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Subject: 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
- Presidency compromise text for Articles 1-10

In view of the Working Party on Competition on 15 October 2013, delegations will find in Annex a Presidency compromise text on Articles 1 to 10 of the above-mentioned Directive. For your convenience additions are marked in **bold/underlined** and deletions in ~~strikethrough~~. This compromise text is in substance identical to the one circulated previously.

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)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular

Articles 103 and 114 thereof,

Having regard to the proposal from the European Commission¹,

After transmission of the draft legislative act to the national Parliaments,

Having regard to the opinion of the European Economic and Social Committee²,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Articles 101 and 102 of the Treaty on the Functioning of the European Union (hereinafter referred to as the Treaty) are a matter of public policy and must be applied effectively throughout the Union to ensure that competition in the internal market is not distorted.

¹ OJ C , , p. .

² OJ C , , p. .

- (2) The public enforcement of those Treaty provisions is carried out by the Commission using the powers provided by Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty establishing the European Community³ (hereinafter: Regulation No 1/2003). Public enforcement is also carried out by national competition authorities, which may take the decisions listed in Article 5 of Regulation No 1/2003.
- (3) Articles 101 and 102 of the Treaty produce direct effects in relations between individuals and create, for the individuals concerned, rights and obligations which national courts must enforce. National courts thus have an equally essential part to play in applying the competition rules (private enforcement). When ruling on disputes between private individuals, they protect subjective rights under Union law, for example by awarding damages to the victims of infringements. The full effectiveness of Articles 101 and 102 of the Treaty, and in particular the practical effect of the prohibitions laid down therein, requires that anyone — be they an individual, including consumers and undertakings, or a public authority — can claim compensation before national courts for the harm caused to them by an infringement of those provisions. This Union right to compensation applies equally to breaches of Articles 101 and 102 by public undertakings or undertakings entrusted with special or exclusive rights by Member States within the meaning of Article 106 of the Treaty.
- (4) The Union right to compensation for antitrust harm requires each Member State to have procedural rules ensuring the effective exercise of that right. The need for effective procedural remedies also follows from the right to effective judicial protection as laid down in Article 47, first paragraph, of the Charter of Fundamental Rights of the European Union⁴ and in Article 19(1), second subparagraph of the Treaty on European Union.

³ OJ L 1, 4.1.2003, p. 1. With effect from 1 December 2009, Articles 81 and 82 of the EC Treaty have become respectively Articles 101 and 102 TFEU. The two sets of provisions are identical in substance.

⁴ OJ C 326, 26.10.2012, p. 391.

- (5) To ensure effective public and private enforcement of the competition rules, it is necessary to regulate the way the two forms of enforcement are coordinated, for instance the arrangements for access to documents held by competition authorities. Such coordination at Union level will also avoid divergence of applicable rules, which could jeopardise the proper functioning of the internal market.
- (6) In accordance with Article 26(2) of the Treaty, the internal market comprises an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured. There exist marked differences between the rules in the Member States governing actions for damages for infringements of national or Union competition law. Those differences lead to uncertainty concerning the conditions under which injured parties can exercise the right to compensation they derive from the Treaty, and affect the substantive effectiveness of such right. As injured parties often choose the forum of their Member State of establishment to claim damages, the discrepancies between the national rules lead to an uneven playing field as regards actions for damages and may affect competition on the markets on which these injured parties, as well as the infringing undertakings, operate.
- (7) Undertakings established and operating in different Member States are subject to procedural rules that significantly affect the extent to which they can be held liable for infringements of competition law. This uneven enforcement of the Union right to compensation may result in a competitive advantage for some undertakings which have breached Articles 101 or 102 of the Treaty, 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 both competition and the proper functioning of the internal market.
- (8) It is therefore necessary to ensure a more level playing field for undertakings operating in the internal market and to improve the conditions for consumers to exercise the rights they derive from the internal market. It is also appropriate to increase legal certainty and to reduce the differences between the Member States as to the national rules governing actions for damages for infringements of ~~European~~**Union** competition law and, when applied in parallel to the latter, national competition law. An approximation of these rules will also help to prevent the emergence of wider differences between the Member States' rules governing actions for damages in competition cases.

(9) Article 3(1) of Regulation (EC) No 1/2003 provides that ‘where the competition authorities of the Member States or national courts apply national competition law to agreements, decisions by associations of undertakings or concerted practices within the meaning of Article [101(1)] of the Treaty which may affect trade between Member States within the meaning of that provision, they shall also apply Article [101] of the Treaty to such agreements, decisions or concerted practices. Where the competition authorities of the Member States or national courts apply national competition law to any abuse prohibited by Article [102] of the Treaty, they shall also apply Article [102] of the Treaty.’ In the interest of the proper functioning of the internal market and with a view to greater legal certainty and a more level playing field for undertakings and consumers, it is appropriate that the scope of this Directive should extend to actions for damages based on the infringement of national competition law where it is applied pursuant to Article 3(1) of Regulation (EC) No 1/2003. Applying diverging rules on civil liability for infringements of Articles 101 and 102 of the Treaty and for infringements of rules of national competition law which must be applied in the same case and in parallel to Union competition law would otherwise adversely affect the position of claimants in the same case and the scope of their claims, and constitute an obstacle to the proper functioning of the internal market. **The provisions of this Directive should not affect damages actions for infringements of national law which may not affect trade between Member States within the meaning of Article 101 or 102 of the Treaty.**

(10) In the absence of Union law, actions for damages are governed by the national rules and procedures of the Member States. All national rules governing the exercise of the right to compensation for harm resulting from an infringement of Article 101 or 102 of the Treaty, including those concerning aspects not dealt with in this Directive such as the notion of causal relationship between the infringement and the harm, must observe the principles of effectiveness and equivalence. This means that they may not be formulated or applied in a way that makes it excessively difficult or practically impossible to exercise the right to compensation guaranteed by the Treaty, and they may not be formulated or applied less favourably than those applicable to similar domestic actions.

- (11) This Directive reaffirms the *acquis communautaire* on the Union right to compensation for harm caused by infringements of Union competition law, particularly regarding standing and the definition of damage, as it has been stated in the case-law of the Court of Justice of the European Union, and does not pre-empt any further development thereof. Anyone who has suffered harm caused by an infringement can claim compensation for the actual loss (*damnum emergens*), for the gain of which he has been deprived (loss of profit or *lucrum cessans*) ~~and~~ **plus interest. This is irrespective of whether the national rules define these categories separately or in combination. The** payment of interest ~~accruing~~ **is an essential component of compensation to make good the damage sustained by taking into account the effluxion of time, and it should be due** from the time the harm occurred until compensation is paid. ~~This,~~ **without prejudice to the qualification of such interest as compensatory or default interest under national law. The** right **to compensation** is recognised for any natural or legal person — consumers, undertakings and public authorities alike — irrespective of the existence of a direct contractual relationship with the infringing undertaking, and regardless of whether or not there has been a prior finding of an infringement by a competition authority. This Directive should not require Member States to introduce collective redress mechanisms for the enforcement of Articles 101 and 102 of the Treaty.
- (12) Actions for damages for infringements of national or Union competition law typically require a complex factual and economic analysis. The evidence necessary to prove a claim for damages is often held exclusively by the opposing party or by third parties, and is not sufficiently known by and accessible to the claimant. In such circumstances, strict legal requirements for claimants to assert in detail all the facts of their case at the beginning of an action and to proffer precisely specified pieces of supporting evidence can unduly impede the effective exercise of the right to compensation guaranteed by the Treaty.
- (13) Evidence is an important element for bringing actions for damages for infringement of national or Union competition law. However, as antitrust litigation is characterised by an information asymmetry, it is appropriate to ensure that ~~injured parties~~ **claimants** are afforded the right to obtain the disclosure of evidence relevant to their claim, without it being necessary for them to specify individual items of evidence. In order to ensure equality of arms, those means should also be available to defendants in actions for damages, ~~so that they~~

can request the disclosure of evidence by those injured parties. National courts can also order evidence to be disclosed by third parties, **including public authorities**. Where the national court wishes to order disclosure of evidence by the Commission, the principle of sincere cooperation between the European Union and the Member States (Article 4(3) TEU) and Article 15(1) of Regulation No 1/2003 as regards requests for information are applicable. **This Directive does not affect the possibility or the conditions under national law according to which appeals can be brought against disclosure orders. Member States can apply wider rules on disclosure of evidence under national law, provided that they comply with the limitations laid down in this Directive.**

- (14) Relevant evidence should be disclosed upon decision of the court and under its strict control, especially as regards the necessity and proportionality of the disclosure measure. It follows from the requirement of proportionality that disclosure requests can only be triggered once an injured party has made it plausible, on the basis of facts which are reasonably available to **him**, that the party has suffered harm that was caused by the defendant. The request for disclosure should refer to **specified pieces of evidence or** categories of **this** evidence which are **defined** as precise **precisely** and narrow **narrowly** as possible on the basis of reasonably available facts.
- ~~(15) The requirement of proportionality should also be carefully assessed when disclosure risks unravelling the investigation strategy of a competition authority by revealing which documents are part of the file or causing a negative bearing on the way in which companies cooperate with the competition authority. The disclosure request should therefore not be deemed proportionate when it refers to the generic disclosure of documents in the file of a competition authority relating to a certain case, or of documents submitted by a party in the context of a certain case. Such wide disclosure requests would also not be compatible with the requesting party's duty to specify categories of evidence as precisely and narrowly as possible. **MOVED TO 21**~~

(16)(15) Where the court requests a competent court of another Member State to take evidence or requests evidence to be taken directly in another Member State, the provisions of Council Regulation (EC) No 1206/2001 of 28 May 2001 on cooperation between the courts of the Member States in the taking of evidence in civil or commercial matters⁵ apply.

(17)(16) While relevant evidence containing business secrets or otherwise confidential information should in principle be available in actions for damages, such confidential information needs to be appropriately protected. National courts should therefore have at their disposal a range of measures to protect such confidential information from being disclosed during the proceedings. These may include the possibility of hearings in private, restricting the circle of persons entitled to see the evidence, and instruction of experts to produce summaries of the information in an aggregated or otherwise non-confidential form. Measures protecting business secrets and other confidential information should not practically impede the exercise of the right to compensation.

(18)(17) The effectiveness and consistency of the application of Articles 101 and 102 of the Treaty by the Commission and the national competition authorities require a common approach across the Union ~~regarding the interaction of rules on disclosure of evidence and the way these Articles are enforced by~~ **that is included in the file of** a competition authority. Disclosure of evidence should not unduly detract from the effectiveness of enforcement of competition law by a competition authority. The limitations on the disclosure of evidence should not prevent competition authorities from publishing their decisions in accordance with applicable Union or national rules. **This Directive does not cover the disclosure of internal documents of competition authorities and correspondence between competition authorities.**

⁵ OJ L 174, 27.6.2001, p. 1.

~~(19)~~(18) Leniency programmes and settlement procedures are important tools for the public enforcement of Union competition law as they contribute to the detection, efficient prosecution and sanctioning of the most serious competition law infringements. Undertakings may be deterred from co-operating in this context if disclosure of documents they solely produce to this end were to expose them to civil liability under worse conditions than the co-infringers that do not co-operate with competition authorities. To ensure that undertakings are willing to produce voluntary statements acknowledging their participation in an infringement of Union or national competition law to a competition authority under a leniency programme or a settlement procedure, such statements should be excepted from disclosure of evidence. **The exception from disclosure should also apply to literal quotations of a leniency corporate statement or a settlement submission in other documents.**

~~(20)~~(19) In addition, an exception to disclosure should apply to any disclosure measure that would unduly interfere with an ongoing investigation by a competition authority concerning an infringement of national or Union competition law. Information that was prepared by a competition authority in the course of its proceedings for the enforcement of national or Union competition law **and sent to the parties** (such as a Statement of Objections) or **prepared** by a party to those proceedings (such as replies to requests for information of the competition authority) should therefore be disclosable in actions for damages only after the competition authority has ~~found an infringement of the national or Union competition rules or has otherwise closed its proceedings~~ **closed its proceedings, for instance by adopting a decision under Article 5 of Regulation No 1/2003 or under Chapter III of the same Regulation, with the exception of decisions ordering interim measures.**

~~(21)~~(20) Apart from the evidence referred to in recitals ~~(19)~~**18** and ~~(20)~~**19**, national courts should be able to order, in the context of an action for damages, disclosure of evidence that exists irrespective of the proceedings of a competition authority (~~‘pre-existing information’~~).

- (21) **[MOVED FROM 15]** The requirement of proportionality should also be carefully assessed when disclosure risks unravelling the investigation strategy of a competition authority by revealing which documents are part of the file or causing a negative bearing on the way in which companies cooperate with the competition authority. The disclosure request should therefore not be deemed proportionate when it refers to the generic disclosure of documents in the file of a competition authority relating to a certain case, or of documents submitted by a party in the context of a certain case. Such wide disclosure requests would also not be compatible with the requesting party's duty to specify **pieces of evidence or** categories of evidence as precisely and narrowly as possible. **Moreover, disclosure of evidence should be ordered from a competition authority only when it cannot be obtained or it is unlikely to be obtained from another party or a third party.**
- (22) Any natural or legal person who obtains evidence through access to the file of a competition authority ~~in exercising his rights of defence in relation to investigations by a competition authority~~ can use that evidence for the purposes of an action for damages to which he is a party. Such use should also be allowed for the natural or legal person that succeeded in his rights and obligations, including through the acquisition of his claim. In case the evidence was obtained by a legal person forming part of a corporate group constituting one undertaking for the application of Articles 101 and 102 of the Treaty, the use of such evidence is also allowed for other legal entities belonging to the same undertaking.
- (23) However, the use referred to in the previous recital may not unduly detract from the effective enforcement of competition law by a competition authority. Limitations to disclosure referred to in recitals ~~(1918)~~ and ~~(2019)~~ should thus equally apply to the use of evidence which is obtained solely through access to the file of a competition authority. Moreover, evidence obtained from a competition authority ~~in the context of exercise of the rights of defence~~ should not become an object of trade. The possibility of using evidence that was obtained solely through access to the file of a competition authority should therefore be limited to the natural or legal person that ~~exercised his rights of defence~~ **was granted access** and his legal successors, as mentioned in the previous recital. This limitation does not, however, prevent a national court from ordering the disclosure of that evidence under the conditions provided for in this Directive.

- (24) Making a claim for damages, or the start of an investigation by a competition authority, entails a risk that the undertakings concerned may destroy or hide evidence that would be useful in substantiating an injured party's claim for damages. To prevent the destruction of relevant evidence and to ensure that court orders requesting disclosure are complied with, courts should be able to impose sufficiently deterrent sanctions. Insofar as parties to the proceedings are concerned, the ~~risk of adverse inferences~~ **possibility to order the payment of costs as well as the risk of adverse inferences (such as presuming the relevant issue to be proven or dismissing claims and defences in whole or in part)** being drawn in the proceedings for damages can be a particularly effective sanction and can avoid delays. Sanctions should also be available for non-compliance with obligations to protect confidential information ~~and for abusive use of information obtained through disclosure. Similarly, sanctions should be available if information obtained through access to the file of a competition authority in the exercise of one's rights of defence in relation to investigations of that competition authority is used abusively in actions for damages.~~
- (25) ~~Article 16(1) of Regulation (EC) No 1/2003 provides that where national courts rule on agreements, decisions or practices under Article 101 or 102 of the Treaty which are already the subject of a Commission decision, they cannot take decisions which run counter to the decision adopted by the Commission. To enhance legal certainty, to avoid inconsistency in the application of those Treaty provisions, to increase the effectiveness and procedural efficiency of actions for damages and to foster the functioning of the internal market for undertakings and consumers, it should similarly not be possible to call into question the finding of an infringement of Article 101 or 102 of the Treaty in a final decision by a national competition authority or a review court **should not be relitigated in subsequent actions for damages. Therefore, such** finding ~~of~~ **of** an infringement ~~of Article 101 or 102 of the Treaty~~ **should constitute full proof** in actions for damages relating to the same ~~that~~ infringement, regardless of whether ~~or not~~ the action is brought in the Member State of the authority or review court **or in another Member State. This effect should cover the material, personal, temporal and territorial scope of the infringement as it was found by the competition authority or review court.** The same should apply to a decision in which it has been concluded that provisions of national competition law are infringed in cases where national and Union competition law are applied in the same case and in parallel.~~

This effect of decisions by national competition authorities and review courts finding an infringement of the competition rules should apply to the operative part of the decision and its supporting recitals. This is without prejudice to the rights and obligations of national courts under Article 267 of the Treaty.

- (26) National rules on the beginning, duration, suspension or interruption of limitation periods should not unduly hamper the bringing of actions for damages. This is particularly important in respect of actions that build upon the competition authority's or a review court's finding of an infringement. To that end, injured parties should still be able to bring an action for damages after proceedings by a competition authority, with a view to enforcing national and Union competition law. **The limitation period should not begin to run before a claimant knows, or can reasonably be expected to have knowledge of the behaviour constituting the infringement, the fact that the infringement caused harm to him and the identity of the infringer who caused such harm. When determining whether a claimant knows of the behaviour constituting the infringement it should be assessed whether such claimant may reasonably have knowledge that the behaviour infringes Union or national competition law.**

CHAPTER I

SCOPE AND DEFINITIONS

Article 1 *Scope of the Directive*

1. This Directive sets out certain rules necessary to ensure that anyone who has suffered harm caused by an infringement of ~~Article 101 or 102 of the Treaty or of national~~ competition law, **as defined in Article 4 of the Directive**, can effectively exercise the right to full compensation for that harm. It also sets out rules fostering undistorted competition in the internal market and removing obstacles to its proper functioning by ensuring equivalent protection throughout the Union for anyone who has suffered such harm.
2. This Directive also sets out rules for the coordination between enforcement of the competition rules by competition authorities and enforcement of those rules in damages actions before national courts.

Article 2 *Right to full compensation*

1. Anyone who has suffered harm caused by an infringement of ~~Union or national~~ competition law shall be able to claim full compensation for that harm.
2. Full compensation shall place anyone who has suffered harm in the position in which that person would have been had the infringement not been committed. It shall therefore ~~include~~ **cover** compensation for actual loss and for loss of profit, ~~and~~ **plus** payment of interest from the time the harm occurred until the compensation in respect of that harm has actually been paid.
- ~~3. Member States shall ensure that injured parties can effectively exercise their claims for damages.~~

Article 3
Principles of effectiveness and equivalence

Member States shall ensure that all national rules and procedures relating to actions the exercise of claims for damages are designed and applied in such a way as to ensure that any injured party can effectively exercise they do not render practically impossible or excessively difficult the exercise of the Union right to full compensation for harm caused by an infringement of competition law (principle of effectiveness). Any national rules and procedures relating to actions for damages resulting from infringements of Article 101 or 102 of the Treaty shall not be less favourable to the injured parties than those governing similar domestic actions (principle of equivalence).

Article 4
Definitions

For the purposes of this Directive, the following definitions shall apply:

1. ‘infringement of competition law’ means an infringement of Article 101 or 102 of the Treaty or of national competition law within the meaning of paragraph 2;
2. ‘national competition law’ means provisions of national law that predominantly pursue the same objective as Articles 101 and 102 of the Treaty and that are applied to the same case and in parallel to Union competition law pursuant to Article 3(1) of Regulation (EC) No 1/2003;
3. ‘action for damages’ means an action under national law by which ~~an injured party brings~~ a claim for damages is brought before a national court; ~~it may also cover actions by which someone acting on behalf of one or more injured parties brings a claim for damages before a national court, where national law provides for this possibility;~~
4. ‘claim for damages’ means a claim for compensation of harm caused by an infringement of competition law irrespective of whether it is exercised by an alleged injured party, its representative or its legal successor;
5. ‘injured party’ means anyone who suffered harm caused by an infringement of competition law ~~has a claim for damages;~~

6. ‘national competition authority’ means an authority designated by a Member State pursuant to Article 35 of Regulation (EC) No 1/2003 as being responsible for the application of Articles 101 and 102 of the Treaty;
7. ‘competition authority’ means the Commission or a national competition authority;
8. ‘national court’ or ‘court’ means any court or tribunal of a Member State within the meaning of Article 267 of the Treaty;
9. ‘review court’ means a national court that is empowered to review decisions of a national competition authority, ~~in which context it may also have~~ **irrespective of whether or not this court has** the power to find an infringement of Article 101 or 102 of the Treaty;
10. ‘infringement decision’ means a decision of a competition authority or review court that finds an infringement of competition law;
11. ‘final’ infringement decision means an infringement decision of a competition authority or review court that can no longer be reviewed;
- 12. [MOVED FROM ARTICLE 5] ‘evidence’ means all types of means of proof admissible before national courts, in particular documents and all other objects containing information, irrespective of the medium on which the information is stored;**
- ~~12.~~ **13.** ‘cartel’ means an 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;

- ~~13.~~ **14.** ‘leniency programme’ means a programme on the basis of which a participant in a ~~secret~~ cartel, independently of the other undertakings involved in the cartel, cooperates with an investigation of the competition authority, by voluntarily providing presentations of his knowledge of the cartel and his role therein, in return for which the participant receives, **by formal decision or informal discontinuation of procedure**, immunity from any fine to be imposed for the cartel or a reduction of such fine;
- ~~14.~~ **15.** ‘leniency corporate statement’ means an oral or written presentation voluntarily provided by, or on behalf of, an undertaking **or a natural person** to a competition authority, describing the undertaking’s **or person'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; this does not include **pre-existing information** ~~documents or information that exist irrespective of the proceedings of a competition authority (‘pre-existing information’)~~;
- ~~15.~~ **16.** **‘pre-existing information’ means evidence that exists irrespective of the proceedings of a competition authority, whether or not such information is in the file of a competition authority;**
- ~~15.~~ **17.** ‘settlement submission’ means a presentation voluntarily provided 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 **or 102** 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~~ **to enable** the authority to apply an expedited procedure;
- ~~16.~~ **18.** ‘overcharge’ means any positive difference between the price actually paid and the price that would have prevailed in the absence of an infringement of competition law;
- ~~17.~~ **19.** ‘consensual settlement’ means an agreement whereby damages are paid following a consensual dispute resolution.

CHAPTER II

DISCLOSURE OF EVIDENCE

Article 5

Disclosure of evidence

1. Member States shall ensure that, where **upon request of** a claimant **who** has presented reasonably available facts and evidence ~~showing plausible grounds~~ **sufficient to support the plausibility of its claim** for suspecting that he, or those he represents, **damages, and** has ~~suffered harm caused by the defendant's infringement of competition law,~~ **in substantiating this claim, specified relevant evidence which lies in the control of the defendant or a third party, the** national courts can order the defendant or a third party to disclose evidence, ~~regardless of whether or not this evidence is also included in the file of a competition authority,~~ subject **to the protection of confidential information and** to the conditions set out in this Chapter. Member States shall ensure that courts are also able to order the claimant or a third party to disclose evidence ~~on~~ **upon** request of the defendant.

This provision is without prejudice to the rights and obligations of national courts under Council Regulation (EC) No 1206/2001.

2. ~~Member States shall ensure that n~~National courts **may** order the disclosure of **either specified pieces of** evidence referred to in paragraph 1 ~~where the party requesting disclosure has or~~ **categories of evidence defined as precisely and narrowly as possible on the basis of reasonably available facts.**
 - ~~(a) shown that evidence in the control of the other party or a third party is relevant in terms of substantiating his claim or defence; and~~
 - ~~(b) specified either pieces of this evidence or categories of this evidence defined as precisely and narrowly as he can on the basis of reasonably available facts.~~

3. Member States shall ensure that national courts limit disclosure of evidence to that which is proportionate. In determining whether any disclosure requested by a party is proportionate, national courts shall consider the legitimate interests of all parties and third parties concerned. They shall, in particular, consider:
- ~~(a) the likelihood that the alleged infringement of competition law occurred;~~
 - (a) the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence;**
 - (b) the scope and cost of disclosure, especially for any third parties concerned; **and**
 - (c) whether the evidence to be disclosed contains confidential information, especially concerning any third parties, and the arrangements for protecting such confidential information; ~~and~~
 - ~~(d) in cases where the infringement is being or has been investigated by a competition authority, whether the request has been formulated specifically with regard to the nature, object or content of such documents rather than by a non-specific request concerning documents submitted to a competition authority or held in the file of such competition authority.~~
4. Member States shall ensure that national courts have at their disposal effective measures to protect confidential information ~~from improper use to the greatest extent possible~~ whilst also ensuring that relevant evidence containing such information is available in the action for damages.
5. Member States shall ~~take the necessary measures to give full effect to~~ **professional** legal privileges **under national and Union law** and other rights not to be compelled to disclose evidence.
- ~~6. Member States shall ensure that, to the extent that their courts have powers to order disclosure without hearing the person from whom disclosure is sought, no penalty for non-compliance with such an order may be imposed until the addressee of such an order has been heard by the court.~~

7. ~~Evidence shall include all types of evidence admissible before the national court seised, in particular documents and all other objects containing information, irrespective of the medium on which the information is stored. [MOVED TO ARTICLE 4]~~

8. ~~Without prejudice to the obligation laid down in paragraph 4 and the limits laid down in Article 6, this Article shall not prevent the Member States from maintaining or introducing rules which would lead to wider disclosure of evidence.~~

Article 6

~~Limits on the disclosure of evidence from~~ Limits on the disclosure of evidence from Disclosure of evidence included in the file of a competition authority

1. Member States shall ensure that, for the purpose of actions for damages, ~~national~~ **when national courts order disclosure of evidence included in the file of a competition authority, the following provisions shall apply in addition to the rules laid down in Article 5.**

Provisions laid down in this Chapter are without prejudice to the rules and practices under national or Union law on the protection of internal documents of competition authorities and correspondence between competition authorities.

2. National courts cannot at any time order a party or a third party to disclose any of the following categories of evidence **in any form:**

- (a) leniency corporate statements; and
- (b) settlement submissions.

3. ~~Member States shall ensure that, for the purpose of actions for damages, national~~ **National** courts can order the disclosure of the following categories of evidence only after a competition authority has closed its proceedings ~~or taken a decision referred to in Article 5 of Regulation No 1/2003 or in Chapter III of Regulation No 1/2003:~~

- (a) information that was prepared by a natural or legal person specifically for the proceedings of a competition authority;
 - (b) information that was drawn up by a competition authority **and sent to the parties** in the course of its proceedings.
4. Disclosure of ~~evidence in the file of a competition authority that does not fall into any of the categories listed in paragraphs 1 or 2 of this Article~~ **pre-existing information** may be ordered in actions for damages at any time.
5. **When assessing the proportionality of a disclosure order for information under paragraphs 3 and 4 of this Article, in addition to the criteria laid down in Article 5 (3), national courts shall consider the interest of effective public enforcement of competition law. National courts shall also consider whether the request has been formulated specifically with regard to the nature, object or content of documents rather than by a non-specific application concerning documents submitted to a competition authority or held in the file of such competition authority.**
6. **The request for disclosure of evidence shall be directed to a competition authority only when such evidence cannot be obtained or is unlikely to be obtained from a party or another third party.**

Article 7

Limits on the use of evidence obtained solely through access to the file of a competition authority

1. Member States shall ensure that evidence falling into one of the categories listed in Article 6(12) which is obtained by a natural or legal person solely through access to the file of a competition authority ~~in exercise of his rights of defence under Article 27 of Regulation No 1/2003 or corresponding provisions of national law~~ is not admissible in actions for damages.

2. Member States shall ensure that evidence falling within one of the categories listed in Article ~~6(3), paragraph 2~~ which is obtained by a natural or legal person solely through access to the file of a competition authority ~~in exercise of his rights of defence under Article 27 of Regulation No 1/2003 or corresponding provisions of national law~~ is not admissible in actions for damages until that competition authority has closed its proceedings ~~or taken a decision referred to in Article 5 of Regulation No 1/2003 or in Chapter III of Regulation No 1/2003.~~
3. Member States shall ensure that evidence which is obtained by a natural or legal person solely through access to the file of a competition authority ~~in exercise of his rights of defence under Article 27 of Regulation No 1/2003 or corresponding provisions of national law~~, and which is not inadmissible pursuant to paragraphs 1 or 2 of this Article, can only be used in an action for damages by that person or by the natural or legal person that succeeded in his rights, including the person that acquired his claim.

Article 8
Sanctions

Member States shall ensure that national courts can impose **effective, proportionate and dissuasive** sanctions ~~on parties, third parties and their legal representatives~~ in the event of **failure or refusal to comply with any court's disclosure order or order protecting confidential information, or in the event of destruction of relevant evidence.**

- a) ~~failure or refusal to comply with any court's disclosure order;~~
 - b) ~~the destruction of relevant evidence, provided that, at the time of destruction:~~
 - (i) ~~the destroying party was or had been a party to the proceedings of a competition authority in relation to the conduct underlying the action for damages; or~~
 - (ii) ~~the destroying party knew or should reasonably have known that an action for damages had been brought before the national court and that the evidence was of relevance in substantiating either the claim for damages or a defence against it; or~~
 - (iii) ~~the destroying party knew that the evidence was of relevance to pending or prospective actions for damages brought by it or against it;~~
- ~~failure or refusal to comply with the obligations imposed by a court order protecting confidential information; or~~

e) ~~abuse of the rights relating to disclosure of evidence provided for in this Chapter, and of the evidence and information obtained thereunder.~~

2. ~~Member States shall ensure that the sanctions that can be imposed by national courts are effective, proportionate and dissuasive. The sanctions available to national courts shall include, insofar as the behaviour of a party to damages action proceedings is concerned, the possibility to draw adverse inferences, such as presuming the relevant issue to be proven or dismissing claims and defences in whole or in part, and the possibility to order the payment of costs.~~

CHAPTER III

EFFECT OF NATIONAL DECISIONS, LIMITATION PERIODS, JOINT AND SEVERAL LIABILITY

Article 9 *Effect of national decisions*

Member States shall ensure that, ~~where national courts rule, in actions~~ **an infringement of competition law found by a final decision of a national competition authority or a review court is deemed to be irrefutably established for the purposes of an action** for damages under Article 101 or 102 of the Treaty or under national competition law, ~~on agreements, decisions or practices which are already the subject of a final infringement decision by a national competition authority or by a review court, those courts cannot take decisions running counter to such finding of an infringement.~~ This ~~obligation~~ **provision** is without prejudice to the rights and obligations under Article 267 of the Treaty.

Article 10 *Limitation periods*

1. Member States shall lay down the rules applicable to limitation periods for bringing actions for damages in accordance with this Article. Those rules shall determine when the limitation period begins to run, the duration of the period and the circumstances under which the period ~~can be~~ **is** interrupted or suspended.

2. Member States shall ensure that the limitation period shall not begin to run before an ~~injured party~~ **claimant** knows, or can reasonably be expected to have knowledge of:
 - (i) the behaviour constituting the infringement;
 - ~~(ii) the qualification of such behaviour as an infringement of Union or national competition law;~~
 - (iii) the fact that the infringement caused harm to him; and
 - ~~(iv)~~ **(iii)** the identity of the infringer who caused such harm.

 3. Member States shall ensure that the limitation period does not begin to run before the day on which a continuous or repeated infringement ceases **or on which it is found by a final decision of a competition authority, whichever is later.**

 4. Member States shall ensure that the limitation period for bringing an action for damages is at least ~~five~~ **three** years.

 5. Member States shall ensure that the limitation period is suspended **or interrupted** if a competition authority takes action for the purpose of the investigation or proceedings in respect of an infringement to which the action for damages relates. The suspension shall end at the earliest one year after the infringement decision has become final or the proceedings are otherwise terminated.
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