3, but would – by their very nature – not be formulated with the same level of detail. The impact of this option largely relies on the willingness of the Member States to carry out the suggested actions.
95. Option 4 thus contains the following measures: a recommendation that Member States ensure the possibility to obtain compensation of full single damages; a recommendation that Member States adopt rules on disclosure of specified categories of evidence, based on fact-pleading and proportionality; a recommendation to exclude certain documents from the file of a competition authority from such disclosure; a recommendation that Member States adopt provisions limiting the liability of successful immunity applicants; a recommendation for Member States to grant binding effect to the final infringement decisions of NCAs; a recommendation that Member States recognize standing of indirect purchasers in actions for damages; a recommendation that Member States recognise the passing-on defence for the infringer that shows that the damages claimant has passed-on part or the whole of the illegal overcharge as well as the suggestion that Member States introduce a rebuttable passing-on presumption in favour of the indirect purchaser; a recommendation as to when limitation periods should start and as to its duration after the finding of infringement by a competition authority; a recommendation that Member States introduce a rebuttable presumption relating to the existence of harm in cartel cases; and a suggestion that Member State facilitate consensual dispute resolution.

5.4. Provision of non-binding assistance for quantification of damages

96. The provision of a non-binding legal framework for the quantification of damages has proven to be one of the measures most widely supported by the respondents to the public consultation on the White Paper. Quantification is one of the most complex issues in the framework of actions for damages for breach of antitrust rules. In this respect, the provision of pragmatic guidance, by reviewing available methods for estimating the loss suffered as a result of a competition law infringement, would be a useful tool for parties and judges in antitrust damages cases.
97. Stakeholders have stressed the need for the non-binding character of such initiative. This stance appears justified, since the exact quantification of the harm largely depends on the specific features of each case (i.e. the structure of the market, the behaviour of players at each level of the distribution chain, etc.). A non-binding measure would therefore ensure that judges can rely on the guidance provided therein, when they deem it appropriate given the circumstances of the case at hand.
98. The 2009 Quantification Study served as a basis for the Commission's formulation of the non-binding framework for damages quantification on which a public consultation was held in 2011. The responses to the public consultation confirmed the need for a pragmatic non-binding guidance. All Policy Options set out for assessment in this report (except the zero-action at the EU level option) must therefore be read as encompassing the adoption of this guidance.

6. IMPACT ANALYSIS

6.1. Assessment criteria

99. The below analysis is predominantly qualitative, due to both methodological and factual considerations. From a methodological point of view, the current Antitrust Damages Initiative aims at regulating the interaction between public and private enforcement and at removing the obstacles to effectively exercising the right to compensation guaranteed by the Treaty, also by removing obstacles currently existing under national rules governing antitrust damages actions.
100. While these changes will secure effective public enforcement and will make it easier to claim compensation, an empirical quantification of the effect of the proposed policy options is not feasible, since it would require access to data that are currently not available. To our knowledge, no jurisdiction in the world has adopted a similar bundle of measures, which makes it impossible to estimate the impact of the proposed policy options in light of another jurisdiction's experience. Furthermore, the impact of each measure is determined by the interaction with other measures: the assessment of individual measures on the basis of their effects in countries where they are in place is therefore not directly relevant.
101. An approximative quantitative impact would be expressed in a very wide range of values. At the lower end of the range, there is the theoretical hypothesis that the measures will not see a substantial increase in effectiveness of damages claims. It is, however, highly unlikely that an initiative at EU level would lead to such a zero benefit. At present, it has been regularly reported that potential damages claimants have not sought redress in a number of prominent cases of infringement of the EU antitrust rules (such as the heat stabilisers, bathroom fittings and bananas cartels) because of procedural obstacles (e.g. the absence of effective access to evidence) and uncertainty of the law (e.g. on the passing-on of overcharges). Removing such obstacles and introducing clear rules would undoubtedly result in an increased level of meritorious damages actions and thus of compensation for victims of antitrust violations. Where undertakings (in particular corporations) or public bodies (such as municipalities) are injured parties, the pursuit of meritorious damages claims may be a legal obligation under applicable rules of corporate law (fiduciary duty of the management of a corporation) or of budgetary rules. A more effective legal framework for bringing damages actions will likely allow decision-makers to decide that it is in the best interest of the corporation/public body to pursue compensation.
102. At the upper end of the range, there is the equally theoretical hypothesis that following the EU initiative all the harm caused by antitrust infringements will be recovered by victims, meaning a recovery of currently foregone compensation that could be as high as €5.7 to €23.3 billion per year.⁶⁷ The width of such a range, combined with the impossibility to predict the increase for each option of both the willingness of injured parties to actually claim compensation for harm suffered and the likelihood that meritorious claims succeed, does not allow quantifying with a satisfactory degree of preciseness the impact of each policy option in terms of enhanced compensation for injured parties. A qualitative assessment on the basis of multiple criteria is therefore the only feasible way of analysing and comparing the impact of each of the policy options.

⁶⁷ See paragraph 0.

6.1.1. Benefits

a. Ensuring full compensation of the entire harm suffered

103. According to the *Manfredi* judgment of the Court, “it follows from the principle of effectiveness and the right of any individual to seek compensation for loss caused by a contract or by conduct liable to restrict or distort competition that injured persons must be able to seek compensation not only for actual loss (*damnum emergens*) but also for loss of profit (*lucrum cessans*) plus interest”.⁶⁸ A legal system which does not allow for an effective exercise of the right to full compensation of the entire harm would therefore violate the EU principle of effectiveness.

104. Since the objective is full compensation for the harm suffered, options will score lower on this criterion to the extent that they are likely to lead to under- or over-compensation of the injured party. An injured party is under- or over-compensated when it receives less or more compensation than the harm actually suffered. Since full compensation in the greatest possible number of cases is a primary objective, good scores on achieving the goal of full compensation will weigh heavily in the comparative impact analysis and in the identification of the preferred option.

b. Protection of effective public enforcement

105. Options will score higher to the extent that they optimise the interaction between public enforcement by the Commission and NCAs and actions for damages before national courts. In addition, options will score higher to the extent that they provide for an appropriate protection of leniency and settlement programmes, as well as of ongoing investigations by competition authorities. Since this is also a primary objective, good scores on achieving the goal of protecting effective public enforcement will weigh heavily in the comparative impact analysis and in the identification of the preferred option.

c. Increased awareness, enforcement, deterrence and legal certainty

106. Options will score higher to the extent that they make economic operators more aware of their rights and obligations under EU competition rules. Clear and explicitly formulated rules add to such awareness, just as much as they clarify the conditions applicable to claims for damages and the conditions of liability of offenders.

107. Likewise, options will score higher to the extent that they widen the scope or increase the intensity of enforcement (by increasing the number of cases for which infringers are held responsible, by addressing different types of infringements or by involving a wider variety of economic operators), the likelihood of detection and of having to bear the financial consequences of anti-competitive behaviour and, assuming the optimum level has not yet been reached, the level of those financial consequences.

108. A higher degree of awareness of the EU competition rules, combined with better enforcement by means of damages actions, contributes to greater compliance with these rules and, hence, to better achievement of their objective to ensure fair competition on the internal market.

109. Options will score higher if they are likely to lead, all other things being equal, to an increase in deterrence rates. However, because increasing deterrence is not a primary

⁶⁸ Joined cases C-295/04 to C-298/04, *Manfredi*, [2006] ECR I-6619 95.

objective, in the final stage of comparing options and determining the preferred option less weight will be given to positive scores on deterrence, particularly compared with good scores on the primary objectives. Options will score lower on this category to the extent that they lead to a situation of over-deterrence, where the risk of damages claims prevents undertakings from engaging in lawful conduct or where damages are paid by undertakings that did not infringe the competition rules.

d. Access to justice

110. Options will score higher on this criterion to the extent that they ensure more effective access to justice for all victims of an infringement of competition law, and as such, promote the right to an effective judicial protection as laid down in Article 47, first paragraph of the Charter and in Article 19(1), second subparagraph, TEU. That is particularly relevant for victims who have only small claims and/or have difficulties in gaining access to the evidence necessary to prove their case. Options will score well if they adequately address the reasons why victims who are willing to bring a damages action eventually decide not to do so.
111. At the root of these reasons is the fact that victims fear the opportunity cost and the financial consequences of losing a meritorious case. More than the former factor, which is largely a matter of personal judgment, the latter is the key to ensuring adequate access to justice, e.g. by reducing the financial risks or the likelihood that meritorious cases will be lost. For instance, options that facilitate access to evidence will score higher. Options that would allow effective and efficient collective redress would also score higher.

e. Efficient use of the judicial system

112. Efficient use of the judicial system means avoiding unnecessary delays, multiple proceedings and contradictory outcomes. Options will score higher in so far as they avoid these undesirable situations. As the judicial system should not be overburdened, options will also score higher to the extent that they allow cases to be settled adequately out of court.
113. Options will score lower on this criterion to the extent that they offer claimants excessive incentives encouraging them to bring damages actions although they have suffered no harm. Options that offer incentives to claimants who suffered minor harm are not considered abusive, even if the harm is outweighed by the litigation costs of the actions.

f. A more level playing field

114. Since actions for damages resulting from competition law infringements are put forward by the Court as a remedy stemming directly from EU law, claimants in such cases should all be able to use this remedy effectively. Article 47 of the Charter explicitly guarantees the right to an effective remedy to everyone whose rights and freedoms guaranteed by the EU law are violated. Although the effectiveness of the remedy may allow some divergence between Member States, it does require compliance with certain standards, which would have to be the same across Europe.
115. Conversely, the dissimilar exposure to antitrust damages claims in the Member States may have an influence on the market behaviour of companies. They could, for instance, decide not to make use of the freedom of establishment, the free movement of goods or the freedom to provide services in those Member States where the right to compensation is most effectively enforced. For companies that have infringed the EU competition rules, there may be a competitive advantage for those that are

established or operate in a Member State with a less well functioning system of antitrust damages.

116. Effective redress, fair competition and the proper functioning of the internal market would therefore require comparable exposure to damages claims, which can be brought about only by similar basic procedural rules governing actions for damages. Options will thus score higher to the extent that they create a level playing field in Europe for claimants and defendants in antitrust damages actions.

g. Providing benefits for consumers and SMEs

117. This report also assessed the impact of the different options on consumers and SMEs. Options will score higher in so far as they provide more benefits to the situation of consumers and SMEs by increasing the effectiveness of their right to obtain full compensation if they are victims of an infringement of EU competition law. Such effectiveness of the right to full compensation will be increased by, among others, reducing the costs consumers and SMEs have to incur in actions for damages and increasing their access to the necessary data to prove their claim.

h. Stimulating economic growth and innovation

118. The report assesses the impact of the different options on macro-economic variables, such as competitiveness, innovation, growth and jobs. This impact coincides largely with the expected level of future compliance with the competition rules. In particular, the more undertakings comply with the rules, the more competitive markets will be and the lower any allocative inefficiency. Further, it is considered that a balanced system, fostering both effective public and effective private enforcement of competition law, stimulates growth, productivity and innovation. Options that are more likely to achieve these results are therefore more likely to contribute positively to growth and employment. Such positive overall effects are likely to outweigh certain negative effects in those rare cases where the breach of competition law and the resulting public fines and liability for civil damages pose a financial threat to the survival of the infringing firm.

6.1.2. Costs

a. Litigation costs

119. This broad category of costs covers both the litigation costs for parties to proceedings (both settlement costs and costs incurred when the case is brought to court) and the enforcement costs for public authorities (such as courts and competition authorities). Options will therefore score higher on these costs to the extent that they offer incentives to litigate and/or suggest measures that increase the costs (resources, opportunity cost and money) of litigation for the parties or for public authorities.

b. Administrative burden

120. This category includes costs incurred by businesses, consumers and public authorities in order to meet legal obligations to keep information and to provide it, either to public authorities or to private parties. Only the net costs are taken into account, i.e. excluding those that would be incurred anyhow, even without any legal obligation.

121. Options will score higher to the extent that they require businesses, consumers or public authorities to keep information for a long period of time (storage costs) and that they impose an obligation to provide that information to one of the parties

(disclosure costs). Options will score high on disclosure costs to the extent that they have a low threshold triggering disclosure and/or wide scope of disclosure.

c. Error costs

122. Error costs are costs related to the possibility of courts issuing a mistaken decision. That could take the form either of incorrectly awarding damages (type I error) or of incorrectly rejecting a claim for damages (type II error). Options will score high on error costs to the extent that they suggest measures that increase the likelihood of error and/or measures that amplify the impact of the error.
123. Errors in quantification of damages are not included in this category because the resulting under- or over-compensation already has a negative impact on the corrective justice objective (see paragraph 104).

d. Implementation costs

124. Implementation costs means costs incurred by businesses, consumers and national public authorities to adapt to new rules (e.g. training costs, compliance costs, etc.). Although real, these costs are therefore transitory. Furthermore, implementation costs cover the costs for transposition as well as the costs that are brought about by incoherences in national legislation as a result of an EU legislative initiative. Options will score high on these costs to the extent that they lead to a big change in the regulatory context in which businesses, consumers and public authorities operate. Options will also score lower in so far as transposition costs are limited and the resulting coherence of national legislation is higher.

6.2. Identifying and assessing the impact of each option

125. The assessment presented in this report is based on the findings of the *Impact Study*, of the IAWP, of the Quantification Study and the consultations on quantification of antitrust harm and on a horizontal approach towards collective redress. This section sets out, in the form of tables, the conclusions of the Commission's assessment of the likely positive and negative impacts that options 1 to 4 would have.
126. Each option is assessed on its own merits, including Option 1, which is the baseline "no policy change" scenario. Option 3 is furthermore assessed in comparison to Option 2, of which it is a refinement. The reason for choosing this method is that, in the context of claims for damages for breach of the EU antitrust rules, it is important to illustrate the significant costs and limited benefits that taking no action at all would have. This approach makes it possible to compare the options with each other.
127. The impact of the option against the baseline is summarised in the tables under the following scoring system:
- +++ / - - - Very positive / negative impact
 - ++ / - - Moderate positive / negative impact
 - + / - Negligible positive / negative impact
 - 0 No Impact
128. As the initiative has no significant environmental impact and no appreciable effects on trade with and investments by non-EU countries, these factors will not be further addressed in this impact assessment report. The below tables contain the assessment of the different policy options on the basis of the assessment criteria described in Section 6.1.

6.2.1. Option 1

129. Option 1 entails the baseline scenario of zero action at EU level on antitrust damages actions. The assessment of the impacts of Option 1 therefore examines the *status quo* and any developments considered likely without EU action (prospective analysis). The likelihood of any such developments is difficult to foresee, even for the short and medium term. It should be borne in mind that Member States have been required to guarantee the effectiveness of the EU competition rules since the EC Treaty entered into force. In 2001 the Court explicitly called upon Member States to provide, in the absence of EU rules, for effective remedies under their civil law and procedure to safeguard the right of all victims to compensation for harm suffered as a result of infringements of Article 101 or 102 TFEU.
130. Notwithstanding these obligations under EU law, to date very few Member States have taken action to improve the effectiveness of their legal framework for antitrust damages actions and there is no clear indication that a significant number of other Member States would adopt the necessary measures without any impetus from EU level. Moreover, in those Member States where measures have been taken or are being contemplated, those measures are rarely covering all existing obstacles to an effective redress system for victims of a competition law infringement.⁶⁹ The Commission's analysis of various likely impacts of the option of zero action at EU level is based on the probably still conservative (i.e. optimistic) assumption that some Member States would adopt a number of measures to improve the effectiveness of antitrust damages actions in Europe, whereas currently only the UK envisages a relevant initiative.
131. In the *Pfleiderer* case, the Court ruled that it is for a national court to determine on a case-by-case basis and according to national law the conditions under which disclosure of leniency-related information must be permitted or refused. It is thus clear that in the absence of EU rules on this issue, legal uncertainty and a potential uneven playing field between Member States may develop with regard to the balance to be struck between the public and private enforcement of competition law. When choosing Option 1, this legal uncertainty would persist.

Table 2: Benefits of Option 1

Benefits achieved/ problem addressed	Impact compared to base-line (0 to +++)	Explanation of rating and aspects of the policy option most relevant to the benefits
1. Ensuring full compensation of the entire harm suffered	0	Under-compensation of many victims likely to remain: obstacles to bringing actions and to successfully proving the conditions for compensation highly likely to persist in most MS • consequently, no guarantee that all EU citizens will enjoy a certain minimum level of protection of their right to antitrust damages ⁷⁰
2. Protection of effective public enforcement	0	Without a legislative measure at EU level, the balancing exercise on the interplay public/private enforcement is left to national courts. There are risks of fragmentation and a lower overall level of protection of public enforcement in the EU. This might endanger the effectiveness of certain public enforcement tools, such as leniency and settlement programmes

⁶⁹ See paragraph 3.2 above for more information on this subject.

⁷⁰ See, in particular, Impact Study, Part III, section 2.1 and Part II, sections 1.6.1, 2.2.1, 3.2.1 and 4.2.1.

3. Increased awareness, enforcement, deterrence and legal certainty	0	Continued under-deterrence and lack of legal certainty: no general increase in deterrence rates and compliance by means of private actions for damages, at best a very small increase in some Member States • clear under-deterrence, especially for cartels, in most MS • uncertainty resulting from the differences between the national legal systems will persist • no increase of awareness at European level, at best only in some MS • without a minimum level of protection, victims of antitrust infringements would have no clear picture of their basic right under EU law to damages in the MS • the lack of a common approach to the interaction with public enforcement (e.g. protection of leniency related information) creates a serious risk that inconsistencies or even loopholes might hamper public enforcement • the uncertainty for leniency applicants would continue to exist
4. Access to justice	0	In most MS, access to justice, in particular for SMEs and consumers, remains problematic: even though some measures may be taken in a few MS (for example on collective redress), access to justice in antitrust damages cases will continue to be difficult, as in many MS significant changes are unlikely, especially in the following areas: access to evidence, collective redress and the passing-on defence ⁷¹
5. Efficient use of the judicial system	0	Current inefficiencies remain in most MS, except maybe some improvement as a result of better collective redress in certain MS ⁷²
6. A more level playing field	0	Substantial differences remain between MS: highly unlikely that in the absence of any EU action businesses would compete across Europe on an equal footing • highly unlikely that citizens and undertakings can enforce their rights conferred by the Treaty throughout the EU in a similar manner • no indication that a virtuous “mutual learning” process or a “race to the top” in the form of competition between legal orders would stimulate adoption of similar best practices across the EU • the current fragmentation of the legal framework for damages actions could even become wider in a few years if some MS enact significant reforms while others maintain the <i>status quo</i> ⁷³
7. Positive impact on SMEs and consumers	0	Exercise of right to damages would remain very difficult: SMEs and consumers are likely to suffer particularly from the persisting legal uncertainty ⁷⁴
8. Stimulating economic growth and innovation	0	Negligible contribution ⁷⁵

Table 3: Costs of Option 1

Costs	Impact compared to base-line (0 to - - -)	Explanation of rating and aspects of the policy option most relevant to the costs
1. Litigation costs	0	Litigation costs may be significant in individual cases, but relatively low overall and total costs might increase slightly: although exercising the right to damages is currently costly (especially due to lack of widespread effective collective redress, legal uncertainty, difficult access to accurate evidence, lack of binding force and differences between legal systems), the level of litigation is likely to remain low • number of cases may increase slightly, if some MS facilitate damages actions

⁷¹ See, in particular, Impact Study, Part III, section 2.1 and Part II, sections 1.6.1, 2.2.1 and 3.2.1.

⁷² See, in particular, Impact Study, Part III, section 2.1 and Part II, sections 2.2.1 and 3.2.1.

⁷³ See paragraph 3.2 above as well as Annex 3 for more information on this subject.

⁷⁴ See, in particular, Impact Study, Part III, section 2.1.1.

⁷⁵ See, in particular, Impact Study, Part III, section 2.1.2.

		but if certain MS improve collective redress, costs for claimants may decrease as a result of efficiencies (compared with individual actions) ⁷⁶
2. Administrative burden	0	Relatively small burden in most MS, but may increase slightly: relatively small number of companies concerned due to low number of cases • in most MS, currently limited information/disclosure obligations on other party • in the not very likely event that some MS increase the scope of disclosure and limitation periods in antitrust damages cases, administrative burden would slightly increase ⁷⁷
3. Error costs	0	Little litigation, some errors will persist, but total number moderate: some errors likely due to lack of effective access to evidence and, hence, access truth and absence of learning effects • given low level of litigation, total number of errors not high but some MS might possibly introduce rules for greater accuracy in fact-finding (although not very likely) • to the extent that the number of cases increases, courts will grow more familiar with antitrust cases and avoid errors ⁷⁸
4. Implementation costs	0	No implementation costs , in the absence of any provisions at EU level

6.2.2. Option 2

132. The second option is to codify the White Paper's suggestions, that were identified as the preferred option in the IAWP.⁷⁹ In the below tables, the measures proposed by Option 2 will be scored in comparison to the baseline scenario of no EU action in the field (Option 1). For stakeholder views and other evidence on the different measures introduced by Option 2, reference is made to Section 7.1 and Chapter 3 of this report, as well as Annex 8.

Table 4: Benefits of Option 2

Benefits achieved/ problem addressed	Impact compared to base-line (0 to +++)	Explanation of rating and aspects of the policy option most relevant to the benefits
1. Ensuring full compensation of the entire harm suffered	+ + +	Overall, a more effective compensation mechanism for all victims: clear but measured facilitation of damages claims (especially by means of disclosure of categories of evidence, opt-in group and representative actions and non-binding guidance on the damages quantification) is likely to lead to an increase in the number of victims compensated • in many MS, disclosure of categories of evidence will improve the likelihood of proving liability and quantification of the full actual harm suffered • facilitation, for indirect purchasers, of proof of passing-on makes compensation of such victims more likely • passing-on defence is in line with the compensation objective, insofar as it endeavours the allocation of compensation to the level where the harm has effectively been suffered • availability of both opt-in group and representative actions remove the often unfavourable cost/benefit ratio and make recovery of scattered damage in the field of competition more likely • rules on limitation periods ensure that there is enough time to bring an action for the whole harm in case of repeated or continuous infringements and infringements of which the victim cannot reasonably have knowledge • limitation of liability for immunity recipient does not entail a risk of reduction of the available compensation, e.g. in case of insolvency, as it does not apply if

⁷⁶ See, in particular, Impact Study, Part III, section 2.1 and Part II, sections 1.6.1, 2.2.1 and 4.2.1.

⁷⁷ See, in particular, Impact Study, Part III, section 2.1 and Part II, sections 1.6.1 and 4.2.1.

⁷⁸ *Ibidem*

⁷⁹ For a detailed description, see Section 0.

		<p>the compensation cannot be obtained from other infringers • no over-compensation</p> <p>but some risk of under-compensation where cases are settled (at a lower amount than the actual harm) • single damages and requirements to fulfil in order to obtain a disclosure order might play as disincentives • no binding legislative measures on costs pose a strong risk of lack of effective action at the national level.</p>
2. Protection of effective public enforcement	++	<p>Increase in protection of effective public enforcement: protection of corporate statements safeguards protection of leniency programmes • limitation of civil liability for the immunity recipient keeps the incentives high to apply for leniency</p> <p>but no effective protection of ongoing investigations of the Commission or NCAs</p>
3. Increased awareness, enforcement, deterrence and legal certainty	+++	<p>Overall, increase in deterrence rates, enforcement and legal certainty: increase in number of damages awards, especially by means of opt-in group and representative actions, plus more effective disclosure rules improve enforcement and, thereby, deterrence rate • increase in the number of victims compensated adds to this effect • rules on limitation periods provide for effective enforcement in most cases while avoiding legal uncertainty • no risk of over-deterrence • significant, comprehensive clarification of conditions for exercising the right to damages and for liability of companies • increased legal certainty on burden of proof for passing-on of overcharges</p> <p>but no incentives (e.g. multiple damages) to stimulate market players to monitor and detect infringements • limitation of liability of the immunity recipient might slightly decrease deterrence of actions for damages for the immunity recipient, but increases the deterrence through actions for damages for other infringers and thus the overall deterrence in cartel cases</p>
4. Access to justice	+++	<p>Overall, broader access to justice especially for indirect purchasers: compensation of greater number of victims (including those who suffered scattered damage) • opt-in group actions and representative actions improve access to justice for low-value small claims • facilitation of pass-on makes proof of damage more likely • in terms of access to evidence, significant improvement in several MS, as disclosure of categories of evidence possible and as initial fact-pleading threshold is adapted to circumstances of each case and protection of corporate statements does not negatively affect access to justice as all pre-existing documents are still available for disclosure • rules on limitation periods, especially on limitation periods in follow-on cases, allow proper access to justice</p> <p>but threshold to obtain disclosure could make it difficult to obtain evidence in some cases • limitation of liability of the immunity recipient may marginally affect access to justice, even if injured parties can still claim compensation from immunity recipients if they cannot obtain it in full from the other cartel participants • no measures on costs regimes could result in no action at Member States level, thus not completely removing one of the obstacles to effective access to justice</p>
5. Efficient use of the judicial system	+++	<p>Overall, significant improvement of efficiency: binding effect of NCA decisions and fault presumption enhances efficiency in follow-on cases • opt-in group/representative actions allow some measure of aggregation of small claims • disclosure is not likely to lead to abuses because of <i>ex ante</i> judicial control, especially of proportionality</p> <p>but no rules on costs entails a strong risk of lack of implementation at national level • in the absence of introduction of opt-out actions, Option 1 may still lead to quite a number of individual claims concerning the same infringement.</p>
6. A more level playing field	+++	<p>Similarly effective protection of right to damages across the EU: more level playing field for consumers and businesses alike.</p>

7. Positive impact on SMEs and consumers	+++	<p>SMEs and consumers are likely to benefit from facilitation of damages claims, especially from improvements in their evidentiary position and from the introduction of opt-in group and representative actions</p> <p>but slight risk that the 'loser pays' rule will discourage SMEs and consumers in low-probability cases or, due to the rules on disclosure, claimants who do not possess much evidence at the outset</p>
8. Stimulating economic growth and innovation	++	<p>Second pillar of enforcement likely to emerge • push for more competitive markets with likely positive effects on growth and employment • very low risk of excessive litigation leading to a deteriorating business environment • positive effects on SMEs and hence for economic growth</p> <p>but the safeguards against abusive proceedings and the lack of measures on costs could still discourage victims from claiming compensation</p>

Table 5: Costs of Option 2

Costs	Impact compared to base-line (0 to ---)	Explanation of rating and aspects of the policy option most relevant to the costs
1. Litigation costs	--	<p>Overall, moderate increase in total litigation costs and per average case: slight increase in number of lawsuits (less than the number of victims compensated due to collective redress mechanisms) • costs per claimant per case may even decrease due to efficiencies produced by collective redress mechanisms, even though they may entail new costs for the courts • in MS where evidence disclosure is currently uncommon, increase in burden on courts • binding effect of NCA decisions across EU allows concentration of damages claims in multi-state cases in one court and avoids re-litigation • presumption of fault reduces parties' costs in follow-on claims • pass-on defence may have little impact on length of procedure, but costs are borne by defendant invoking it • early disclosure may stimulate cost-efficient early settlements</p>
2. Administrative burden	--	<p>Overall, a moderate impact: slight increase in number of lawsuits and broader disclosure than currently exists in several MS lead to slightly more screening and production of documents • in some MS longer record-keeping obligations due to possibly longer limitation periods than baseline</p>
3. Error costs	-	<p>Number of errors may increase slightly, if at all: as the number of cases increases slightly, so may the total number of errors, but no indication that overall statistical incidence of errors would increase • binding effect of NCA decisions may make errors less likely in follow-on cases • greater accuracy in fact-finding • the 'loser pays' rule stimulates selection of meritorious cases and prevents frivolous suits</p>
4. Implementation costs	--	<p>Moderate implementation costs: some measures under this option (especially disclosure rules, limitation of liability of the immunity recipient, binding effect and collective redress mechanisms) require changes in the law of several MS. Especially the implementation of sectoral collective redress mechanisms leads to costs. • need for training of judges and the legal community • none of the changes required raises major public policy concerns • all one-off costs, except for the training of judges</p>

6.2.3. Option 3

133. Compared to Option 2, the legislative initiative envisaged under Option 3 mainly proposes further safeguards to access to evidence, introduces a rebuttable presumption of harm caused by a cartel and proposes measures to facilitate

consensual dispute resolution.⁸⁰ The scores attributed to Option 3 in the below tables are based on a comparison of this option with the baseline option of no EU action in the field (Option 1). However, for the sake of clarity and in order to avoid repeating the same arguments as given in Tables 4 and 5 in relation to Option 2, the explanation of the rating is presented also in comparison to Option 2. For stakeholder views and other evidence on the different measures introduced by Option 2, reference is made to Section 7.1 and Chapter 3 of this report.

Table 6: Benefits of Option 3

Benefits achieved/ problem addressed	Impact compared to base-line (0 to +++)	Explanation of rating and aspects of the policy option most relevant to the benefits
1. Ensuring full compensation of the entire harm suffered	+ +	<p>Lower than under Option 2: similar incentives and measures aimed at facilitating damages actions • the rebuttable presumption on the existence of harm and the introduction of the principle of effectiveness as regards quantification increase the possibility to obtain compensation • the strong protection of public enforcement may lead to more cartel cases and thus to more follow-on damages actions • the facilitation of consensual dispute resolution increases the possibilities for out-of-court settlements,</p> <p>but additional safeguards for evidence disclosure might have an adverse impact on the use of such procedural tools • contrary to Option 2, no competition specific collective redress is introduced</p>
2. Protection of effective public enforcement	+ + +	<p>Higher than under Option 2: strong protection of the file of the competition authority regarding corporate statements and settlement submissions. • access to other documents in the file of the competition authority only after the closure of the proceedings provides increased protection of ongoing investigations of the Commission and NCAs</p>
3. Increased awareness, enforcement, deterrence and legal certainty	+ + +	<p>The same as under Option 2: the rebuttable presumption on the existence of harm and the introduction of the principle of effectiveness as regards quantification increases the chance that victims can successfully claim damages</p> <p>but the absence of collective redress mechanisms in Option 3 makes that the increased damages awards as expected under Option 2 through the introduction of collective redress would not be realized.</p>
4. Access to justice	+ + +	<p>The same as under Option 2: • the rebuttable presumption on the existence of harm and the introduction of the principle of effectiveness as regards quantification lowers victims' hesitance to initiate actions for damages • the facilitation of consensual dispute resolution increases the possibilities of a out-of-court settlement and thus of obtaining fair compensation within a short time period,</p> <p>but the additional safeguards for evidence disclosure might have an adverse impact on the use of such procedural tools • contrary to Option 2, no competition specific collective redress mechanism is introduced</p>
5. Efficient use of the judicial system	+ +	<p>Lower than under Option 2: • no risk of burdening the courts with unfounded or otherwise abusive claims because no sectoral collective redress mechanism as under Option 2 is introduced • stimulating fair out-of-court settlements reduces the burden on the judiciary</p> <p>but in the absence of introduction of collective redress mechanisms Option 3 may lead to more individual claims concerning the same infringement</p>

⁸⁰

For a detailed description, see section 0.

6. A more level playing field	+++	The same as under Option 2: more level playing field for both infringing undertakings and injured parties
7. Positive impact on SMEs and consumers	++	Lower than under Option 2: in comparison to Option 2, the evidentiary position of SMEs and consumers is better under Option 3, due to the introduction of the rebuttable presumption of harm in cartel cases. but the protection of the file of competition authorities may lead to more difficulties to obtain access to evidence • no collective redress mechanisms
8. Stimulating economic growth and innovation	++	The same as under Option 2

Table 7: Costs of Option 3

Costs	Impact compared to base-line (0 to - - -)	Explanation of rating and aspects of the policy option most relevant to the costs
1. Litigation costs	-	Overall, slight increase in total litigation costs and per average case; though less costs than in Option 2: the fact that there is no collective redress under Option 3 leads to less actions being brought and thus to lower litigation costs • rebuttable presumption of harm in cartel cases saves costs • the facilitation of quantification of the harm reduces the administrative burden for courts and increases the likelihood of out-of-court settlements
2. Administrative burden	-	Lower than under Option 2: the protection of public enforcement will reduce the administrative burden that damages actions could cause on competition authorities
3. Error costs	0/-	Lower than under Option 2: due to the fact that no collective redress mechanisms are introduced, less actions will be brought and error costs will be lower, if any.
4. Implementation costs	-	Lower than under Option 2: implementation costs are expected as a result of introducing collective redress mechanisms; as those mechanisms are absent under Option 3, implementation costs are expected to be lower.

6.2.4. Option 4

134. Option 4, the 'non-regulatory approach', identifies a range of useful solutions and best practices, mainly from the experience in Member States, which the Commission would recommend to all Member States for implementation in their legal systems. The impact assessment of this non-regulatory approach is based on the assumption that the specific measures that in Option 3 are suggested as legislative measures would in Option 4 only be recommended to the Member States.⁸¹
135. Predicting the impact of mere recommendations is a delicate exercise, as it will to a large extent depend on the Member States. The likelihood that they will implement legislative changes on the basis of recommendations is difficult to foresee and would mainly depend on a persuasive effect of the recommendations, next to a more general awareness raising effect. Although some literature advocates the use of soft law and recommendation of best practices to achieve broad policy objectives at the EU level, there is no compelling evidence that the persuasive effect has ever been strong enough to create a high likelihood that EU Member States would change their

⁸¹ See paragraph 5.3.3 above for a description of those measures.

existing national laws, particularly not in areas of law such as civil liability and civil procedure.⁸² Also, the publication of the 2005 Green Paper and the 2008 White Paper and the discussions around these and other policy documents of the Commission, while having some impact on the debate in the Member States, has so far not led to significant changes in the statutory rules prevalent in the Member States. Further, the Impact Study confirms that there is little likelihood that the effects of Option 4 would add up to much more than those of the baseline scenario of Option 1, under which no EU action is foreseen.⁸³

136. The shortcomings of a non-regulatory initiative could neither be avoided if in parallel the Commission were to start a series of infringement proceedings under Article 258 TFEU to ensure compliance with the *acquis communautaire* on this subject. Such actions would remove existing obstacles on a case by case basis and would only foster change of provisions that do not comply with the principle of effectiveness. They would not indicate which measures can better ensure effective compensation.
137. The rating of various impacts of Option 4 set out below reflects both effective and rather ineffective persuasive effect. The rating is put in a range, from the hypothesis that all Member States follow the recommendations to the hypothesis that a few or no Member State will follow the recommendations. The scores attributed as such entail an independent comparison of Option 4 with the baseline scenario of no action at EU level (Option 1). However, Option 4 is necessarily interconnected with both the baseline scenario and with Option 3, to which its measures are identical. If few or no Member States decide to follow the measures recommended under Option 4, its effects coincide with that of the baseline scenario of no EU action (Option 1). Therefore, the lower end of the range of scores attributed to Option 4 corresponds with the likely impacts of Option 1. For the explanation of these scores, reference is made to Tables 2 and 3 above. As explained in the previous paragraphs, the adoption of Option 4 is more likely to lead to the effects at the lower end of the range rather than those at the higher end of the range.
138. If, on the other hand, all Member States decide to follow the recommendations, the effects of Option 4 could be close to those of Option 3, where the same measures are laid down in a legislative proposal. However, account should be taken of the fact that even if all Member States implement the recommendations, divergent choices will be made among the Member States as to the exact measures to be taken, leading to reduced legal certainty, lower efficiency of judicial systems and access to justice as well as a potential increase in litigation costs.⁸⁴ Therefore, the upper end of the range will not necessarily equal the score assigned to Option 3. In order to avoid a repetition of arguments, reference is made to tables 6 and 7 on the assessment of option 3: in the Tables 8 and 9 below it is explained why the upper end of the range is lower than the score of Option 3, where applicable.

Table 8: Benefits of Option 4

⁸² See, e.g., Impact Study, Part III, section 2.5.

⁸³ See Impact Study, Part III, section 2.5.1 and Table 79.

⁸⁴ The risks related to fragmented national legislations are explained in Sections 3.2 and 3.3 above.

Benefits achieved/ problem addressed	Impact compared to base-line (0 to +++)	Explanation of rating and aspects of the policy option most relevant to the benefits
1. Ensuring full compensation of the entire harm suffered	0 / +	The upper end of the range is lower than under Option 3 because if the implementation is left to the Member States on a voluntary basis, the resulting measures are likely to diverge to some extent. This divergence may affect the willingness of victims to seek redress and may thus reduce the likelihood that full compensation is obtained in all Member States
2. Protection of effective public enforcement	0 / +	Without a legislative measure at EU level, the balancing exercise is left to national courts on the basis of national law: this risks leading to fragmentation of the applicable rules. Given that the Commission and NCAs jointly enforce the EU antitrust rules through the ECN, a soft law approach would fail to achieve the legal certainty necessary to safeguard effective public enforcement
3. Increased awareness, enforcement, deterrence and legal certainty	0 / +	The upper end of the range is lower than under Option 3 because of lack of legal certainty and awareness in cross border cases, caused by likely divergence between Member States
4. Access to justice	0 / +	The upper end of the range is lower than under Option 3 because the likely divergent options in the different Member States may discourage victims to seek redress in other Member States than their own
5. Efficient use of the judicial system	0 / +	The upper end of the range is lower than under Option 3 because of the likely divergence in rules between Member States
6. A more level playing field	0 / +	Differences between Member States may even become wider if they act differently on the recommendations ⁸⁵
7. Positive impact on SMEs and consumers	0 / +	The upper end of the range is lower than under Option 3 because diverging rules in the Member States may cause additional difficulties for victims to initiate proceedings in other Member States
8. Stimulating economic growth and innovation	0	The persistent divergence of national rules does not entail significant benefits for the internal market.

Table 9: Costs of Option 4

Costs	Impact compared to base-line (0 to - - -)	Explanation of rating and aspects of the policy option most relevant to the costs
1. Litigation costs	0 / - -	The upper range is higher than under Option 3 because divergent measures in the Member States produce higher litigation costs in cross-border cases
2. Administrative burden	0 / -	See explanations in the tables on Options 1 and 3 for the ratings in this table
3. Error costs	0 / -	See explanations in the tables on Options 1 and 3 for the ratings in this table

⁸⁵ The experiences since the White Paper, as described in Section 3.2 and Annex 3 of this report show that Member States are expected to act differently on recommendations.

4. Implementation costs	0 / -	See explanations in the tables on Options 1 and 3 for the ratings in this table
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7. COMPARING THE OPTIONS

7.1. Comparing the policy options and assessment of the preferred option

7.1.1. Summary comparison of the options and identification of the preferred option

139. In Chapter 6, the four policy options have been scored on the basis of a number of different criteria. In order to determine the preferred option, this section will provide a short comparison between the options.

A preference for binding EU action

140. It is clear from the above assessments that options envisaging EU legislative action (Options 2 and 3) are preferred over options that do not envisage EU legislative action (Options 1 and 4). In this respect, whereas Option 4 (recommendations and good practices) envisages some EU-action and Option 1 entails the baseline scenario of zero action at EU level, the Impact Study confirms that there is little likelihood that the effects of Option 4 would add up to much more than those of Option 1.⁸⁶ Even if under Option 4 some progress is made towards achieving the policy objectives of this initiative, the shortcomings of Options 1 and 4 in comparison to Options 2 and 3 largely coincide.

141. The main issue related to Options 1 and 4 is that the current broad divergence between national legislations relating to actions for damages would persist.⁸⁷ This would be problematic in terms of the effectiveness of damages actions due to divergent national legislations. As to Option 1, this is confirmed in the Impact Study, which finds that the level of corrective justice would be very low, while deterrence may increase only very slightly over the next few years.

142. The broad divergence in legislation is described in more detail in Section 3.2 above. It is equally explained why no significant change in the situation of divergent national provisions is to be expected if no EU action in the field of antitrust damages actions is taken (the baseline scenario, Option 1). Furthermore, on the basis of the experience after the White Paper (also further described in Section 3.2), it cannot be expected that soft law at the EU level would significantly change the current situation. After the White Paper, very few Member States have taken measures to improve the effectiveness of antitrust damages actions; the vast majority of Member States have not taken any action whatsoever. Moreover, these measures concerned only specific elements of the White Paper's suggestions and varied largely among Member States. There are no indications that adoption of yet another act of EU soft law on the subject would significantly change this situation.

143. As a result, both Options 1 and 4 would cause the internal market to remain fragmented in terms of the level of judicial protection due to the uneven playing field and, as a result, prone to forum-shopping (this problem is further described in Section 3.3 above). Also, divergence between national legislations would cause significant burdens to be borne by SMEs and consumers, who would continue to

⁸⁶ See Impact Study, Part III, section 2.5.1 and Table 79.

⁸⁷ Whereas the recommendations of Option 4 might lead to more Member States taking certain measures than would be the case under Option 1, it would most likely still lead to a broad divergence in national legislations as each Member State would be free to choose in relation to which issues it would like to take measures and the content of such measures.

suffer from inadequate access to justice, in particular in cross-border cases.⁸⁸ Finally, there would be little or no positive macro-economic impact.

144. Furthermore, when taking no EU action as foreseen under the baseline scenario (Option 1), the uncertainty following the *Pfleiderer* ruling of the Court as to the use of documents from the file of a competition authority in actions for damages would persist. This uncertainty and its potential consequences are described in Section 3.1 and Annex 2 of this report. The legal uncertainty may be a negative factor having an impact on the public enforcement of EU competition law, in particular on the competition authorities' leniency programmes.
145. As described above, experience shows that EU soft law in the field of antitrust damages actions has not had the effect that Member States take adequate measures. Quite on the contrary, hardly any action is taken and where measures were adopted, these varied widely from one Member State to another. Such inconsistencies are also emerging in the case-law on disclosure of documents from the file of a competition authority in actions for damages. There is therefore no indication that soft law would be sufficient for all Member States to take adequate measures to protect effective public enforcement. The need to regulate the interaction between the public and private enforcement of competition law, thus ensuring the effectiveness of both systems, would therefore not be fulfilled when choosing Options 1 or 4.
146. In conclusion, even though under Options 1 and 4, the administrative burden, litigation costs and error costs would be likely to remain at a relatively low level (all due to the quasi-absence of damages actions), the achievement of the policy objectives would be very limited and important problems, with regard to the protection of effective public enforcement as well as in relation to the effective private enforcement, would persist.

A preference for a separate, but horizontal approach to collective redress

147. The preference for an option including EU legislative action points to Option 2 or Option 3. Before discussing and comparing the benefits of these Options, it is necessary to assess the main difference among the measures they contain, namely the provision of a competition-specific system of collective redress.
148. In the public consultation on the White Paper, consumer associations have expressed themselves in favour of both opt-in group actions and representative actions, in order to enhance the opportunities to effectively obtain compensation. Collective redress mechanisms have been seen as essential mechanisms in this respect. Businesses and business associations, however, generally fear that collective actions will only increase litigation to the detriment of business. The results of the 2011 public consultation of collective redress show the same image: consumers are in favour and urgently call for EU action in the field, whereas business generally holds that there is no need/justification for EU action on collective redress. Among Member States, the views are divided, whereas the five national competition authorities that responded are all in favour of introducing collective redress.
149. Option 2 contains two complementary means of collective redress which would be specific to actions for damages for infringements of EU competition law. Option 3 contains no such means, referring instead to horizontal initiatives on collective redress. While Option 2 is clearly more advantageous in providing immediate means

⁸⁸ See Impact Study, Part III, section 2.1.

of redress to victims such as consumers and SMEs, it is also necessary to assess this measure against the more general objective of the Commission to foster a coherent EU policy on collective redress,

150. Taking into account the results of the public consultation and in particular the position taken by the Parliament in its Resolution of 2 February 2012,⁸⁹ a separate horizontal approach appears currently more appropriate than a competition-specific solution. The main reason is that the field of competition law is not the only field of EU law in which scattered harm frequently occurs and in which it is difficult for consumers and SMEs to obtain damages for the harm they suffered. Similar problems (e.g. high litigation costs in comparison to the individual damage) exist also in other fields of law, such as consumer law or environmental law. Therefore, the basic principles applicable to collective redress can, to a large extent, be common to all these fields of law.
151. A horizontal instrument may also avoid unnecessary fragmentation of national civil laws and provide consumers and SMEs with a mechanism to obtain effective redress through collective actions in all fields where this is considered necessary. As such, a horizontal initiative would ensure coherence on collective redress across all fields of law at the EU level. However, this does not affect the need for the Commission to take characteristics specific to a certain field of law into account. In so far as specific provisions are considered necessary in relation to – for example – the field of competition law, these provisions could be laid down in a separate chapter of such horizontal instrument or in subsequent separate legal instruments.

A preference for a more balanced system of public and private enforcement

152. While the preference for a coordinated approach to collective redress points at Option 3, it is also necessary to assess the benefits and costs of the other specific measures of the options that include legislative action. As explained in section 5.3.2. above, Option 3 is to a large extent based on Option 2, but in addition optimises the interplay between public and private enforcement by regulating access to evidence in the file of a competition authority. Option 3 also considers to facilitate the claimant's burden of quantifying antitrust harm by introducing a rebuttable presumption of harm in cartel cases. It also introduces measures to further stimulate consensual dispute resolution. On the basis of the above, it must be concluded that both Option 2 and Option 3 fulfil to a large extent the policy objectives. Both options effectively address the main obstacles that currently hinder effective redress for victims of antitrust infringements, building on European legal traditions. In comparison to the baseline scenario of no EU action in the field (Option 1), both Option 2 and Option 3 take measures to improve the effectiveness of the private enforcement of competition law. These measures will be discussed below.
153. First of all, both Option 2 and Option 3 improve the possibilities for claimants to obtain access to the evidence they need to substantiate their claim, by providing for rules on disclosure of specified categories of evidence, based on fact-pleading and proportionality. In the public consultation on the White Paper, respondents from the consumer side, a number of law-firms and even business respondents that had allegedly been victims of anticompetitive conduct, identified the limited possibilities as regards disclosure as one of the main obstacles standing in the way of effectively exercising the EU right to full compensation. These respondents encouraged the

⁸⁹

See footnote 24.

Commission to go further than the system provided for in the White Paper (and proposed by Options 2 and 3), by loosening the conditions to obtain a disclosure order. Nevertheless, respondents from the business side considered the rules from the White Paper not to be restrictive enough and asked for further measures to avoid 'fishing expeditions' and to protect confidential information. Options 2 and 3 choose the middle ground between the opinions from the consumer-side and those of the business-side, providing for a system that significantly improves the possibilities for victims to obtain the necessary evidence, without being overburdensome or costly for the defendants.

154. The disclosure rules proposed under Option 2 and 3 will constitute a significant improvement for the effectiveness of private enforcement in almost all Member States. Nevertheless, as the rules in Options 2 and 3 would be minimum standards, those Member States having a more far reaching system could maintain this system. For further information on the rules applicable to disclosure in the Member States, reference is made to section 3.2.
155. Options 2 and 3 both allow standing for indirect purchasers, in order to make sure compensation is awarded to the entities who actually suffered damage. This rule is endorsed by almost all stakeholders; only 8 of the respondents to the public consultation of the White Paper suggested to limit standing to direct purchasers. Allowing standing of indirect purchasers is in conformity with the applicable law in the vast majority of Member States.
156. In connection with this, the passing-on defence is available for the infringer that shows that the damages claimant has passed-on part or the whole of the illegal overcharge. Nevertheless, as the proof of passing on is hard for both parties, it is considered fair to put the burden of proof on the party infringing competition law by introducing a rebuttable passing-on presumption in favour of the indirect purchaser.
157. In the public consultation on the White Paper, the availability of the passing-on defence has generally been supported by all respondents. Furthermore, as to the facilitation of the burden of proof of passing on, consumer association and other non-business respondents held that whereas it is difficult for both the claimant and the defendant to prove the pass on, and this is thus an important obstacle for indirect purchasers to obtain compensation, the statutory simplification of the burden of proof should benefit the victims, otherwise it would result in the infringer taking advantage of its illegal conduct, and retaining the illegal overcharge. Businesses and business associations have generally expressed reservations against such facilitation in the burden of proof, because of the risk of double or multiple compensation. In view of the fact that the risk of undercompensation is currently deemed more important than the risk of overcompensation, as well as the fact that indirect purchasers would have significant difficulties to prove passing-on, Options 2 and 3 introduce a facilitation on the burden of proof.
158. As discussed in section 3.2 above, the status of the passing-on defence is unclear in most Member States due to lack of legislation and case-law on the topic, even though there are no legal obstacles to such defence. As to the burden of proof of the passing-on defence in those Member States where it is allowed, different national systems exist (see section 3.2 above). The rules provided for in Options 2 and 3 therefore constitute a necessary harmonisation of the national rules, and a facilitation of actions for damages.

159. Option 2 and 3 both facilitate follow-on actions by providing for rules on limitation periods after the finding of infringement by a competition authority or a review court and for binding effect for the final infringement decisions of NCAs.
160. In the public consultation on the White Paper, potential claimants have expressed themselves in favour of the introduction of such rules on limitation periods, whereas some business associations and law-firms argued that a new limitation period for follow-on actions would jeopardize legal certainty. However, none of the respondents have contested that clarifying rules on limitation periods would have a positive effect on the possibilities to obtain full compensation.
161. Currently, only 6 Member States provide for specific limitation periods for follow-on cases. These limitation periods differ in system (suspension of ordinary limitation period or separate limitation period) and in duration. The other 21 Member States, however, do not provide for such limitation periods at all, which may hinder the possibility to bring follow-on actions for damages because the limitation period has already expired. In other Member States this is corrected by case-law, which sets the starting point of the ordinary limitation period at the moment the infringement decision has become final. Therefore, the rules proposed by Options 2 and 3 as regards limitation periods would constitute a significant improvement in most Member States.
162. The binding effect of NCA decisions has been one of the more controversial issues in the public consultation on the White Paper. The main criticism is that such rule is running counter to the independence of the judiciary or that it constitutes a potential violation of the rights of defence. As to decisions of NCAs from other Member States, some stakeholders pointed at different standards among authorities across the EU. Nevertheless, it should be noted that a significant number of respondents (among which consumer associations, law firms and other respondents from jurisdictions where a similar provision already exists) recognize the usefulness of this measure not only for damages claimants, but also for the efficient and consistent application of competition rules.
163. National legislation on binding effect of NCA decisions is at the moment very divergent: there is one Member State where both its own and other NCA decisions have binding effect, 10 Member States in which the final decisions of their own NCA have binding effect but those of other NCAs do not and 16 Member States where NCA decision do not have binding effect. In those Member States their evidential value ranges from a rebuttable evidentiary presumption to constituting merely "a view" on the facts and the law. The rule on binding effect of NCA decisions proposed by Options 2 and 3 would thus constitute an important means of harmonising national legislation and making follow-on actions for damages more effective.
164. Both options provide for measures improving the interplay between public and private enforcement in comparison to the baseline scenario (Option 1). Such measures include an enhanced protection against disclosure in actions for damages for documents from the file of a competition authority and a limitation of liability of successful immunity applicants. In the public consultation on the White Paper, respondents (apart from consumer associations) generally deemed the protection of corporate statements from disclosure to be an essential conditions for the success of leniency programmes and thus an important guarantee for effective public enforcement of EU competition law. The limitation of liability of immunity

recipients is a debated topic in the public consultation on the White Paper. Nevertheless, it is generally considered that the measure is a positive incentive to apply for leniency, and thus to have a positive effect on public enforcement. However, some respondents thought that the measure would provide an excessive benefit for the immunity recipient.

165. Both options provide safeguards avoiding abuse of litigation and unmeritorious claims. As such, they have a direct positive impact on the fundamental right to effective judicial protection laid down in Article 47, first paragraph of the Charter and in Article 19(1), second subparagraph, TEU.
166. When comparing the two options, Option 2 is a bit stronger as regards achieving the policy objective of ensuring full compensation of the entire harm suffered. This is due not only to the introduction of a competition specific system of collective redress discussed above, but also to fewer limitations on disclosure of evidence in relation to documents from the file of a competition authority (i.e. settlement submissions are not protected under Option 2; Option 2 limits disclosure during investigations of competition authorities).
167. Option 2 is stronger as regards efficient use of the judicial system and the positive impact on SMEs and consumers. The objectives of access to justice, a more level playing field and the macro-economic impact are achieved alike under Options 2 and 3.
168. However, Option 3 generally provides for a more balanced system. It contains an overall improvement of the possibility to obtain access to evidence, while offering a stronger protection of effective public enforcement, by protecting more documents from the file of the competition authorities from disclosure in actions for damages. As to settlement submissions, stakeholders responding to the question on the interplay between public and private enforcement of competition law in the 2011 public consultation on collective redress confirmed that the settlement programme could be weakened by the stimulation of private enforcement in broadly the same way as the leniency programme. In a similar manner, some respondents to the public consultation on the White Paper indicated that the attractiveness of NCA and EU settlement procedures could be adversely affected by the strengthening of the private enforcement of competition law.
169. Because of its limited scope, such additional protection is considered not to make it impossible or excessively difficult for victims of a competition law infringement to obtain compensation for the harm they suffered. The protection is therefore considered to be compatible with the right to effective judicial protection laid down in Article 47, first paragraph of the Charter and in Article 19(1), second subparagraph, TEU. Furthermore, the introduction of a rebuttable presumption in relation to the existence of harm in cartel cases and the introduction of a rule that the burden and level of proof and of fact-pleading required for the quantification of the harm cannot render the exercise of the claimant's rights to damages practically impossible or excessively difficult, make it more likely that compensation is awarded. A balanced system fostering both effective public and private enforcement of competition law brings about benefits to growth, productivity and innovation.

170. In terms of costs, Option 3 scores better than Option 2. Litigation costs⁹⁰ are reduced by the introduction of the rebuttable presumption in relation to quantification of harm. Also, error costs and implementation costs are lower under Option 3, because Option 3 does not foresee the introduction of a sector-specific framework of collective redress. The administrative burden is lower under Option 3 as the interests of public enforcement are better protected. The below table provides for an overview of the scores of the four options.

Table 10: Summary of impacts of Policy Options 1-4

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

171. The comparative assessment of the four options shows that Option 3, in combination with the non-binding guidance on damages quantification as identified in Section 5.4, is the most suitable option. It achieves better than any other option the objectives that have been set out, producing the benefits outlined in this impact assessment at the lowest comparative cost, and taking into account the concerns and some of the suggestions that have been put forward during the public consultations.

⁹⁰ See Section 7.1.2 for a more detailed assessment of the litigation costs of the preferred option.

172. The potential benefits of the preferred option in the attainment of the objective of full compensation can be estimated by reference to the data on foregone compensation by year from the impact study cited above.⁹¹ It was estimated that foregone compensation in the EU ranges from €5.7 to €23.3 billion per year. The improvement of the procedural framework under the preferred option does not include competition specific systems of collective redress available throughout the EU to facilitate consumer claims. In this situation, although it is not possible to predict the quantitative chance of damages recovery, it is safe to conclude that the improved procedural framework will still produce an increased compensation benefit comprised within the range indicated, which embodies a conservative estimate and thus also takes into account the reduced benefits due to the absence of competition specific collective redress mechanisms. Maintaining the assumption of a potential reduction of cartels by 5% due to increased deterrence, the negative consumer welfare impact of such infringements could be additionally reduced by €1.32 to 3.45 billion per year.
173. There are two different reasons to predict that the impact of the preferred option will remain within the ranges indicated by the impact study. The lower-bound of the broad range of foregone compensation already incorporates a number of restrictive assumptions, which compensate for the possible lack of mass consumer claims in those countries where this is not currently provided by national law. Moreover, the data from the impact study on foregone compensation and welfare impact are based on an average annual amount of cartel fines, which is then elaborated through the application of a detection rate, an overcharge to fine ratio, and refined by other criteria. In recent years, cartel fines have for a variety of reasons increased (e.g. longer duration and/or wider geographic scope of the cartel, bigger companies involved, etc): from the average annual fines considered by the study, amounting to €1.248 billion, in 2012 the cartels found by the Commission have been sanctioned with a total of €1.875 billion in fines (with an average over the years 2008-2012 increased to €1.832 billion per year). Thus, the same methodology would produce higher impacts on the levels of compensation to be expected from an initiative on private enforcement.

7.1.2. *Litigation costs of the preferred option*

174. The fact that it is not possible to quantify the litigation costs of the preferred option in detail, explains the essentially qualitative assessment. However, on the basis of the available data, drawing in particular on the Impact Study⁹², the following can be said as to the potential magnitude of litigation costs. As most of the available quantitative information on litigation costs originates from the US, those figures are taken as a starting point.

On litigation and litigation costs

175. An often quoted source for litigation cost estimates in US private antitrust actions is the Georgetown Project, which provided estimates of litigation costs for both settlements and trials⁹³. As part of this detailed empirical exercise, it was found that in the US, claimant's lawyers' fees in private antitrust actions were in the range of 10

⁹¹ See Section 0.

⁹² Impact Study, pages 85-89 and pages 150-152.

⁹³ The Georgetown Private Antitrust Litigation Project and Study (1973-83).

to 20% of the awards.⁹⁴ Further, opportunity costs for parties, such as the time spent by their executives on these matters, has been estimated to range between approximately 50 and 75% of the lawyers' fees, while the court costs are estimated at a few percent of the awards.⁹⁵ On this basis, one could conclude that between 35-75% of the awards is 'dissipated' through litigation costs in the US.⁹⁶

176. The US system is of course characterized by a set of measures that affect the magnitude of litigation costs and that are neither present nor proposed in Europe. For example, in the US, claimant's lawyers' fees are often awarded on the basis of a percentage of the award, while in Europe *pacta de quota litis* are generally not allowed.⁹⁷ Also different rules regarding evidence⁹⁸ and lower court costs⁹⁹ have an impact on litigation costs. Taking these differences into consideration, it is safe to assume that even after the introduction of the measures suggested in the preferred option, litigation costs in Europe will not go beyond 10 to 20% of the awards.¹⁰⁰
177. Considering now the overall level of litigation, a US-style system, where litigation is encouraged through e.g. multiple damages awards,¹⁰¹ asymmetric fee-shifting, extensive discovery and opt-out class actions, scores high on the deterrence scale as it very strongly encourages litigation. However, this high level of litigation is a costly way to achieve the corrective justice objective. The various measures and legal mechanisms retained in the preferred option differ in its significant aspects very strongly from the US model, thereby limiting, if not excluding unmeritorious actions. As a result, the preferred option will lead to a significantly lower level of litigation and litigation costs than what is witnessed in the US.
178. The impact of the four policy options on litigation costs have been assessed in Section 6.2, taking the said differences with the US-system as a starting point. Of the options involving EU-legislative action, Option 3 scores the best, due to the fact that the litigation costs of individual claimants are reduced as a result of the shift of the burden of proof with regard to the existence of harm in cartel cases, the facilitation of consensual dispute resolution and the fact that Option 3 does not foresee the introduction of sector-specific measures on collective redress.
179. However, in relation to the base-line of no EU action is foreseen, the preferred option (Option 3) will lead to some increase in litigation costs due to an increase in the

⁹⁴ On this basis Salop and White (1986) estimated that the total annual costs of private antitrust litigation in the US amounted to approximately US\$250 million for 1973-1983 (in 1984 dollars).

⁹⁵ Court costs in the U.S. have been estimated at 5.5% of the (untrebled) award (Impact Study, page 89).

⁹⁶ The lower end of this range is calculated on the basis of lawyers' fees amounting to 10% of the award for each party, an opportunity cost equal to 50% of these fees. The upper end is obtained assuming that lawyers' fees are 20% of the award for each party, that the opportunity cost amounts to 75% of these fees. For both, court costs account for 5% of the award.

⁹⁷ For exceptions, see the Impact Study, page 88.

⁹⁸ *Ibidem*

⁹⁹ For instance, the Impact Study indicates on page 89 that "in Europe, court costs are often expressed as a percentage of the damage award, which can range – depending on the country and on the value of the claim – from 2% to 6%."

¹⁰⁰ See the Comparative Study, paragraph I(viii) on p.96, which suggests that the cost of bringing an antitrust claim is lower than 10% of the value of the claim in most EU countries, although it is higher in the UK and Ireland.

¹⁰¹ In systems with multiple damages (like the US), it may be profitable for the claimant to file a suit, even if the probability of winning the case is small. Indeed, if it prevails, the award would be very high. While multiple damages thus increase deterrence, they encourage cases with little merit and hence increase litigation costs, see e.g. the Impact Study, page 88.

number of lawsuits. The structure and amount of fees for litigation (and out-of court activity connected to it) vary across Member States, so it is difficult to provide an exact estimate. However, as a proxy, it is interesting to consider the expected impacts of reforming the system of private enforcement in the UK, as currently envisaged in a consultation paper.¹⁰² The option of improving the framework for private actions by introducing rules on the relationship with public enforcement and encouraging ADR (without introducing public opt-out collective actions) is estimated to lead to an increase in average annual costs for participants of £17,7 million (€21,35 million) against total benefits of £61,4 million (€74 million) in increased deterrence¹⁰³ and cartel prevention, and £296 000 (€357 000) in public sector benefits.

Impact of the preferred option on the number of damages actions

180. Given the complexity of establishing a competition law infringement, it is realistic to assume that antitrust damages actions will usually be follow-on actions. Under that assumption, the upper ceiling of the number of actions for damages that can be initiated equals the number of cases in which the Commission or the NCAs take a decision establishing an infringement. Since 2007, NCAs took on average 55 infringement decisions per year and the Commission 8. However, only very few of those cases have so far led to an antitrust damages action. In relation to NCA cases, we are aware of damages actions being brought in less than 10% of these cases. As regards Commission cases, it seems that no follow-on damages actions have been brought in relation to more than two thirds of the infringements found by the Commission.¹⁰⁴ Furthermore, as far as the latter category of follow-on actions is concerned, they rarely cover all victims: indeed, whereas the Commission decision usually finds an infringement for the whole EEA (or at least a substantial part of it), damages actions are brought by or on behalf of victims from only one or more Member States. Given these data, the most extreme theoretical effect of the current Antitrust Damages Initiative would be that it results in actions for damages in all remaining cases, covering all victims of those infringements.
181. Such an increase is, however, not to be expected. In Member States which currently have a regime favourable to actions for damages (like the UK where there are favourable regimes for disclosure of evidence and collective actions), experience shows that the number of cases in which actions for damages are initiated does by no means coincide with the total number of decisions taken by the Commission and the NCA. In fact, the recently published impact assessment by the UK government on private actions in competition law indicates that only few cases are brought before the national courts.¹⁰⁵ Out of 21 findings of infringement by the OFT between 2000 and 2007, only 2 led to follow-on cases brought by injured parties.¹⁰⁶ Out of 45

¹⁰² See BIS – Department for Business Innovation & Skills – "Private actions in competition law: a consultation on options for reform" and the Impact Assessment thereof, both available at: <http://www.bis.gov.uk/Consultations/consultation-private-actions-in-competition-law>.

¹⁰³ In the UK impact assessment's methodology, increased deterrence is calculated as a multiplier of damages, and particularly in a benefit of 5:1 in stand alone cases, and 1:1 in follow-on cases.

¹⁰⁴ In the absence of any EU-wide obligation of parties and/or national courts to inform national or European authorities of damages actions brought, this figure is only an approximation, based on anecdotal information. Moreover, this figure does not take account of informal settlements, which rarely are made public.

¹⁰⁵ Department for Business, Innovation & Skills, Impact Assessment, Private actions in competition law: a consultation on options for reform, April 2012, paragraph 22.

¹⁰⁶ Ibid, paragraph 25. It should be noted, however, that settlement may have been reached in other cases.

companies harmed by a breach of competition law, only five companies finally decided to bring an action, most commonly because the expected costs of litigation did not outweigh the benefits.¹⁰⁷

182. The same reasoning can be applied by victims in relation to the current Antitrust Damages Initiative. Furthermore, smaller sized victims, such as SMEs, might fear for their good business relationship with infringers if they sue them in actions for damages. Therefore, the implementation of the preferred option is expected to have the effect of increasing actions for damages, but not causing mass litigation such as in the US. Finally, the fact that out-of-court settlements are fostered by the current Antitrust Damages Initiative supports the conclusion that the increase in litigation and related costs will be moderate.

7.1.3. *Transposition costs for the Member States*

183. "Transposition costs" refers to the likely costs incurred by Member States in adapting national law in order to implement the measures proposed under the preferred option. For the purposes of this analysis:

- 'High transposition costs' indicates that significant changes to national laws, regulations or administrative practices or structural changes, such as setting up an agency or making recurrent budgetary costs, are required in order to implement the proposed measures in the Member States' domestic legal system;
- "Low transposition costs" indicates that a measure would only require minor adaptations in the national legal systems because of its limited impact or because of already existing similar laws, regulations or administrative practices under national law;
- No transposition costs are envisaged where the requirements of a specific measure are already met in the Member State(s), where the envisaged instrument is of a non-binding nature or where the measure in question reproduces the *acquis communautaire*, and should therefore be already complied with by the Member States;
- The intermediate indicators of "medium" (between high and low) transposition costs and "very low" (between low and no) transposition costs will also be used.

As shown in table below, the current Antitrust Damages Initiative does not require Member States to make significant or structural changes. Hence, all transposition costs in relation to the current Antitrust Damages Initiative are rather limited. Where the table indicates that differences may exist among Member States, reference is made to section 3.2 above, where these differences are described.

Table 11: Overview of transposition costs

Proposed Measures under the Preferred Option	Assessment of Transposition Costs

¹⁰⁷ Ibid, paragraph 24.

Standing of direct and indirect purchasers	<i>Acquis communautaire</i> : no new transposition costs .
Joint and several liability and limitation thereof for immunity recipients	Depending on the existing legal framework in the Member States, the introduction of joint and several liability for co-infringers will entail low or no transposition costs . Transposition costs of measures concerning the limitation of the civil liability of the immunity recipient depends on the existing situation under national law. For Member States that do not provide any form of limitation of civil liability: medium transposition costs . Member States that already provide for such mechanisms would only have to apply these to immunity recipients: low transposition costs .
Rules on access to evidence (<i>inter partes</i> disclosure)	Some form of disclosure is or should already be available under the legal system of the Member States in some areas of law (i.e. intellectual property rights enforcement, for which rules on disclosure are part of the <i>acquis communautaire</i> under Directive 2004/48/EC). In these cases, should disclosure rules not yet be available in antitrust damages actions, Member States would only need to expand the scope of application of rules on disclosure, also adapting them to the specificities of the envisaged measures: medium transposition costs . Where Member States already have disclosure rules for antitrust damages actions along the lines of the envisaged measures, the transposition costs will even be lower.
Binding effect of final decisions of NCAs	If a Member State already grants the binding effect before national courts of final decisions by NCAs: no transposition costs . In Member States that recognise binding effect only to the decisions adopted by domestic NCAs, the transposition costs of extending that effect also to final decisions of other NCAs are considered very low . In those Member States where no such effect is provided for at all, transposition costs are considered low because a decision by a national competition authority already bears a strong persuasive effect on national courts.
Full single damages	<i>Acquis communautaire</i> : no new transposition costs .
Passing-on defence and rebuttable presumption of passing on of the illegal overcharge to the indirect purchaser	In most Member States it is not clear whether or not a passing-on defence can be invoked in antitrust damages actions. However, where not explicitly excluded, this defence could probably be allowed pursuant to the general principles underlying national tort rules according to which the burden of proof lies with the party invoking the defence, hence very low transposition costs . If a Member State directly or indirectly excludes such defence: medium transposition costs . Introducing a rebuttable presumption that the illegal overcharge has been passed-on is something yet absent in most national legal systems. However, this is in essence a rebut of the burden of proof, that would shift from the injured party to the infringer. The application of this technique (rebuttable presumption) to antitrust damages actions brought by indirect purchasers would not imply any major change in the legal systems of the Member States: medium transposition costs .
Rules on limitation periods	To the extent that the envisaged measures implement the EU principle of effectiveness, that is part of the <i>acquis communautaire</i> and thus entails no new transposition costs . For what concerns the possibility to claim compensation after a final decision by the Commission or a NCA, the provision of a new limitation period would raise some issues only in those cases where the limitation period has expired before the start of public proceedings (in other cases, a suspension pending an investigation of an NCA would allow for a similar effect). As this is rarely the case: low transposition costs .
Rebuttable presumption of harm caused by cartels	Introducing a rebuttable presumption that in cartel cases harm exists shifts the burden of proof to the party which most likely has the relevant information. The application of this technique (rebuttable presumption) would not imply any major change in the legal systems of the Member States: low transposition costs .
Non-binding framework on damages quantification	The provision of non-binding guidance on the quantification of damages by its very nature does not require any implementation activity on the part of the Member States: no transposition costs .

Rules on Consensual Dispute Resolution	Consensual dispute resolution mechanisms exist in all Member States. The introduction of rules to stimulate recourse to consensual settlements, and their co-ordination with the rules on joint and several liability, would thus not entail significant modifications in national legal orders: low transposition costs .
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7.2. Choice of legal instrument

7.2.1. *The options*

184. Having identified the adoption of a legislative proposal at the EU level as the preferred option, it is necessary to assess which particular instrument would be most suitable in the area of antitrust damages actions: a regulation, a directive or a combination of the two. The assessment of these options takes account of which one most effectively achieves the objectives set out above, the costs (in particular the implementation costs for the Member States) and the effects in terms of simplification or complication of the existing legal framework.

7.2.2. *Regulation*

185. The advantage of introducing the preferred option through a regulation is clearly its direct applicability that would ensure the elimination of most obstacles in the legal framework as of the day of its entry into force. A regulation would also create a set of provisions that are equally available to all victims of antitrust infringements in the Member States.

186. However, a regulation could require a detailed elaboration of all the aspects that are necessary for the concrete functioning of the envisaged redress system. It would thus constitute a separate body of law, next to the existing national rules on civil liability and civil procedure. This approach is quite intrusive, and could be pursued only if proven necessary, especially if less intrusive measures, such a directive, would not be able to effectively achieve the objectives.

7.2.3. *Regulation and Directive*

187. A mix of instruments would allow the inclusion in a regulation of some of the measures of the preferred option for which there exists little or no political discretion for Member States when implementing (e.g. binding effect of decisions of NCAs and the protection of corporate statements), therefore benefiting from direct applicability of the legislative text of reference throughout all the Member States. At the same time, other measures that only provide for minimum requirements and allow for more political discretion for Member States when implementing (e.g. disclosure and limitation periods) would be included in a directive, thus allowing Member States to properly adapting them into their own legal systems.

188. The major pit-fall of this option is that it implies an increased heterogeneity of the legal framework for damages actions, which would oblige parties and judges in damages actions to rely on a set of multiple legal sources.

7.2.4. *Directive*

189. A directive appears to be the most appropriate legal instrument to effectively bring forward the current Antitrust Damages Initiative, to make the measures work effectively and to allow for a smooth adaptation into the legal systems of the Member States.

190. A directive would allow the Member States to achieve the objectives and implement the measures of the preferred option into their national substantive and procedural

law systems. This approach is less intrusive than any of the previous options, to the extent that Member States are left the choice of the most appropriate technical and regulatory tools to implement the measures that are contained in the preferred option. It allows greater flexibility to take account of specificities of national legal systems. A directive would furthermore be a flexible tool to introduce a minimum harmonisation in those areas of national law that are crucial for the functioning of damages actions, ensuring a common minimum standard all across the EU, but leaving room for further reaching measures to the individual Member States.

191. Finally, a directive would avoid regulatory intervention in all those cases where the domestic provisions in the Member States are already in line with the proposed measures: in other words a directive would allow a targeted implementation.

7.3. Proportionality and EU added value of the Preferred Option

192. The Commission considers that action at EU level along the lines of the preferred option would respect the principle of subsidiarity since there is a clear need for and added value in such action. The preferred option is also fully in line with the principle of proportionality, both as regards its general approach and the content of the individual measures envisaged.

7.3.1. Subsidiarity: European added value

193. The preferred option would have European added value for the following reasons:

- There is a significant risk that the lack of EU-wide regulation of the interaction between public and private enforcement would jeopardise effective public enforcement. The *Pfleiderer* ruling leaves a considerable discretionary power to the national courts, which could lead to important discrepancies between the Member States and even within Member States regarding the disclosure of evidence from the files of competition authorities. This causes appreciable legal uncertainty, not only for claimants of damages before national courts, but also for defendants and competition authorities and can potentially cause a disincentive for cartel participants to cooperate with the competition authorities in the context of their leniency programme, thereby weakening public cartel enforcement. As leniency applicants can and may have to apply for leniency in several jurisdictions (given the flexible case allocation system within the European Competition Network), any loophole in the protection of corporate statements across the EU would be highly detrimental to public enforcement of competition rules in Europe as a whole. Moreover, discrepancies between Member States might also have a negative impact on the exchange of information between competition authorities within the framework of the ECN. It is thus necessary to establish certain harmonised rules setting a common interaction between public and private enforcement applicable in all Member States: this can only be achieved at the EU level.
- Experience shows that in the absence of EU legislation, most Member States do not on their own initiative provide for an effective framework for compensation for victims of infringements of Articles 101 and 102 of the Treaty, as required by the Court in its *Courage* and *Manfredi* judgments. Since the publication of the Commission's Green and White Paper, only few Member States have enacted legislation aimed at facilitating antitrust damages cases. The actions at national level are also limited to specific issues and do not cover the whole range of measures envisaged by the current Antitrust Damages

Initiative. Despite the few steps taken individually by some Member States, there is thus still a lack of effective compensation of victims of infringements of the EU antitrust rules. Only further incentives at European level can create a legal framework that adequately ensures effective redress and guarantees the right of effective judicial protection as laid down in Article 47 of the Charter.

- There is currently marked inequality between Member States in the level of judicial protection of individual rights guaranteed by the Treaty, which may cause distortions of competition and hamper the proper functioning of the internal market. The result is an evident disparity in the very content of the entitlement to damages guaranteed by EU law. More specifically, a claim under the law of one Member State may lead to full recovery of the claimant's loss, while a claim for an identical infringement in another Member State may lead to a significantly lower award or even no award at all. This inequality between Member States increases if few Member States take measures in limited fields and other Member States do not take action, as it currently happens. The trans-national dimension of Articles 101 and 102 TFEU warrants measures at the EU level.

7.3.2. *Proportionality*

194. In terms of proportionality, the preferred option strikes a careful balance between maintaining the effectiveness of public enforcement of competition law, stimulating effective protection of victims' rights to compensation, the legitimate interests of potential defendants and third parties and important interests of Member States. The preferred option is the minimum necessary to effectively achieve its objectives: to guarantee effective protection of public enforcement of competition law across the EU, as well as access for victims of competition law infringements to truly effective remedies to obtain full compensation for the harm they suffered.
195. Those objectives are also achieved at the lowest possible costs. The costs imposed on citizens and businesses are proportionate to the stated objectives. A first step in this direction was already taken with the White Paper by excluding more radical measures (for instance multiple damages, opt-out class actions and wide discovery rules). The efforts to strike this balance were widely welcomed during the public consultations. The additional safeguards included in the preferred option further strengthen this balance by reducing potential costs (especially in terms of litigation) without jeopardising the effectiveness of the right to compensation. Finally, also the choice for a Directive as the instrument is in line with the principle that there should be as little intervention as possible, while attaining the objectives pursued.

8. MONITORING AND EVALUATION

196. Extensive research and consultation preceded the adoption of the Green Paper, the White Paper and the current Antitrust Damages Initiative. Three wide-ranging studies, four public consultations with a high number of responses and a series of additional consultations with stakeholders at Member State and EU levels, including public authorities, prominent scholars and practitioners from the private sector, greatly contributed to the analysis and evaluation of the relevant issues.
197. Following the adoption of the current Antitrust Damages Initiative, the Commission will continue monitoring the applicable legal framework for antitrust damages claims in Europe, as much as it will monitor the implementation of the Directive in the Member States once adopted and the effects it produces in terms of improved framework for damages actions for breach of the EU antitrust rules.
198. The monitoring exercise will be focussing primarily on the achievement of the objectives set out in Chapter 4. Where the preferred policy option targets existing inefficiencies and obstacles preventing full compensation of victims of antitrust infringements, the monitoring process will aim at identifying which of these obstacles have successfully been removed and to what extent. This analysis should be carried out through the monitoring of national legislation and practice in the domains of civil and procedural rules and through continuous contact with the stakeholders.
199. Apart from the applicable legal framework for antitrust damages actions, other monitoring indicators will include the extent to which victims of competition law infringements effectively obtain compensation and the optimisation of the interaction between private and public enforcement. The degree of effective compensation should encompass both successful damages actions before national courts and out-of court settlements to the extent that the information is made available.
200. The evaluation of the successful removal of obstacles to effective compensation on the basis of the increased instances in which infringers of the competition rules pay damages to injured parties can also be performed with reference to a number of proxies. These include: the increase in overall number of actions for damages brought before national courts and the increase in the number of Member States in which actions for damages are brought. The optimisation of the interaction between public and private enforcement will be evaluated through the number of judgments of national courts providing adequate protection to public enforcement instruments and the number of cases in which immunity recipients are not primarily targeted in actions for damages.
201. Dialogue with stakeholders will also be necessary to monitor the effects in terms of increased litigation costs, particularly as regards false positives, i.e. the situation in which undertakings that did not infringe competition law are obliged to pay damages. Although the safeguards in the preferred policy option are meant to avoid such false positives, we should be vigilant for any significant increase, since that would be an important indication of inefficient features of the devised system.
202. The monitoring and evaluation process will provide useful information for potential future modifications. However, before carrying out a meaningful ex-post evaluation exercise it will be necessary to wait until the measures put forward at the European level are fully implemented and functioning in the Member States. Therefore, the ex-

post evaluation will have to take place at least five years after the Directive has been adopted.

203. The implementation process in the Member States will also be monitored on the basis of certain provisions included in the legislative initiative. These provisions require the Member States to communicate to the Commission the text of the provisions that implement the proposal, as well as explanatory documents, such as correlation tables between those provisions and the proposal. When Member States adopt those provisions, they shall contain a reference to the proposal or be accompanied by such a reference on the occasion of their official publication. Furthermore, Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by the proposal.
204. Finally, implementation by Member States will be monitored through analysis of the relevant case-law of national courts. The parameters of the analysis should cover, in particular: the type of harm for which compensation has been awarded (actual loss and/or loss of profit); the type of victims reached by awards (businesses and consumers); the type of action brought (stand alone or follow-on); reasons for which damages are not awarded by the court. The analysis of the relevant case-law should be facilitated by Member States by increasing compliance with the legal obligation under Article 15(2) of Regulation 1/2003, under which they should transmit to the Commission any judgment applying Articles 101 and 102 TFEU.

ANNEX 1

Overview of the functioning of the Commission's leniency programme

1. OVERVIEW

Article 101 TFEU prohibits agreements between undertakings having as their object or effect the prevention, restriction or distortion of competition. Secret cartels are one of the most harmful infringements of this provision, as they have as their object the very distortions prohibited under Article 101, such as price-fixing, market-sharing and output-limiting agreements.

The Commission enforces EU competition rules, together with National Competition Authorities, under Council Regulation 1/2003. This legal instrument, further specified by Commission Regulation 773/2004, also grants the Commission investigative powers (such as the power to conduct inspections and request informations) and the authority to impose administrative fines and penalty payments on infringers. The fines imposed by the Commission on any infringing undertaking can amount to a maximum of 10 per cent of its turnover.

Despite its investigative powers, it may be very difficult for the Commission to detect harmful cartels in view of their secret nature. In order to encourage participants to cartels to cooperate with the Commission bring infringements to an end, the Commission launched its leniency programme in a 1996 Notice.¹⁰⁸ Drawing inspiration from other jurisdictions, and building on its discretionary fine-setting powers, the Commission committed not to impose fines, or to reduce them, on undertakings that cooperate by giving notice of the Cartel and providing evidence for its successful prosecution. Thanks to this incentive, several high-profile cartel cases have been detected and prosecuted by the Commission, which also imposed fines to the other cartel members amounting to several billion euros. The 1996 Notice has been replaced in 2002¹⁰⁹ and later reviewed with the adoption of the most recent Commission Leniency Notice in 2006 ('Leniency Notice').¹¹⁰

2. FUNCTIONING OF THE EU LENIENCY PROGRAMME

The EU leniency programme as set out in the 2006 Leniency Notice rewards undertakings that co-operate with the Commission by disclosing their participation in an alleged cartel, also providing information and evidence and fulfilling other requests that can be made by the Commission. The first undertaking coming forward may thus obtain a total immunity from the fine, provided that the Commission did not already have enough evidence to find an infringement as regards the alleged cartel, and that it is the first to provide contemporaneous incriminated evidence of the alleged cartel as well as a corporate statement containing information about it. When an undertaking does not qualify for total immunity (e.g. it is not the first to submit a request to the Commission, or it provides insufficient evidence), it could still obtain a reduction of the fine in view of its contribution to the investigation of the infringement.

¹⁰⁸ 18 July 1996, Commission Notice on the non-imposition or reduction of fines in cartel cases, [1996] OJ C 207, p. 4.

¹⁰⁹ 19 February 2002, Commission Notice on Immunity from fines and reduction of fines in cartel cases, [2002] OJ C 45 p. 3.

¹¹⁰ 8 December 2006, Commission Notice on Immunity from fines and reduction of fines in cartel cases, [2006] OJ C 297 p. 17.

The Notice also sets out the procedure for the participation to the EU leniency programme. The undertaking must approach the Commission's Directorate-General for Competition with a formal application for immunity. When an undertaking is willing to cooperate and needs time to collect the information and evidence required by the Leniency Notice, but does not want to lose its 'place in the queue' (i.e. it wants to avoid that other undertakings may issue a formal application and possibly obtain immunity in its place), it can request a marker. If the Commission grants the marker for a certain period of time, the formal application by the undertaking will be regarded as having been made at the time it first approached the Commission.

When submitting formal applications for immunity, undertakings must provide evidence and information on the cartel. Other than the evidence in its possession, the applicant must produce a corporate statement, i.e. a voluntary submission containing the information specifically required by the Notice. This information includes a detailed description of the alleged infringement, the identity of the participant undertakings and of individuals who have been involved in the cartel.

Corporate statements are sensitive documents not only because they contain confidential information, but also because they contain the acknowledgement of an undertaking's participation to serious infringements of the EU competition rules. The disclosure of corporate statements could thus expose their authors to liability. In order to protect the information in its possession, also from the perspective of its disclosure in other jurisdictions, and not to discourage undertakings from co-operating, the Notice envisages certain forms of protection. For instance, the corporate statement can be provided orally by the undertakings and recorded at the Commission's premises. Access to the corporate statements is also restricted by the Notice to the addressees of a Statement of Objections (i.e. alleged co-infringers), that cannot obtain copies of the statements, and can only use the information for the purposes of judicial and administrative proceedings for the application of the EU Competition Rules.

3. LENIENCY PROGRAMMES IN THE MEMBER STATES

Alongside the leniency programme provided for at EU level by the 2006 Notice, leniency programmes are currently operated at national level by the National Competition Authorities of all Member States except Malta. In order to approximate the existing provisions on leniency at EU and national level, to avoid excessive discrepancies among legislation that could discourage applicants, and to ensure coordination in the enforcement of the Treaty provisions, the European Competition Network ('ECN') has developed an 'ECN Leniency model programme',¹¹¹ which sets out a framework against which national programmes should progressively be aligned, which concerns both the conditions for the granting of immunity and the provisional requirements thereof.

¹¹¹ Available at http://ec.europa.eu/competition/ecn/mlp_revised_2012_en.pdf.

ANNEX 2

Summary of the *Pfleiderer* judgment of the Court of Justice

1. FACTS AND BACKGROUND

On 21 January 2008, the German Competition Authority (the *Bundeskartellamt*) imposed fines amounting to EUR 62 million on three European manufacturers of decor paper and on five individuals who were personally liable for agreements on prices and capacity closure. The decisions of the German Competition Authority became final. *Pfleiderer* is a purchaser of decor paper and thus allegedly suffered harm as a result of the cartel. Following the *Bundeskartellamt*'s decision, *Pfleiderer* submitted an application to the competition authority seeking full access to the file, with a view to preparing civil actions for damages. This request expressly included all document relating to the leniency application which had been voluntarily submitted and the evidence seized.

The competition authority rejected *Pfleiderer*'s request and restricted access to the file to a version from which confidential business information, internal documents and leniency documents had been removed and refused access to the evidence which had been seized by the Authority. *Pfleiderer* brought an action before the District Court (*Amtsgericht*) in Bonn challenging this partial refusal.

The Bonn District Court ordered access both to the leniency documents in the file and to the incriminating material and evidence collected. The enforcement of this decision and the proceedings were, however, stayed by the District Court, as it referred a question to the European Court of Justice (the Court) for preliminary ruling.

2. THE PRELIMINARY QUESTION

The preliminary question referred by the Bonn District Court was whether EU competition law has to be interpreted as meaning that victims of cartels may not, for the purpose of bringing an action for damages, be given access to leniency documents from the file of a national competition authority, within the framework of public enforcement proceedings.

3. THE JUDGMENT OF THE COURT

The Court held that neither the provisions of the Treaty on competition nor Regulation 1/2003 lay down common rules on leniency or on the right of access to leniency documents. As regards the leniency notice and the ECN model leniency programme, the Court held that these document are not binding on Member States. The Court then established that it is for the Member States to lay down and apply national rules on the right of access to leniency documents by victims of a cartel. In exercising this competence, Member States have to act in accordance with EU law; in particular they may not render the implementation of EU law impossible or excessively difficult or jeopardize the effective application of Articles 101 and 102 TFEU.

Leniency programmes were recognised as useful tools to uncover and bring to an end infringements of the competition rules, thus serving the objective of effective application of Articles 101 and 102 TFEU. On the question whether the effectiveness of those programmes could be compromised if leniency documents were disclosed to persons seeking to bring an actions for damages, the Court held that the view can reasonably be taken that a cartel participant would be deterred from cooperation with the competition authorities in the context of the leniency programme if these leniency documents were disclosed.

Nevertheless, the Court recalled that it is settled case-law that any individual has the right to claim damages for loss caused to him by violations of the EU competition rules. This right constitutes a significant contribution to the maintenance of effective competition in the EU. As such, the applicable national rules for disclosure cannot be less favourable than those governing similar domestic claims and cannot operate in such a way as to make it practically impossible or excessively difficult to obtain compensation.

National courts thus have to weigh the diverging interests in favour of disclosure of the information and in favour of the protection of that information provided voluntarily by the leniency applicant on a case-by-case basis, according to national law and taking into account all the relevant factors in the case.

ANNEX 3

Overview of the most important measures for antitrust damages actions included in the legislative proposals in Austria, Germany and the United Kingdom

1. AUSTRIA

In early 2012, the Austrian government held a public consultation on proposed changes to the Austrian competition law (Kartellgesetz und Wettbewerbsgesetz). The proposal contains among others provisions aiming to facilitate both 'follow-on' and 'stand-alone' antitrust damages actions by:

- (a) requiring the cartel court to publish its decisions (which is so far not the case and one of the major obstacles for bringing follow-on actions)
- (b) introducing antitrust specific provisions for damages actions that foresee, *inter alia*:
 - a binding effect of Commission and NCAs decisions on civil courts as regards the finding of an antitrust infringement;
 - the possibility for civil courts to suspend proceedings pending proceedings before the Commission or NCAs;
 - the suspension of the limitation period for damages actions until six months after a related public enforcement decision has become final; and
 - the payment of interest from the time the harm occurred (to exclude that interest may be due only from a later moment, e.g., when the damages action was brought).
- (c) allowing parties to seek in stand-alone cases a declaratory judgment by the cartel court, finding a competition law infringement, in view of bringing an antitrust damages action before the competent civil court.

2. GERMANY

In March 2012, the German government put forward a legislative proposal for an 8th Amendment to the GWB (the German act against restraints on Competition). This Amendment foresees a specific right of action for consumer associations in the field of private enforcement. This right of action, which builds on an existing right for business associations, has the following features:

- (a) It is specific to competition law (EU and national law is covered). While it adopts an approach which has previously been used in other areas (notably in the law of unfair competition), the proposed rule is limited to an infringement of antitrust rules.
- (b) It empowers consumer associations to bring the action. The legislative proposal makes explicit reference in this respect to the Consumer injunctions Directive (2009/22/EC) as well as to a similar national law on injunctions in consumer law matters. The GWB already now empowers business associations in a similar way and the legislative proposal contains in fact a clarification as to the scope of the empowerment of business associations.

- (c) The aim of the action is the skimming-off of illicit profits. The defendant can raise as a defence that he already has paid compensation to private parties or that the illicit profit which he obtained through the infringement has already been skimmed off through an action of the NCA (who has the power to make such an order).
- (d) The proceeds of the action are to be paid to the budget of the federal government. The consumer and/or business association can nevertheless obtain reimbursement of their costs.
- (e) In its explanatory memorandum for the legislative proposal, the federal government explicitly mentioned the ongoing debate on collective redress at EU level as a reason for making such proposal.

3. UNITED KINGDOM

On 24 April 2012, the UK Government (Department for Business, Innovation and Skills) launched a public consultation on 'Private Actions in Competition Law: A Consultation on Options for Reform'. The consultation document, as well as the January 2013 Government's response, put forward the UK Government's views on a number of issues relating to the private enforcement of competition law, in particular:

- (a) Competition-specific proposals on collective redress

The UK Government believes there is a robust case for collective actions in the competition field, and does not favour generic 'horizontal' collective redress. This reiterates the position expressed by the UK Government in their reply to the Commission's public consultation on collective redress last year.

The UK Government thus decided to introduce a limited opt-out collective actions regime for competition law infringements, particularly due to the dismal record of the pure opt-in model currently available to consumers in the UK. The Government also envisages the introduction of a new opt-out settlement regime for competition law in the CAT, similar to the model of the Netherlands, and to require that any opt-out settlement must be judicially approved.

- (b) Complementarity of public and private enforcement

While the UK Government is fully committed to maintaining the public enforcement by competition authorities at the heart of the enforcement regime, it believes that private-sector led challenges to anticompetitive behaviour should be encouraged to complement public enforcement. As regards the interplay of public and private enforcement, the UK Government puts emphasis on the need to protect the effectiveness of the leniency programme. To this end, it considers protecting certain categories of leniency documents, admitting the joint and several liability of immunity recipients. In its response to the public consultation, while stressing the need to preserve incentives for potential leniency applicants to cooperate with antitrust investigations, the Government has announced its intention not to propose action at national level because it expects the Commission to take an initiative on this issue. Absent such an initiative, or in case of a significant delay, the Government will consider specific proposals.

ANNEX 4

Detailed Summary of the Impact Assessment report for the White Paper on actions for damages for breach of the EU antitrust rules (IAWP)¹¹²

1. INTRODUCTION

In 2005, the Commission published a Green Paper on actions for damages for breach of the EU antitrust rules, by which it consulted stakeholders on a number of possible measures to remove existing obstacles to private enforcement of Articles 101 and 102 TFEU. These options concerned procedural and substantive requirements governing actions for damages. Following the public consultation on the Green Paper, the Commission services impact-assessed these options in order to select the most cost-efficient bundle of suggestions to overcome current obstacles to private enforcement, as put forward in the 2008 White Paper on actions for damages for breach of the EU antitrust rules.

The present Impact Assessment Report has not reviewed options that had already been discarded because of their excessive costs, insufficient benefits or unsatisfactory impact on the attainment of the objectives. The conclusions drawn in the IAWP are shortly summarised below, with the exception of the baseline option (zero action at EU level) and the option on non-regulatory measures, which have been reassessed during the current exercise.

2. THE IAWP'S POLICY OPTION 1

The first policy option assessed in the IAWP concerned legislative measures maximising the facilitation of claims and the incentives for victims. This option was meant not only to remove all the identified existing obstacles to private enforcement, but was also aimed at providing significant incentives for potential claimants to enforce their rights, as experimented in other jurisdictions. Thus, the option envisaged fully-fledged opt-out class actions, by which some victims were allowed to claim damages on behalf of all injured parties except those that expressly opted not to be represented. As a further incentive to claimants, the option suggested that they should never be liable for the defendant's costs even if they lost the case (unilateral fee-shifting), except for frivolous or vexatious claims. As regards access to evidence, the option allowed for broad disclosure, by which the claimant could request relevant documents with a low threshold to obtain an order from the judge, i.e. only having to demonstrate a plausible case. The passing-on defence was not accepted under this option, allowing direct purchasers to always claim damages, but claims by indirect purchasers were also allowed as they are part of the *acquis*. The liability of the infringers did not require that they acted at fault. Finally, limitation periods for the claim were set at 20 years, and the decisions of NCAs were binding on civil courts.

The assessment of this policy option resulted in undoubtedly high benefits in terms of full compensation and access to justice for victims, and significant benefits in terms of deterrence of anticompetitive conduct. However, due to the potential for abuses and the lack of significant safeguards, the option was not deemed satisfactory in view of its sub-optimal use of the judicial system, but most notably for its high administrative and litigation costs, which were deemed to be excessive. The option also entailed very high implementation costs because measures such as full-fledged opt-out by any group of victim, the unilateral fee-

¹¹² 2 April 2008, Commission Staff Working Document – Impact Assessment Report accompanying the White Paper on Damages actions for breach of the EC antitrust rules, SEC (2008) 405.

shifting and the disclosure of evidence not tied to fact pleading are far from European legal traditions, thus requiring significant changes to the law of all Member States.

3. THE IAWP'S POLICY OPTION 2

The IAWP's Policy Option 2 was the basis upon which the White Paper was drafted, because it was identified as the bundle which could foster the attainment of objectives at the lowest possible costs. Policy Option 2 allowed 2 complementary forms of collective redress, i.e. an opt-in collective actions, and a representative actions that could be brought on behalf of the victims by qualified representative bodies such as consumer associations. The disclosure of evidence was based on an initial exchange of lists in which the parties indicated the relevant evidence, only after the claimant had presented reasonably available facts and evidence in support of its allegations. Incentives for the claimant were also provided in the softer form of rebuttable presumptions on fault and on the passing-on in case of claims by indirect purchasers. The decisions of national competition authorities were meant to be binding on civil courts throughout the EU. Limitation periods were set at five years from the date on which the claimant should reasonably have been aware of the harm, with a new limitation period of two years in case of public proceedings on the infringement. A peculiarity of this policy option was that it provided recovery of single damages (full compensation) except in case of cartels, when double damages would be allowed.

As anticipated, the assessment of this option showed a more balanced cost/benefit ratio. Litigation and administrative costs were significantly lower than in option 1 thanks to the provision of safeguards on collective redress, through the presumption of pass-on in case of claims by indirect purchasers while allowing the passing on defence in case of claims by direct purchasers, and by maintaining a 'loser pays' cost rule, with a discretionary power for the judge to shift fees on the defendant. Error costs and implementation costs of the option, however, remained high due to double damages in cartel cases, which are not consistent with the compensatory nature of tort litigation in Europe.

4. THE IAWP'S POLICY OPTION 3

The third policy option targeted the adoption of legislative measures of a more limited scope by comparison with Option 2. In particular, Option 3 envisaged full single damages rather than double damages in cartel cases; disclosure of specified categories of evidence based on fact-pleading. Different from Option 2, it did not establish a passing-on presumption in claims by indirect purchasers and it limited the binding effect of decisions of National Competition authorities to the domestic civil courts only. Limitation periods were similarly envisaged as in Option 2, except for the elimination of a new 2-year period in case of public enforcement. The collective redress measures maintained the representative actions, but did not retain the complementarity with opt-in actions.

On balance, the costs entailed by Option 3 were still lower, due to the further elimination of incentives for claimants, even in the form of rebuttable presumptions (e.g. as regards the passing-on presumption for indirect purchasers). However, the same reasons led to a lower estimation of the benefits of the option, which would not significantly foster a better legal framework for all victims of competition law infringements and an insufficient level of access to justice. The efficient use of the judicial system was also not enhanced because of the limited scope of the binding effect of decisions adopted by national competition authorities.

However, some elements of Option 3 were estimated as worth retaining to correct the pitfalls of Option 2 and further limit its costs (e.g. evidence disclosure based on fact-pleading; no

double damages). Only with regard to costs the assessment led to the identification of a preferred option more similar to one of the other scenarios (i.e. non-regulatory intervention).

ANNEX 5

Table 12: Overview of the Policy Options which were analysed in the 2008 IAWP

	Option 1:	Option 2:	Option 3:	Option 4:	Option 5:
Damages	Double, all types of damage, including interest	Double for cartels; for rest full single (i.e. all types of damage, including interest)	Full single	No legislative measures, only identification and recommendation of good practices in line with Option 3	No EU action at all
Access to evidence	Broad disclosure, low threshold	Initial provision of lists + broad disclosure, both based on fact-pleading threshold	Disclosure of specified categories, based on fact-pleading and proportionality		
Indirect purchaser	Standing allowed				
Passing-on	Defence excluded	Defence allowed; facilitation of proof of pass-on in favour of indirect purchaser	Defence allowed		
Effect of NCA decisions	Binding across EU		Binding in own Member State		
Fault (once infringement established)	Strict liability	Rebuttable presumption; exoneration for excusable errors	Strong probative value of finding of infringement		
Collective redress	Opt-out class actions	Opt-in collective + representative actions	Representative actions		
Limitation period	20 years as of damage or 5 years as of reasonable knowledge	Minimum 5 years as of reasonable knowledge + restart + two years	Minimum 5 years as of reasonable knowledge + suspension		
Cost rule	One-way shifting	Loser pays, but judge may shift all costs	Loser pays, but judge may shift part of costs		
Interaction with leniency	Protection of corporate statements from disclosure; limitation of liability on the part of immunity recipient				

ANNEX 6

Table 13: Overview of the Preferred Option in the 2008 IAWP

	Preferred Option	Main objective(s)	Further description
Damages	Full single	Full compensation, legal certainty, greater awareness of the rules.	Entitlement to damages for actual loss, loss of profit plus interest.
Access to evidence	Disclosure of specified categories, based on fact-pleading and proportionality	Access to justice, appropriate and efficient use of the judicial system.	Upon request by one of the parties, the national court can order the disclosure of evidence held by the other party or by a third party. Based on fact-pleading, under the control by the judge on proportionality and necessity.
Indirect purchaser	Standing allowed	Full compensation, access to justice, legal certainty	Any individual can claim compensation for harm suffered, hence standing for both direct and indirect purchasers.
Passing-on	Defence allowed facilitation of proof of passing-on in favour of indirect purchaser	Full compensation, legal certainty, access to justice.	If the direct purchaser has passed on the illegal overcharge resulting from an infringement to his own customers, the infringer can invoke it as a defence against a damages action by the direct purchaser. Conversely, when indirect purchasers claim compensation from the infringer they should benefit from a rebuttable presumption that the illegal overcharge has been passed on to them in its entirety.
Effect of NCA decisions	Binding across EU	Greater awareness of the rules, increased enforcement and improved compliance, efficient use of the judicial system, increased legal certainty	National courts cannot take a decision running counter to a final finding of an infringement by an EU national competition authority.
Fault (once infringement established)	Rebuttable presumption exonerating for excusable errors	Full compensation, access to justice	In those Member States that provide for a fault requirement in damages cases, once an infringement of Article 101 or 102 TFEU has been found, fault is presumed unless the infringer can show that the infringement was the consequence of an excusable error.
Collective redress	Opt-in collective + representative actions	Full compensation, access to justice, appropriate and efficient use of the judicial system	Complementary collective redress mechanisms: collective actions by victims on an opt-in basis or representative actions brought by qualified entities designated in advance or authorised on a case by case basis by a Member State.
Limitation period	Minimum of 5 years as of reasonable knowledge + restart + 2 years	Access to justice, legal certainty	Limitation periods cannot start to run before the infringement ceases or is brought to an end, nor before the victim can reasonably be expected to have knowledge of the infringement and the harm it caused. If a competition authority finds an infringement of Article 101 or 102 TFEU, possibility to bring an action within two years of the final decision.
Cost rule	No legislative measure, only identification and recommendation of good	Full compensation, access to justice, efficient use of the judicial system	Member States should reflect upon their cost rules and consider procedural rules fostering settlements as well as design means to avoid that

	practices in line with Option 3: loser pays, but judge may shift all or part of the costs		the loser-pays rule discourages victims from bringing a meritorious action.
Interaction with leniency	Protection of corporate statements from disclosure; limitation of liability on the part of immunity recipient	Greater awareness of the rules, increased enforcement and improved compliance, to the benefit of Europe's competitiveness.	Corporate statements submitted by leniency applicants should not be disclosed in a damages action; further reflection on the possibility to limit liability of the immunity recipient only to its own direct and indirect purchasers.

ANNEX 7

Glossary of terms

Action for damages

Action by which an injured party or someone acting on behalf of one or more injured parties brings a claim for damages before a national court.

Antitrust

Field of competition law and policy. In the EU context, ‘antitrust’ refers both to the rules governing anti-competitive agreements and practices (cartels, other cooperation agreements, distribution agreements, etc.) based on Article 101 TFEU and to the rules prohibiting abuses of (existing) dominant positions based on Article 102 TFEU.

Cartel

Agreement and/or concerted practice between two or more competitors aimed at coordinating their competitive behaviour on the market and/or influencing the relevant parameters of competition, through practices such as the fixing or coordination of purchase or selling prices or other trading conditions, the allocation of production or sales quotas, the sharing of markets and customers including bid-rigging, restrictions of imports or exports and/or anti-competitive actions against other competitors.

Collective redress

A legal mechanism whereby claims (such as claims for damages) of a group of persons are brought collectively before a national court or tribunal (private enforcement of EU antitrust rules). Collective redress can take several forms, such as representative actions, group actions, etc. Representative actions are brought by a natural or legal person (e.g. consumer organisations, business associations or ombudsmen) on behalf of a group of persons who claim to be affected by an antitrust law infringement. Group actions are actions in which several victims combine their individual claims into one single legal action.

Consensual dispute resolution

Out-of-court resolution of a dispute between private parties (in this case the victims of a competition law infringers and the persons having infringed competition law). Consensual dispute resolution covers any form of out-of-court resolutions of disputes, including settlement, mediation, arbitration and other forms of out-of-court resolution of disputes.

Direct purchaser

Natural or legal person having purchased the goods or services which were subject of an infringement of competition law directly from one or more of the undertakings having infringed competition law.

Disclosure of evidence

Process by which the national court can order a party to the proceedings or a third party to submit to it and to the other party or parties to the proceedings pieces of evidence the former party has in its possession. The order can be issued on request of a party or *ex officio*.

European Competition Network (ECN)

The competition authorities of the Member States (NCAs) and the Commission form a network of public authorities: they act in the public interest and cooperate closely to protect competition. This network is a forum for discussion and cooperation in the application and

enforcement of EU competition policy. It provides a framework for European competition authorities to cooperate in cases where Articles 101 and 102 TFEU are applied, and for flexible rules on the allocation of cases between the authorities. It is the basis for creating and maintaining a common competition culture in Europe. The European Competition Network was created on the basis of Regulation No 1/2003.

ECN Model Leniency Programme

A document endorsed by the ECN members. It aligns the key elements of leniency policies within the ECN to increase the effectiveness of leniency programmes in the EU and to simplify the burden for applicants and authorities in case of multiple filings. The Model Programme sets out the essential procedural and substantive elements that ECN members believe every leniency programme should contain. The ECN authorities made a political commitment to use their best efforts to align their leniency programmes with the ECN Model Leniency Programme or to introduce aligned programmes. However, this document is not a programme as such under which applicants could apply for leniency and it does not raise legitimate expectations.

Fine

A monetary penalty imposed by a Commission or NCA decision on an undertaking, for a violation of EU competition rules.

Immunity recipient

An undertaking receiving immunity from any fine to be imposed in application of a leniency programme.

Indirect purchaser

Natural or legal person which did not purchase the goods or services which were subject of a competition law infringement directly from one or more of the undertakings having infringed competition law, but who purchased those goods from the direct customer. An indirect purchaser is a (direct or indirect) customer of the direct purchaser who is further down the distribution or supply chain.

(Leniency) corporate statement

A voluntary presentation by, or on behalf of, an undertaking to a competition authority, describing the undertaking's knowledge of a secret cartel and its role therein, which was drawn up specifically for submission to the authority with a view to obtaining immunity or a reduction of fines under a leniency programme concerning the application of Article 101 of the Treaty or the corresponding provision under national law.

Leniency programme (See also Annex 1)

A programme on the basis of which a participant to a secret cartel, independently from the other undertakings involved in the cartel, co-operates with the investigation of the competition authority, by providing voluntary presentations of its knowledge of the cartel and its role therein, in return for which the participant receives immunity from any fine to be imposed for the cartel or a reduction of such fine. The Commission's current leniency programme is set out in the 2006 notice on immunity from fines and reduction of fines in cartel cases.

Limitation period

The period during which an action can be brought before a national court. In case of this impact assessment, limitation periods concern the period during which injured parties of an infringement of competition law can bring an action for damages to obtain full compensation for the harm they suffered as a result of such infringement.

National Competition Authority (NCA)

National competition authorities (NCAs) are the authorities designated by the Member States pursuant to Article 35 of Regulation 1/2003 as responsible for the application of Article 101 and 102 TFEU in their territories. EU law obliges Member States to ensure that NCAs are set up and equipped in such a way that the provisions of Regulation No 1/2003 are effectively complied with. Together with the Commission, the competition authorities from Member States form the European Competition Network (ECN).

National court

A court or tribunal of a Member State that is authorised to seek a preliminary ruling from the Court of Justice of the European Union pursuant to Article 267 of the Treaty.

Overcharge

Any positive difference between the price actually paid and the price that would have prevailed in the absence of an infringement of competition law.

Passing-on defence

A defence against a direct purchaser's damages claim, relying on evidence showing that the overcharge resulting from a cartel was passed on – fully or partially - by the direct purchaser to its own customers further down the distribution chain (the indirect purchasers).

Quantification of harm

The process by which the amount of harm suffered by the injured party is determined by the national court, and normally expressed in monetary terms.

Rebuttable presumption

A means of evidence by which the existence or non-existence of a fact is deemed to be proven, unless evidence to the contrary is brought.

Regulation No 1/2003

Council Regulation setting out the main rules for the enforcement of EU antitrust rules (Articles 101 and 102 TFEU). This Regulation, which took effect on 1 May 2004, has modernised the procedural rules governing how EU antitrust rules are enforced. It put an end to the notification system under which companies notified agreements to the Commission for approval under the antitrust rules. Regulation 1/2003 entrusts, in parallel with the Commission, competition authorities of the Member States (NCAs) and national courts with the role of applying Article 101 and 102 TFEU. This means there is wide-spread enforcement of the same set of rules to prosecute cartels and other anti-competitive practices throughout Europe. Regulation 1/2003 also forms the basis for the European Competition Network (ECN) in the framework of which the Commission and NCAs coordinate the application of EU antitrust rules. Regulation 1/2003 replaced Regulation No 17/1962.

Settlement procedure

The settlement procedure is a simplified procedure in cartel investigations, which results in a faster handling of the case and in a reduction of the fines. In order to participate in this procedure, the undertakings involved have to acknowledge their participation in the cartel.

Settlement submission

A voluntary presentation by, or on behalf of, an undertaking to a competition authority describing the undertaking's acknowledgement of its participation in an infringement of Article 101 of the Treaty or a corresponding provision under national law and its liability for

this infringement, which was drawn up specifically as a formal request for the authority to apply a simplified procedure and a reduction of the fine.

ANNEX 8

Overview of the results of the Public Consultation on the White Paper on Antitrust Damages Actions (2008)

On 2 April 2008, the Commission published for public consultation a White Paper on damages actions for breach of the EU antitrust rules. This overview summarises (I) the main trends in the submissions and (II) the specific suggestions received on the individual sections of the White Paper.

1. MAIN TRENDS AMONG RESPONDENTS TO THE WHITE PAPER

The White Paper triggered a large number of submissions (more than 170) by governments of several Member States, national parliaments, national competition authorities, judges, businesses and business associations, law firms, consumer associations, academics and individuals. In terms of geographical spread, comments were issued by public authorities or stakeholders from almost all Member States. All the submissions are published on the website of DG Competition.¹¹³

Of all the respondents, very few questioned the underpinning idea of the White Paper, namely that in most cases victims of competition law infringements in practice do not obtain the compensation they are entitled to under the Treaty. The majority of respondents agreed that something needs to be done to address this issue, while divergent opinions emerged as to the specific measures to be adopted. There was unanimous support for the approach of the White Paper to pursue, as primary policy objectives, the effective compensation of victims (not punishment of infringers) and the preservation of strong public enforcement.

2. SPECIFIC SUGGESTIONS ON INDIVIDUAL SECTIONS OF THE WHITE PAPER

(a) Standing: indirect purchasers and collective redress

Standing for indirect purchasers, already recognized in the case-law of the Court of Justice, did not give rise to many comments. As regards collective redress, a majority of respondents from the business community observed that the mechanisms proposed in the White Paper could increase litigation costs for business and that safeguards are necessary to avoid abuses. Consumer associations emphasised the need for collective redress mechanisms, possibly opt-out representative actions, in order to provide effective compensation also for consumers, who typically suffer low-value and scattered damage. There was also a wide support for a consistent approach to collective redress across different EU policy areas.

(b) Access to evidence

Many respondents from the business community warned that rules on *inter partes* disclosure should equally work for claimants and defendants in order not to unbalance their procedural position, and contended that safeguards should be put in place to avoid 'fishing expeditions' and to protect confidential information. On the latter issue, some suggested protective mechanisms such as confidentiality rings or confidentiality orders.

Other respondents (e.g. consumer associations and several law firms) argued that the conditions for disclosure suggested in the White Paper are too strict, as they would still make it difficult for a claimant to bring a case, especially when he cannot rely on a prior finding of

¹¹³ http://ec.europa.eu/comm/competition/antitrust/actionsdamages/white_paper_comments.html.

an infringement by a national competition authority. Victims often are not in a position to know which precise categories of documents among those held by the infringer are needed to help proving the case.

(c) Binding effect of final NCA decisions

Many welcomed that the measure would foster consistent application of competition rules and legal certainty, and avoid unnecessary costs and delays due to re-litigation of the same issue. Other commentators criticized that a rebuttable presumption would be sufficient and more in line with the role of the judge. Some stakeholders recommended that the rights of defence should be fully taken into account when considering this measure, especially in view of possible different standards of proof for civil courts and competition authorities.

(d) Fault requirement

Some stakeholders, especially among business respondents, argued that the fault requirement should not be specifically regulated in the antitrust sector, but should follow the applicable general provisions of civil law. It was also argued that the proposed test of 'excusable error' could amount to a strict liability test, in particular in situations where self-assessment is not easy for firms. Consumers, some Member States and legal practitioners, on the other hand, welcomed the Commission's proposal. Some of them suggested that an infringer should never be allowed to escape liability on grounds of fault (referring to ECJ case-law). Many respondents called for a better definition of the excusable error test.

(e) Damages

All respondents welcomed the choice of compensation and single damages as the guiding principle of the White Paper. Some within the business community asked the Commission to clearly rule out punitive damages also under national law. Others argued that Member States should be left free to introduce them in their national legal order.

The vast majority of respondents welcomed the Commission's commitment to produce guidance on the quantification of damages, as long as it is not binding and leaves judges to take account of the particularities of individual cases. Regarding quantification methods, for instance calculation of damages in the aggregate or based on the illicit gain was opposed by some companies but held necessary by consumer associations for the effective functioning of representative actions.

(f) Passing-on of overcharges

The passing-on of overcharges as a defence against damages claims was broadly welcomed, especially by business respondents.

The White Paper proposal that indirect purchasers should benefit from a rebuttable presumption that the illegal overcharge has been passed on to them in its entirety has been contested in submissions by companies and business associations. It has been argued that such presumption would expose defendants to the risk of double or multiple compensation. Others stressed that, if the passing-on defence is allowed, a statutory facilitation of the proof for the victims is necessary, while others stressed that, absent a facilitation, the infringer would on one side benefit from the defence and then not compensate anyone.

To avoid multiple compensation, some suggested consolidating cases so that the arguments of direct and indirect purchasers could be heard in the same proceedings. Others proposed that the first claimant (either direct or indirect purchaser) is awarded the entire compensation and that the second claimant should sue the first to obtain his share.

(g) Limitation periods

Several respondents welcomed the White Paper's suggestions as they would give claimants the necessary time to file a lawsuit after an NCA/Commission decision. Some preferred a suspension of the limitation period until the NCA/Commission decision is taken over a new limitation period starting then. Businesses and some law-firms argued that the provision of a new limitation period in follow-on cases may not be in line with needs of legal certainty. Others suggested introducing, at European level, an objective limitation period running from the occurrence of the damage to ensure that at some stage claims would be time-barred in the interest of legal certainty.

(h) Costs of damages actions

Potential claimants agreed that Member States should assess their cost regimes in order to address the obstacles often faced by victims. They recalled that the cost risk of antitrust damages actions is often the main disincentive preventing victims from seeking redress. A few stakeholders also made the case for contingency fees, insurance schemes, purchase of claims by third parties and public funding.

Nevertheless, most respondents from industry and law practice stressed their opposition to any revision of the loser-pays principle, seeing this general rule as a useful safeguard against abuses. Some argued for a derogation from the general rule in special circumstances based on the judge's discretion. Upfront cost orders were, however, widely rejected as an unjust burden on companies.

There was broad support for early resolution of cases, although consumers insist that fair settlements can only be reached if an effective framework for antitrust damages actions is in place.

(i) Interaction between leniency programmes and actions for damages

The protection of corporate statements from disclosure was generally deemed important for the success of leniency programmes. Some suggested extending this protection to all documents submitted by leniency applicants. Other submissions, instead, suggested that private and public enforcement are two separate issues and that there are no grounds to protect leniency submissions from disclosure.

A similar reasoning led several respondents to reject a limitation of liability for the immunity recipient, if it is formulated as a limitation of the right to compensation. Some submissions from businesses welcomed this proposal as an incentive to apply for leniency.