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Skadden, Arps, Slate, Meagher & Flom LLP & Affiliates

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European Commission Issues Proposals on Private Antitrust Damage Actions and Collective Actions

On June 11, 2013, the European Commission (Commission) issued a widely anticipated series of proposals designed to advance private antitrust damage and collective actions in Europe. To accomplish this, the Commission issued both a proposed binding Directive on private antitrust damage actions and a proposed non-binding Recommendation on collective redress mechanisms. The Directive, which must be considered and passed by the European Parliament and Council of the European Union, covers a number of procedural issues in private antitrust damage actions in European Union (EU) Member States, including the disclosure and use of evidence, the effect of decisions by national competition authorities (NCAs), the applicability of joint and several liability, and the availability of a pass-on defense.[1] With respect to the Recommendation, the Commission urges Member States to allow private plaintiffs to seek relief for violations of competition, consumer protection, environmental and other laws on a collective basis in certain circumstances, while also advising Member States to impose certain safeguards, such as allowing only pre-approved representative entities to bring collective actions and banning punitive damages, designed to discourage the types of excessive and abusive litigation found in the United States.[2]

The Commission's proposals represent the culmination of an almost decade-long process considering how private antitrust damages and collective actions should operate in the EU. The Commission first adopted a Green Paper on antitrust damages actions in 2005, followed in 2008 by a White Paper on antitrust-specific collective redress and another Green Paper on consumer collective redress. In 2011, the Commission carried out a public consultation seeking comments on collective actions in the EU.[3] Most recently, in 2012, the European Parliament adopted a resolution calling for a collective redress proposal that would include a common set of principles providing uniform access to justice in Member States. Following is a high-level overview of the Commission's most significant proposals.

The Proposed Directive on Private Antitrust Damages Actions

The Commission's proposed Directive sets out "certain rules 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 enforcement of those rules in damages actions before national courts." These proposed rules would provide, *inter alia*:

1 The proposed Directive is available here.

2 The Recommendation is available here.

3 Skadden submitted comments during the consultation. *See* Skadden, Response to Commission Staff Working Document Public Consultation: Towards a Coherent European Approach to Collective Redress (April 30, 2011), available here. The Commission appears to have taken to heart many of the concerns expressed by Skadden and others, for example, regarding the imperative of an "opt-in" system of collective redress as opposed to an "opt-out" system and the retention of the "loser pays" principle.

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Ingrid Vandenborre
Brussels
+32.2.639.0336
ingrid.vandenborre@skadden.com

Gary A. MacDonald
Washington, D.C.
+1.202.371.7260
gary.macdonald@skadden.com

Patrick Heneghan
London
+44.20.7519.7165
patrick.heneghan@skadden.com

Karyl Nairn QC
London
+44.20.7519.7191
karyl.nairn@skadden.com

James A. Keyte
New York
+1.212.735.2583
james.keyte@skadden.com

Tiffany Rider
Washington, D.C.
+1.202.371.7329
tiffany.rider@skadden.com

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Four Times Square, New York, NY 10036
Telephone: +.1.212.735.3000

WWW.SKADDEN.COM

- **Access to Leniency Documents** – Modifying the *Pfleiderer* balancing test adopted by the European Court of Justice,[4] national courts may *never* order the disclosure, or permit the use, of leniency corporate statements and settlement submissions to the Commission, and 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;

- **Access to General Evidence** – National courts should order defendants or third parties to disclose evidence 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, provided that such evidence is relevant to the petitioner's claim and that the disclosure request is proportionate and narrowly tailored;

- **NCA Decisions Are Binding** – Final infringement decisions by an NCA in one Member State are to be binding in all other Member States on national courts overseeing private actions challenging the same conduct;

- **Uniform and Extended Limitations Periods** – Limitations periods for infringement claims would be at least five years; would be suspended during competition authority proceedings and at least one year thereafter; would not begin to run before the day a continuous or repeated infringement ceases; and would not begin to run before the claimant knows, or reasonably should know, that the infringement has occurred, that it has caused harm to him or her, and the identity of the infringer;

- **No Joint and Several Liability for Immunity Recipients** – Immunity recipients would only be liable to claimants who are their own direct or indirect purchasers or providers, except when other claimants show that they are unable to obtain full compensation from other defendants;

- **Pass-On Defense Available** – Defendants will be able to invoke a defense that the claimant passed on all or part of the overcharge alleged, except where it is legally impossible for claimants at succeeding levels of the supply chain to claim compensation;

- **Recovery by Indirect Purchasers** – Indirect purchaser claimants shall have the burden of proving that an overcharge was passed on to them, but a rebuttable presumption of such an overcharge shall apply if such claimants show that direct purchasers suffered an overcharge and that the claimants purchased goods or services that were the subject of the infringement, or goods and services derived from or containing the goods or services that were the subject of the infringement; and

- **Proof of Harm and Damages** – Cartel infringements 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 (such as a direct purchaser's lost profits when it is forced to charge higher prices and thus loses sales) as well as overcharges.

This Directive will become binding in all EU Member States if approved by the European Parliament and the Council of the European Union. If the Directive is approved, Member States will have two years from such approval to bring their national laws and procedures into compliance with the Directive. The proposed Directive on private antitrust damages actions also was accompanied by a non-binding "Communication" from the Commission and "Practical Guide" from the Commission

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4 For a discussion of the *Pfleiderer* decision, *see* Skadden, "National Grid: Disclosure of EC Leniency Materials at Stake" (November 29, 2011), available here.

staff on quantifying harm in private actions for damages.[5] The Practical Guide, which "explains the particular features, including the strengths and weaknesses, of various methods and techniques available to quantify antitrust harm," is essentially a roadmap for economic analysis, such as the use of geographic and product benchmarks and regression analysis.

The Proposed Recommendation on Collective Redress Mechanisms

The Commission's Recommendation sets out its views as to the appropriate mechanisms for enabling citizens to obtain effective redress through collective actions while limiting the potential for excessive and abusive litigation. This Recommendation applies not only to collective redress for infringements of competition law, but also for infringements of, *inter alia*, consumer protection, environmental and financial services laws. The Recommendation lays out a series of "principles" that all Member States should follow in devising and implementing collective redress regimes, including:

- **"Opt-In" Principle** – Claimant party should be formed on the basis of the "opt-in" principle, any deviation from which should be justified by "reasons of sound administration of justice";
- **Representative Entities** – Representative actions should be brought only by public authorities or by representative 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;
- **"Loser Pays"** – Legal costs of the winning party should be borne by the losing party (the so-called "loser pays" principle);
- **Third-Party Funding** – Third-party funding of collective redress actions should be permitted, so long as such funding is disclosed to the court at the outset of the proceedings, there is no conflict of interest between the third party and the claimants, and the third party has sufficient resources to meet its financial commitments to the claimants and to meet any adverse costs if the action fails. However, two important provisos are applicable to third-party funders:
  - Compensation to third-party funders may not be based on the amount of the settlement reached or compensation awarded to the claimant unless this funding arrangement is regulated by a public authority; and
  - Third-party funders may not seek to influence procedural decisions of the claimant party (including settlement decisions), provide financing for an action against a competitor or against a defendant on whom the funder is dependent, or charge excessive interest on the funds provided;
- **Cross-Border Cases** – Member States should allow a single collective action in a single forum where a dispute concerns persons from several Member States;
- **No Contingency Fees** – Member States should not allow methods of attorney compensation, such as contingency fees, that risk creating an incentive to unnecessary litigation. If a Member State decides to allow contingency fees, appropriate national regulation of those fees in collective redress cases should be implemented;

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5 The Communication and Practical Guide are available here and here.

- **No Punitive Damages** – Punitive damages should be prohibited so that compensation awarded to a claimant in a collective setting does not exceed the compensation that would have been awarded in an individual action; and

- **Collective Follow-On Actions** – Where a public authority is empowered to adopt a decision finding a violation of EU law, collective redress actions should only start after any proceedings of the authority have been concluded definitively. If a collective redress action is launched before the authority begins its proceedings, the court may stay the collective redress action until the conclusion of the authority's proceedings.

The Commission's package of proposals follows a series of proposals publicized by the UK government several months ago.[6] The UK proposals are similar in many respects to those promulgated by the Commission, for example prohibiting contingency fees for plaintiffs' lawyers and treble or exemplary damages. Interestingly, however, the UK proposals go beyond the Commission's in at least one respect: creating a limited opt-out action for antitrust claims. Because the Commission's proposals are non-binding, the Commission will have to persuade Member States like the UK and others of the desirability of the Commission's proposals if the Commission is to achieve its aim of bringing consistency to Member States' collective action regimes.

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As is evident, the Commission's recent proposals provide ample fodder for discussion and analysis regarding their impact and implications, including for example the impact the Directive's proposals regarding the disclosure of competition authority materials and the liability of immunity recipients will have on the EC's leniency program and potential applicants, and on the European Court of Justice's case-by-case balancing approach to the issue articulated in its 2011 *Pfleiderer* decision and its *Donau Chemie* decision issued last week.

Overall, the Commission's proposals on private antitrust damages actions and collective actions — nearly a decade in the making — make clear that the Commission is committed to promoting such actions in Europe. In any event, the issues raised by the Commission's proposals will be important not only to determining companies' exposure in Europe, but also to underscore the importance of having a global approach to antitrust compliance, risk management and litigation strategy. As private antitrust damages actions, including collective actions, become more commonplace outside the United States, it becomes ever more critical for companies, particularly those that operate globally, to coordinate across jurisdictions on issues such as process, privilege and substantive claims.

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6 *See* Skadden, "UK's Department of Business, Innovation and Skills Proceeds with Private Competition Action Reforms" (March 27, 2013), available here.