EU Commission proposes new measures re private actions for damages and collective actions

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On June 11, 2013 the European Commission published a series of proposals with the aim of advancing private actions for damages and collective actions in national courts in the European Union. The proposals include:

- a binding *Directive governing actions for damages* for infringements of EU and Member State competition law (the Proposed Directive);
- a *Communication on quantifying harm* in actions for damages based on breaches of EU competition law (the Communication on Quantification of Harm);
- a non-binding *Recommendation on the common principles for collective redress* in Member States for injunctions and damages claims based on violations of EU rights (the Recommendation); and
- a Communication "Towards a European Horizontal Framework for Collective Redress" (Communication on Collective Redress).

The proposals are long anticipated and represent the culmination in almost a decade of political debate and consultation including the Commission's Green Paper on antitrust damages actions in 2005, its White Paper in 2008 on antitrust specific collective redress, the Commission's public consultation in 2011 seeking comments on collective actions in the European Union and the resolution adopted by the European Parliament in 2012 calling for collective redress proposals that would include a common set of principles providing uniform access justice in the Member States of the European Union.

Of the proposals issued by the Commission the key ones are the Proposed Directive and the Recommendation. Both instruments apply to all types of EU competition law infringements and the Recommendation applies in addition to violations of any other substantive laws of the European Union. The Proposed Directive must now be considered by the European Parliament and the Council where it is anticipated that it will face resistance on a number of aspects. Once it has been adopted, the Proposed Directive would allow the Member States two years to bring the changes into force. The Recommendation is immediately applicable and asks the Member States to reform their national laws over the next two years so as to bring them in to line with the Recommendation. However, the Recommendation is not legally binding on the Member States.

The Proposed Directive

Central to the Proposed Directive are the rules the Commission considers

> "necessary to ensure that anyone who has suffered harm caused by an infringement of [EU] or of national competition law, can effectively exercise the right to full compensation for that harm"

as well as rules

> "for the coordination between enforcement of the competition rules by competition authorities and the enforcement of those rules in damages actions before national courts".

The victims of antitrust infringements include direct and indirect purchasers. The right to "full compensation" does not include punitive damages. The proposed rules include the following specific measures:

- **Discovery.**

  National courts should order defendants or third parties to disclose evidence, regardless of whether or not this evidence is also included in the file of a competition authority, where a claimant has presented reasonably available facts and evidence showing plausible grounds for suspecting that he has suffered harm caused by the defendant's infringement of competition law. This is provided, however, that the evidence is relevant to the petitioner's claim, that the disclosure request is proportionate and narrowly tailored and that confidential information is duly protected.

- **Access to leniency documents and settlement documents.**

  The Proposed Directive offers temporary protection for certain documents that have been prepared in the context of enforcement proceedings (e.g. replies to a competition authorities' request for information, preliminary assessments in the context of a commitment procedure). National courts may never order the disclosure, or permit the use, of leniency corporate statements and settlement submissions to the

Commission, but may order the disclosure, or permit the use, of other information prepared specifically for or by a competition authority only after the authority has closed its proceedings or taken a decision. This is an endeavour on the part of the Commission to modify the balancing test adopted by the ECJ in *Pfleiderer* (*Pfleiderer AG v Bundeskartellamt* (C-360/09) [2011] All E.R. (EC) 979).

- **Probative effect of national authorities' decisions.**

  Final infringement decisions (i.e. decisions that are no longer subject to judicial review) by national competition authorities in one Member State are to be binding in all other Member States on the national courts deciding on private actions in relation to the same competition law violation.

- **Joint and several liability.**

  If a number of firms have been found to have violated competition law (e.g. firms party to a cartel), they will be jointly and severally liable for any private action for damages. However, immunity recipients will only be liable for damages caused to their direct or indirect customers or providers, save that it will remain a "debtor of last resort" if the claimants can show that they are unable to obtain full compensation from the other defendants.

- **Passing-on defence.**

  Defendants will be permitted to invoke a defence that the plaintiff passed on the overcharge resulting from the infringement (in whole or part) to its customers save where it is legally impossible for claimants at succeeding levels of the supply chain to claim compensation. The burden of proof is on the defendant. Conversely, in actions by indirect purchasers, there will be a rebuttable presumption that the overcharge has been passed on to them if the claimant can show that that direct purchasers suffered an overcharge and that the claimant purchased products that were the subject of the infringement or were products derived from or containing the products that were the subject of the violation.

- **Presumption of harm.**

  Cartel violations will carry a rebuttable presumption of harm and the requirements for quantifying such harm should not render a claimant's right to recover damages "practically impossible" or "excessively difficult". Such harm may include lost profits as well as overcharges. This recognises the difficulty for the claimant in proving causation.

- **Limitation periods.**

  Limitation periods for infringement claims should be a period of at least five years to bring a claim; this would be suspended if a competition authority starts proceedings, or for the duration of a consensual dispute resolution process and for at least one year after a decision relative to the same becomes final.

It is widely anticipated that some of the proposed rules will trigger controversy in the European Parliament and with some Member States. It is open to debate, for example, whether the exclusion of immunity documents from court-ordered disclosure is consistent with the recent judgment of the ECJ in *Donau Chemie* (*Bundeswettbewerbsbehorde v Donau Chemie AG* (C-536/11) [2013] 5 C.M.L.R. 19). In *Donau Chemie* the ECJ found that EU law precludes provisions of national law that, in a private action for damages, make access to antitrust enforcement files subject to the consent of all the parties to the proceedings, without the national court having the right to balance the interests of the parties involved.

The Communication on Quantification of Harm

In this proposal the Commission sets out that the legal requirements in a Member State for quantifying harm flowing from a violation of competition law should not make it impossible or excessively difficult for victims to be compensated. The Communication is accompanied by a lengthy "practical guide" that offers economic and legal insights into the harm typically caused by competition law violations and some methods for quantifying harm. The Communication is intended as a practical guide to parties and national courts on quantifying harm in private actions for damages. The Communication is not binding in its application.

The Recommendation and the Communication on Collective Redress

These instruments apply to collective redress for violations of competition law as well as for violations of any other substantive laws of the European Union such as consumer protection, environmental and financial services laws.

In the Recommendation the Commission sets out what it considers to be the appropriate mechanisms for facilitating effective redress for citizens through collective actions while limiting the potential for excessive and abusive litigation.

In the Communication on Collective Redress the Commission is clear that it does not want the Recommendation to lead to "abusive litigation", referring to:

> "US Supreme Court decisions [that] have started to progressively limit the availability of class actions in view of the detrimental economic and legal effects of a system that is open to abuse by frivolous litigation."

Accordingly, in its Recommendation the Commission sets out a series of principles that all Member States should follow in devising and implementing collective redress regimes and sets out a number of conditions aimed at preventing abusive and frivolous litigation including:

- **Admissibility.**

  Collective actions should only be brought when certain admissibility criteria are met.

- **Representative actions.**

  These actions should only be brought by public authorities or by designated entities that have been designated in advance or certified on an ad hoc basis by a national court for a particular case and that: (a) are not-for-profit entities; (b) have a direct relationship between their main objectives and the rights claimed to have been violated; and (c) have sufficient financial resources, human resources and legal expertise to adequately represent multiple claimants.

- **Collective actions should in principle be follow-on.**

  In fields of law where a public authority is empowered to adopt a decision finding that a violation of EU law, collective redress actions should start only once the proceedings of the public body have concluded definitively.

- **Compensatory (non-punitive) damages.**

  Compensation awarded in a collective setting should not exceed the compensation that that would have been awarded in an individual action. Punitive damages should be prohibited.

- **Opt-in mechanism.**

  The claimant group should be formed on the basis of the "opt-in" principle, and not on an "opt-out" principle. Any deviation from this is to be justified by "reasons of sound administration of justice".

- **Funding.**

  Funding mechanisms which might encourage abusive litigation, such as contingency fees, should not be permitted.

- **Loser pays.**

  The legal costs of the winning party are to be met by the losing party. *Cross-border cases.* Member States should allow a single collective action in a single forum where a dispute concerns persons from several Member States.

Conclusion

The Commission's proposals follow a series of proposals issued by the UK Government in March 2013 (see the *Department of Business Innovation and Skills, Government Response Plan*, 2013) and are substantively similar to them (see for example the provisions in relation to contingency fees and exemplary damages).

In relation to the Commission's non-binding proposals, the Commission will now have the job of persuading Member States that if there is to be consistency in their respective regimes for collective action, the Member States would do well to implement the Commission's proposals. Some Member States, such as the United Kingdom, are likely to be proactive towards adopting the Commission's proposals. Others, such as Germany, might be less ready to embrace change. While German law actively encourages private actions for damages, it is a little circumspect of collective redress.

On its passage through the European Parliament and the Council some parts of the Proposed Directive may not survive at all and some may be altered materially. Nevertheless, the Commission's proposals make it clear that the Commission is committed to promoting private actions for damages and collective actions. There developments underscore the importance of having a global approach to competition law compliance, risk management and litigation strategy and for international companies to have a co-ordinated approach across jurisdictions on such matters in particular with regard to process and privilege issues.

The June 11, 2013 Proposed Directive and the Communication on Quantification of Harm are available at: *http://ec.europa.eu/competition/antitrust/actions damages/documents.html* [Accessed March 6, 2014]. The Recommendation and the Communication on Collective Redress are available at: *http://ec.europa.eu/justice /newsroom/civil/news/130611 en.htm*.