CDC Cartel Damage Claims (‘CDC’) welcomes the opportunity to comment on the initiative of the European Commission (‘Commission’) to amend Regulation 773/2004 and the Notices on Access to File, Leniency, Settlements and Cooperation with national courts (‘Modification Package’) in order to ensure their consistency with the recently adopted Directive on antitrust damages actions (‘Directive’). We believe the consultation is an opportunity for the Commission to harmonize the scope of the Modification Package with other EU law instruments and the EU courts’ recent case-law.

1. **Publication of meaningful decisions in accordance with Art. 30 of Regulation 1/2003 will avoid unnecessary disputes and litigation in relation to access to information**

As evident from Recital 3 of the proposed amendment of Regulation 773/2004, the main concern of the Commission in the context of the Modification Package is the protection of its leniency programme. One of the fundamental changes compared to the status quo is therefore the codification of the Commission’s leniency programme in Regulation 773/2004. According to the Commission, that programme helps to uncover secret cartels which are ‘often difficult to detect and investigate’ and provides ‘a basis for injured parties to claim damages for the harm suffered from those infringements’. While these statements reflect the Commission’s concern about the effective balance between public and private enforcement of competition law, it is exactly the Commission which is already best placed to avoid such conflicts. In *Akzo Nobel NV* the General Court (‘GC’) clarified that the publication of meaningful decisions on infringements of Art. 101 and 102 TFEU under Art. 30 of Regulation 1/2003 allows the Commission to achieve the balance of protecting its leniency programme while at the same time guaranteeing fair and open access to factual information on the basis of which victims can pursue their compensation claims. Contrastingly, the lack of compulsory information on the infringement either results in unsubstantiated requests for potentially relevant information under Regulation 1049/2001 or dissuades claimants from initiating costly procedures before the national courts in order to obtain necessary data. Against this, and in line with Art. 5(8) of the Directive as well as the recent EU courts’ case-law, the Commission should specify in Art. 15(3) of Regulation 773/2004 that this Regulation applies

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5. Commission Notice on the cooperation between the Commission and the courts of the EU Member States in the application of Articles 81 and 82 EC, OJ C 101, 27.4.2004, pp. 54-64.
9. The same reasoning is applicable to the public settlement programme.
11. Indeed, Art 5(2) of the Directive requires a reasoned justification containing facts and evidence sufficient to support the plausibility of a claim for damages.
12. Recital 26 of the Directive provides that any limitation under its provisions on the disclosure of evidence must not prevent competition authorities from publishing their decisions in accordance with applicable Union or national rules.
without prejudice to the Commission’s obligation to disclose to the general public the detailed description of any infringement of competition law.\(^\text{13}\)

2. **Protection of leniency applicants does not justify shielding from civil liability**

Moreover, Recital 4 of the proposed amendment of Regulation 773/2004 provides that in cartel cases ‘undertakings may be dissuaded from cooperating with the Commission if doing so might have negative consequences for their position in civil proceedings’. However, this may not go as far that in practice leniency applicants are shielded from the civil liability for their infringements. In that regard, it has to be taken into account that Art. 11(4) of the Directive provides that successful immunity applicants are not jointly and severally liable. This civil liability reduction results in a significant additional incentive on top of the reduction of the administrative fine. In line with paragraphs 80 and 81 of *Akzo Nobel NV* the Commission should therefore specify in the context of Recital 4 of the proposed amendment of Regulation 773/2004 that the disclosure of information revealing the details of the undertaking’s participation in the infringement does not expose it to an increased risk of having to bear the civil law consequences of its participation in that infringement. Such specification would be fully consistent with paragraph 39 of the Commission’s 2006 Leniency Notice\(^\text{14}\) and Art. 5(5) of the Directive\(^\text{15}\). It will also strengthen the current policy of the Commission according to which ‘evidence pertaining to the alleged infringement cannot be accepted as confidential’.\(^\text{16}\) Concordantly, in *Akzo Nobel NV* the GC confirmed that the disclosure of the way in which the cartel operated is crucial in order to allow private claimants to establish any infringers’ civil liability, the harm suffered and the causal link between the infringement and the alleged harm. According to the GC such information cannot be regarded as being confidential in nature. It must therefore be disclosed to interested parties within a reasonable time.\(^\text{17}\)

3. **Clarifications in Regulation 773/2004 regarding the use of evidence obtained through access to the Commission file**

The Modification Package aims to align Regulation 773/2004 with the Directive. However, some proposals in the wording of the Modification Package go beyond the wording of the Directive. In order to avoid conflicts and misinterpretations with the Directive as well as the binding case-law of EU Courts, the limits on and the penalties for ‘the use of evidence obtained solely through access to the file of a competition authority’ contained in Art. 7 and 8 of the Directive and referred to in the proposals for the amendment of Regulation 773/2004 (Art. 16a), the Notice on access to file (point 48), the Notice on Leniency (point 34) and the

\(^\text{13}\) Cf., e.g., the judgment of the Austrian Supreme Court (‘ASC’) of 27 January 2014 in Case 16 Ok 14/13 on the scope of the Cartel Court’s obligation to publish meaningful decisions necessary to allow interested parties to evaluate possible damages claims. The ASC highlighted also the importance of transparency as the main goal of Section 37 of the Austrian Cartel Act.

\(^\text{14}\) ‘the fact that immunity or reduction in respect of fines is granted cannot protect an undertaking from the civil law consequences of its participation in an infringement of Article 81 EC’.

\(^\text{15}\) ‘the interest of undertakings to avoid actions for damages following an infringement of competition law shall not constitute an interest that warrants protection’.


\(^\text{17}\) The proposal for an amendment of Regulation 773/2004 refers to the Charter of fundamental rights of the European Union which confirms the Commission’s, as well as the national courts’, obligation to take due account of the fundamental rights of the victims, enshrined namely in Art. 17 (right of property) and Art. 47 (access to justice) of the Charter.
Notice on cooperation between the Commission and the national courts (points 26a and 26b) should be clarified:

- Firstly, the Commission has to specify the point in time when a Commission investigation is deemed to be ‘closed’. In line with Art. 7(2) of the Directive, the Commission should specify in Art. 16a para. 2 of Regulation 773/2004 and the above mentioned Notices that the adoption of the Commission decision closes the administrative proceedings, irrespective of any subsequent judicial appeal.

- Secondly, the condition in the proposed Art. 16a para. 3 of Regulation 773/2004 that information can only be disclosed if ‘the Commission has closed its proceedings against all parties under investigation’ is not in line with Art. 5 and 6 of the Directive. This condition should therefore be deleted. In particular regarding the fact that according to the case of the Court of Justice of the EU (CJEU) in AssiDomän,18 fining decisions constitute a bundle of individual decisions against each of the addressees and the possibility of so called hybrid proceedings where some infringers may agree to an early settlement while the investigation continues against other infringers, it is not justified to make the disclosure of information dependent on the closure of the proceedings against all parties. The same argumentation applies to the wording of Recital 26b of the Notice on cooperation between the Commission and the national courts, which should be amended accordingly.

- Thirdly, in accordance with Akzo Nobel NV, the Commission should specify that any disclosure of decisions, in or out of court, which contain details of the infringement, does not result in a breach of the obligations of the protection of confidentiality or professional secrecy and does not undermine any administrative or judicial proceedings whatsoever.20

- Fourthly, the Commission should specifically confirm that the above limits and penalties do not apply to the voluntary disclosure of own documents and/or information by an infringer, including leniency statements and settlement submissions, after the Commission has closed its proceedings. This would provide the necessary legal certainty for leniency applicants and facilitate out-of-court settlements where such information may play an important role. Leniency applicants could therefore successfully mitigate their civil liability in line with Art. 18 and 19 of the Directive, which in turn would further foster the attractiveness of applying for leniency in the first place.

4. Protection of leniency programme should not result in disincentive for complainants

As the Commission rightly points out in Recital 3 of the proposed amendment to Regulation 773/2004, secret cartels and other competition law infringements are often difficult to detect. The Commission is therefore to a considerable degree dependant on the provision of evidence on the infringement by third parties. Besides individuals or undertakings involved in the infringement which can benefit from a reduction of the fine under the leniency programme,

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19 In Art 6(10) of the Directive, the EU legislator considered reasonable that a party or a third party could provide evidence needed to substantiate cartel damage claims.
20 Supra note 7, para. 64.
also other parties may have a genuine interest in informing the Commission about secret
competition law offences. For example competitors, suppliers and/or customers which are not
part of a cartel but suffer from its effects have a justified interest that (i) the infringement
comes to an end, and (ii) they obtain compensation for the harm suffered. If the Modification
Package is adopted in its current form, such complainants are worse off than under the status
quo, in particular as Art. 8(2) of Regulation 773/2004 will be deleted. This is a serious
disincentive for market participants which have knowledge about a secret competition law
infringement but which are not directly involved in it to come forward with their information as
they will be barred from using information they obtain in the context of the administrative
proceedings for potential civil proceedings. The Commission therefore cuts off a potentially
very important alternative pool of informants and makes itself even more dependent on the
cooperation of individuals or undertakings which have violated the law. Art. 8(2) of Regulation
773/2004 should therefore not be deleted.

5. Unnecessary restriction of documents provided by Commission to national courts

While the Directive does not contain any limitation in respect of what information or which
documents the Commission may provide to national courts, the proposed amendments of the
Commission Notice on the cooperation with courts of the EU Member States specifically
contains an absolute renunciation by the Commission to transmit leniency corporate
statements and/or settlement submissions to national courts. This absolute self-limitation of
the Commission thus exceeds the more flexible rules of the Directive and is not required by
the rules of the Directive. The proposal is also questionable from a practical point of view as it
may well be possible that a national court may require leniency statements and/or settlement
submissions in order to verify certain facts or evidence which are relevant in order to solve a
Non liquet. While it should be possible for the Commission to request confidentiality measures
(e.g. confidentiality rings) to be taken by national courts, an absolute ex-ante denial to provide
certain categories of documentation seems a far-reaching intervention in the independence
and proper functioning of the judicial system of the Member States, in particular as it is up to
the national judges to strike the balance between public and private enforcement. The per-se
rule of non-disclosure in paragraph 26a of the Commission Notice on the cooperation with
courts of the Member States should therefore be deleted, in particular if the leniency applicant
agrees to the disclosure. The same reasoning applies to the proposed amendment of point 39
the Commission Notice on the conduct of settlement procedures. It is incomprehensible that
the Commission should not be able to provide settlement submissions to national courts, in
particular if the settling party has agreed to such measure as it may be positive for it in the
context of proceedings before national courts.

6. Absolute denial of access to leniency statements and settlement decisions not in line
with case-law of the CJEU

The absolute denial of access to leniency statements and settlement submissions referred to
in the proposed amendments of Regulation 773/2004 (Art 15(1) ter), Notice on leniency (point
35 bis), Notice on settlements (point 39), Notice on cooperation between the Commission and
the national courts (points 26 and 26 bis) is not in line with the case-by-case balancing test
advocated by the CJEU in its Donau Chemie judgment which explicitly opposed any per se
prohibition of access to certain types of documents. In that regard, one must stress that the absolute prohibition of accessing certain types of documents would enable cartel members by extensive leniency statements to deliberately conceal relevant information on their infringement and keep the illegal gain. Thus, in some cases the access to leniency statements or information contained therein might be the only way for claimants to substantiate their claim and for courts to ensure that the right to full compensation is properly protected. This should be duly taken into account by the Commission in its proposed Modification Package.

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21 Judgment of the Court of 6 June 2013, Bundeswettbewerbsbehörde v Donau Chemie AG and Others, Case C-536/11, EU:C:2013:366.

22 It is critical to underline, for instance, that in ‘public settlement’ decisions in accordance with Commission Regulation 622/2008, the Commission omits any detailed descriptions of the respective cartel arrangements and meetings or does not publish a decision at all. The fact that the main advantage of a settlement for a cartelist may be that a short decision makes it harder for victims to prove the loss sustained is recognised by defence lawyers already (cf., e.g., Grafunder, R., Settlement-Verfahren in Kartellbußgeldverfahren, Rechtsboard, 14 February 2014, available online at http://blog.handelsblatt.com/rechtsboard/2014/02/14/settlement-verfahren-in-kartellbuessgeldverfahren-merkblatt-des-bundeskartellamts).
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