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ALERT MEMORANDUM

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# European Commission Proposes Measures to Facilitate Actions in Damages

On June 11, 2013, the European Commission (the "Commission") published a package of measures designed to facilitate private actions for damages:[1] (i) a proposal for a directive on damages actions under national law for infringements of competition law (the "Damages Directive");[2] (ii) guidance for national courts on quantifying harm resulting from such infringements (the "Practical Guide");[3] and (iii) a recommendation for collective redress mechanisms in Member States for breaches of EU law (the "Collective Redress Recommendation").[4] The Damages Directive and the Practical Guide relate solely to competition actions, while the Collective Redress Recommendation applies to both competition actions and civil claims more generally (*e.g.*, consumer protection and data protection).

The Damages Directive seeks to optimize the interaction between public and private enforcement of competition law; to minimize discrepancies between rules applicable to antitrust damages actions in Member States; and to ensure that victims of infringements of EU competition law can obtain full compensation for the harm they have suffered. It follows earlier initiatives to level the playing field for damages claims,[5] and takes into account relevant

1 *See* http://ec.europa.eu/competition/antitrust/actionsdamages/index.html.

2 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, COM(2013) 404, June 11, 2013.

3 Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, C(2013) 3440, June 11, 2014; *and* Commission Staff Working Document – Practical Guide on quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union, SWD(2013) 205, June 11, 2013.

4 Commission Recommendation on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, C(2013) 3539/3, 11.6.2013; *and* Commission communication "Towards a European Horizontal Framework for Collective Redress", COM(2013) 401/2, June 11, 2013.

5 *See* Green Paper - Damages actions for breach of the EC antitrust rules COM(2005) 672, 19.12.2005 (the "Green Paper"); *and* White Paper on Damages Actions for Breach of the EC antitrust rules COM(2008) 165, 2.4.2008 (the "White Paper").

developments in EU jurisprudence, in particular the *Pfleiderer* and *Donau Chemie* judgments concerning disclosure of documents.[6]

The Collective Redress Recommendation establishes a number of non-binding principles for collective redress mechanisms – *i.e.*, mechanisms whereby, for reasons of procedural economy, many similar legal claims can be bundled into a single court action. It is recommended that such mechanisms are made available for all breaches of EU law, including competition law. The Commission's stated objectives are to facilitate access to justice for claimants, while respecting the different legal systems of Member States and avoiding the adverse effects of abusive litigation, which it considers can be seen in particular in "class actions" in the United States.

This Memorandum discusses the key elements of the Damages Directive (Section I); provides a brief outline of the Practical Guide to quantifying harm (Section II); examines the Collective Redress Recommendation (Section III); and presents our comments and conclusions on the collective package (Section IV).

## I. THE DAMAGES DIRECTIVE

The direct effect of the prohibitions laid down in Articles 101 and 102 of the Treaty of the Functioning of the European Union ("TFEU") has always meant that any individual can claim compensation for losses resulting from competition law infringements.[7] Yet, in practice, applicable national rules and procedures have often rendered the exercise of this right difficult or almost impossible. The obstacles to a successful damages action that the Commission has identified, and which the Damages Directive seeks to resolve, include: (i) obtaining the evidence required to prove a case; (ii) establishing the extent of defendants' liability for damage; (iii) taking account of the "passing-on defense"; and (iv) proving harm. These are addressed below.

### A. Disclosure of Evidence

The Commission considers that information asymmetry – the fact that much of the relevant evidence a claimant will need to prove their case is unavailable or in the possession of the defendant – is one of the key obstacles to successful damages actions in competition cases, where the infringing conduct tends, by its very nature, to be secretive. However, the Commission is equally concerned not to jeopardize the effectiveness of its leniency and settlement procedures, which rely on providing some assurance to defendants that their leniency

6 *See* Case C-360/09, *Pfleiderer AG v Bundeskartellamt*, ("*Pfleiderer*") [2011] ECR I-5161; *see also* Joined Cases C-295-298/04, *Manfredi*, [2006] ECR I-6619; Case C-199/11 *European Community v. Otis NV and others*, [2012] ECR I-0000; and Case C-536/11, *Donau Chemie*, [2013] ECR I-0000.

7 *See* Case C-453/99, *Courage and Crehan* [2001] ECR I-6297.

corporate statements and settlement submissions will be protected. The *Pfleiderer* judgment, which leaves the question of whether to disclose such documents within the remit of national judges, risks divergent results between (and even within) different jurisdictions, and is said by the Commission to be unsatisfactory.[8] The solutions therefore proposed in the Damages Directive are as follows:

- Disclosure may only be ordered when a claimant has presented reasonably available evidence showing plausible grounds for suspecting harm caused by an infringement.[9] Disclosure is limited to evidence which is relevant, proportionate, and precisely and narrowly defined.[10]
- The proportionality exercise involves consideration of: (i) the likelihood of an infringement; (ii) the scope and cost of disclosure; (iii) whether the evidence to be disclosed contains confidential information; and (iv) the specific formulation of the disclosure request.[11] Non-specific requests for a competition authority's entire file are likely to be disproportionate.
- Two categories of evidence are excluded from the general rules:
  - First, absolute protection from disclosure is granted to leniency corporate statements and settlement submissions (provided to either the Commission or a national competition authority); national courts cannot order the disclosure of these documents at any time.[12]
  - Second, temporary protection is granted to information prepared during a competition authority's investigation (*e.g.*, a party's replies to the authority's request for information, or the authority's statement of objections); disclosure of these documents can only be ordered after proceedings are closed.[13]
- If a party has obtained such documents through access to a competition authority's file in the exercise of its rights of defense, those documents are not admissible in private damages proceedings (at all, in the case of the first category, or until after the authority has closed its proceedings, in the case of the second

8 *See* the Explanatory Memorandum to the Damages Directive, p. 3.

9 Damages Directive, Article 5(1).

10 *Ibid.*, Article 5(2) and 5(3).

11 *Ibid.*, Article 5(3).

12 *Ibid.*, Article 6(1).

13 *Ibid.*, Article 6(2).

category).[14] For other documents, only the person who obtained access to the file can use those documents as evidence in an action for damages (to avoid such documents becoming an object of trade).

- Sanctions shall apply in the event of failure or refusal by a party to comply with a disclosure order, for the destruction of evidence, or for the failure to comply with court orders regarding confidentiality of information.[15]

The Commission is hereby seeking to establish certain bright lines for the disclosure of evidence on its file in the course of national damages actions, despite the European Court of Justice ("ECJ") ruling in *Pfleiderer* that requests for disclosure of any such documents – including leniency corporate statements and settlement submissions – should be assessed on a case-by-case basis by the national court, and it ruling in *Donau Chemie* that EU law precludes a national rule that leaves no possibility for the national court to weigh up the interests involved in deciding whether to grant access to leniency corporate statements. This provision of the Damages Directive therefore raises issues of compatibility with the ECJ's interpretation of EU law, and thus a real question as to whether it will be enforceable since the ECJ's interpretation of EU law is hierarchically superior, and therefore takes precedence over, the provisions of a Directive.

### B. Joint and Several Liability

The Damages Directive confirms the rule of joint and several liability for joint infringements of competition law, meaning that each infringing company is bound to compensate a claimant in full for any harm caused by the joint infringers. However, it proposes that the liability of companies that have been granted immunity from fines under a leniency program to their direct and indirect purchasers (or providers) shall be limited to the damage that their direct and indirect purchasers cannot recover from other joint infringers.[16] (It is not clear what steps an injured party must take before they may pursue the option to sue an immunity recipient as a last resort because they cannot obtain full compensation from the remaining cartelists; *e.g.*, whether the injured party must first try and fail to recover damages from those co-cartelists.) An infringing undertaking is permitted to recover a contribution from another infringing

14 *Ibid.*, Article 7.

15 *Ibid.*, Article 8.

16 *Ibid.*, Article 11(2). A direct purchaser is one that purchased the cartelized product from an infringer. An indirect purchaser is one that purchased the cartelized product from a direct purchaser, either in the same form or as part of another product.

undertaking, provided that the contribution of an immunity recipient does not exceed the harm it caused to its own direct or indirect purchasers (or providers).[17]

The Damages Directive also provides that if an infringement caused harm to parties other than the direct or indirect purchasers or providers of the infringing undertakings, an immunity recipient may be held liable only for its share of that harm.[18] This could be construed as a recognition of the so-called "umbrella effect", whereby direct and indirect purchasers of non-infringing undertakings may suffer harm in the form of higher prices due to non-infringing undertakings raising their prices in line with the broader rise in market prices attributable to the cartel. In that case, how the immunity recipient's share of that damage is determined (*e.g.*, turnover, market share, role in the cartel, etc.) is left to the discretion of the Member States.[19]

### C. Passing-on Defense

The Damages Directive expressly recognizes the existence of the "passing-on defense": a defendant can invoke as a defense the fact that the claimant passed on the whole or part of the overcharge resulting from the infringement to its own customers. The burden of proving that the overcharge was passed on lies with the defendant.[20] However, if the overcharge is passed on to persons at the next level of the supply chain for whom it is legally impossible to claim compensation for their harm (for example, because of national laws on foreseeability and remoteness), then the passing-on defense is unavailable. Otherwise, an infringing undertaking would be unduly freed from liability for the harm it caused.[21]

For indirect purchasers at the next level in the supply chain – for whom the amount of compensation depends on the degree to which any overcharge was passed-on to them by the direct purchaser – there is a rebuttable presumption that passing-on by the direct purchaser occurred if the indirect purchaser can prove that certain conditions are met. The indirect purchaser must show that: (i) the defendant committed a competition infringement; (ii) the infringement resulted in an overcharge to the direct purchaser; and (iii) the indirect purchaser bought goods or services from the direct purchaser that were the subject of the infringement. The Member State court will then estimate what share of the overcharge was passed-on.[22]

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17 *Ibid.*, Article 11(3).

18 *Ibid.*, Article 11(4).

19 Explanatory Memorandum to the Damages Directive, p. 16.

20 Damages Directive, Article 12(1).

21 Thus, a direct purchaser that has passed on the overcharge may, in certain circumstances, enjoy a windfall.

22 Damages Directive, Article 13.

### D. Rebuttable Presumption of Harm

Significantly, the Damages Directive introduces a rebuttable presumption that cartel infringements cause harm.[23] This is combined with a wide definition of a "*cartel*" as an agreement and/or concerted practice between competitors aimed at coordinating their competitive behavior on the market.[24] These proposals appear designed to alleviate the problems that the Commission has identified in proving and quantifying antitrust harm, which it considers to be fact-intensive and costly. While the Damages Directive recognizes that harm from competition infringements must be quantified on the basis of national rules and procedures, it provides that Member States are to ensure that the burden and level of proof for such quantification of harm does not render the exercise of an injured party's right to damages practically impossible or excessively difficult. That being said, this rebuttable presumption of harm does not mean that claimants are freed from having to prove that they bought products affected by the cartel and/or the quantum of their loss, so the impact of the presumption may not be especially meaningful in practice. We welcome too the fact that the Commission has refrained from attaching a presumptive level of overcharge to cartel damages claims.

In the package published on June 11, 2013, the Commission adopted a Practical Guide to quantifying harm, in order to help national courts evaluate economic evidence and to suggest methods for quantifying harm in competition cases; this is discussed at Section II below.

### E. Miscellaneous Provisions

The Damages Directive proposes that national courts be bound by findings of an infringement by national competition authorities.[25]

Damages actions are subject to a minimum five year limitation period. The limitation period is suspended until a competition authority has completed its investigation and time will not start to run until the injured party has reasonable knowledge of the basic elements of the infringement (including that the behavior in question qualifies as an infringement of EU or national competition law).[26]

Consensual dispute resolution processes are encouraged. Any claim of a settling injured party is reduced by the settling co-infringer's share of the harm caused, and non-settling co-

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23 *Ibid.*, Article 16.

24 *Ibid.*, Article 4(12).

25 *Ibid.*, Article 9.

26 *Ibid.*, Article 10.

infringers cannot recover contribution from settlers. The limitation period will also be suspended during any consensual dispute resolution process.[27]

The Damages Directive would be required to be transposed into national law within two years of its date of adoption.[28]

## II. GUIDANCE ON THE QUANTIFICATION OF HARM

The Practical Guide to quantifying harm sets out principles for calculating harm caused by competition law infringements. As a preliminary matter, the Commission has confirmed the basic proposition that compensation is to be calculated by comparing the actual position of a claimant with the position in which the claimant would have found itself had the infringement not occurred. This includes compensation for both actual loss and loss of profit suffered as a result of the infringement, as well as an entitlement to interest.[29]

The aim of the Practical Guide is to offer assistance to national courts (and parties) in the often complex task of quantifying harm caused by competition infringements, and assessing economic evidence on the counterfactual that would exist in the absence of the infringement. It sets out various forms of harm that are caused by anti-competitive practices, and explains methods and techniques for quantifying such harm. It is not binding on national courts or the parties, and is intended only to provide information that can be used in the framework of national rules.

First, the Practical Guide explains the methods and techniques used for constructing the counterfactual. For example, there are comparator-based methods (which use data from similar product and geographic markets), simulation models, and finance-based analysis, all of which deploy econometric techniques to try to predict what would have happened on the affected market if the infringement had not occurred.[30]

Second, the Practical Guide explains what kinds of harm typically result from anti-competitive conduct, and sets out methods for quantifying such harm:

- For cartels, the harm is typically a rise in the prices that direct and indirect customers pay for the affected product. This can result in two different potential types of harm for customers: (1) an overcharge compared to how much the

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27 *Ibid.*, Articles 17 and 18.

28 *Ibid.*, Article 20.

29 Communication from the Commission on quantifying harm in actions for damages based on breaches of Article 101 or 102 TFEU, ¶¶ 3, 6; referring to Joined Cases C-295-298/04, *Manfredi* [2006] ECR I-6619.

30 *Ibid.*, pp. 15-41.

product would have cost absent the infringement; and (2) in the case of intermediate producers, a so-called "volume effect" (*i.e.*, the lost profits when a cartel overcharge imposed increases the direct purchaser's own input costs, which it then passes on to its customers in the form of higher downstream prices, leading to a reduction in the direct purchaser's own sales). Any pass-on of overcharge needs to be factored into the quantification exercise.[31]

- For exclusionary practices, the typical outcome is foreclosure from the market resulting in a loss of profit. This can be caused to, and claimed by, companies who were prevented entry or expansion into that market due to the exclusionary practices. Exclusionary practices can also lead to harm for customers if the practice is successful in driving competitors out of the market and the existing company subsequently raises prices.[32]

## III. COLLECTIVE REDRESS RECOMMENDATION

The Collective Redress Recommendation applies to all breaches of EU law, but particularly complements the Damages Directive so as to facilitate collective damages claims for competition law infringements. Its objectives are to provide a pan-European approach to collective redress that: (i) is capable of effectively resolving a large number of individual claims for compensation, whether on behalf of natural or legal persons; (ii) delivers legally certain and fair outcomes within a reasonable timeframe; (iii) provides for robust safeguards against abusive litigation; and (iv) avoids economic incentives to bring speculative claims.[33] Unlike the Damages Directive, there is no requirement to transpose the Recommendation into national law; however, if the Recommendation is not followed, the Commission may consider legislative measures to ensure that its objectives are met.

The Recommendation applies to both injunctive and compensatory collective redress, and sets out a number of common principles and procedural safeguards to facilitate such actions. First, Member States are encouraged to designate representative entities to bring representative actions based on clearly defined conditions of eligibility and/or to empower public authorities to bring representative actions.[34] Second, questions of admissibility of the collective action should be verified at the earliest possible stage of proceedings; thus, verification of admissibility should

31 *Ibid.*, pp.42–54.

32 *Ibid.*, pp.55–68.

33 Collective Redress Recommendation, p. 9.

34 *Ibid.*, ¶¶ 4-7.

be conducted by judges of their own motion.[35] Third, the Recommendation calls for application of the "loser pays principle"; *i.e.*, the party that loses a collective redress action should reimburse necessary legal costs borne by the winning party.[36] Finally, to enable cross border cases, national rules should not preclude a single collective action in a single forum in cross-border cases.[37]

In the case of injunctive collective redress, the Recommendation expressly encourages expedited proceedings, where appropriate by way of summary proceedings. Appropriate sanctions (such as fixed fines for each day's delay) are recommended to ensure effective compliance with injunctive orders.[38]

As for compensatory collective redress, the Recommendation establishes an opt-in principle: the claimant party should be formed only on the basis of the express consent of those claiming to have been harmed. Any such person should be able to join the claimant party at any time before a judgment is given or the case is otherwise settled. Conversely, any person should be allowed to leave the claimant party at any time before the judgment or final settlement without foregoing the right to pursue his claim in other ways.[39] The Commission's preference for an opt-in form of collective redress may reflect, at least in part, concerns as to the difficulty in bringing an opt-out collective action across borders. By comparison, the collective redress proposal currently before the United Kingdom Parliament, which envisages both opt-in and opt-out collective actions, and therefore stands in tension with the Commission's Recommendation, proposes limiting opt-out actions to claimants domiciled in the United Kingdom.[40]

The Commission recommends that punitive damages are prohibited in claims for compensatory collective redress.[41] This likely reflects concerns voiced by stakeholders that the establishment of collective redress mechanisms might increase the risk of abusive litigation.[42] With regards to private third-party funding of collective actions, it is recommended that

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35 *Ibid.*, ¶¶ 8-9.

36 *Ibid.*, ¶ 13.

37 *Ibid.*, ¶¶ 17-18.

38 *Ibid.*, ¶¶ 19-20.

39 *Ibid.*, ¶¶ 21-24.

40 United Kingdom Draft Consumer Rights Bill, June 2013, Schedule 7, para. 5.

41 Collective Redress Recommendation, ¶ 31. Note, however, that the Damages Directive does not preclude punitive damages in other types of private actions.

42 *Ibid.*, pp. 7–8.

remuneration for the fund provider based upon the settlement amount obtained is prohibited. Finally, in the case of collective follow-on actions, Member States are encouraged to allow collective redress actions only after proceedings launched by public authorities in the same matter have been concluded definitively (otherwise, such actions should be stayed).[43]

## IV. CONCLUSION

The Damages Directive follows, to a large extent, the Commission's suggestions in the previous Green and White Papers. Perhaps the most significant difference from those consultations is the absence of provisions concerning collective redress; these have been reserved for the non-binding Recommendation. This might be explained by the differences in the legal traditions of the Member States in this area. For example, in Germany, collective systems of seeking compensation for cartel damages are allowed and have become common; whereas in France, class actions that do not concern the representative body's own interest are inadmissible.

The Damages Directive would also provide welcome clarity as regards access to documents and the absolute protection of leniency corporate statements and settlement submissions, and the scope of the passing-on defense.[44] However, and significantly, the Damages Directive proposes establishing a rebuttable presumption that cartels cause harm. While this ought to ease the burden for claimants in damages actions, the broad definition of a cartel risks over-extending this presumption to practices where it is not warranted. This further tips the balance against defendants, who already face heavy odds stacked against them as regards the presumptions applied by the Commission in establishing a cartel infringement (*e.g.*, the lack of any need to show actual effects in an object infringement case).

The Damages Directive will next be discussed by the European Parliament and the EU Council of Ministers according to the ordinary legislative procedure. Although the consultation phase has already been long and extensive, given the impact of the suggestions on national civil procedure rules, discussions in both institutions are likely to yield further modifications. In light of the uncertain outcome of the legislative process, it may well be that the one of the short-term effects of the proposals is to delay the introduction of national reforms, to enable Member States to ensure that any national scheme is in conformity with the final form of the Damages Directive.

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43 *Ibid.*, ¶¶ 33–34.

44 For example, the passing-on defense has been considered recently in the U.K., where the OFT supported excluding such provisions from U.K. legislation, considering that any solution would be best formulated on a European level. It remains to be seen what impact the Commission's reform package will have on the draft Consumer Rights Bill currently before the U.K. Parliament, which deals with private actions and collection redress in the U.K. and which was published the day after the Commission's announcement.

Please feel free to contact any of your regular contacts at the firm or any of our partners or counsel listed under "Antitrust and Competition" in the "Practices" section of our website (http://www.clearygottlieb.com) if you have any questions.

CLEARY GOTTLIEB STEEN & HAMILTON LLP

# Office Locations

**NEW YORK**
One Liberty Plaza
New York, NY 10006-1470
T: +1 212 225 2000
F: +1 212 225 3999

**WASHINGTON**
2000 Pennsylvania Avenue, NW
Washington, DC 20006-1801
T: +1 202 974 1500
F: +1 202 974 1999

**PARIS**
12, rue de Tilsitt
75008 Paris, France
T: +33 1 40 74 68 00
F: +33 1 40 74 68 88

**BRUSSELS**
Rue de la Loi 57
1040 Brussels, Belgium
T: +32 2 287 2000
F: +32 2 231 1661

**LONDON**
City Place House
55 Basinghall Street
London EC2V 5EH, England
T: +44 20 7614 2200
F: +44 20 7600 1698

**MOSCOW**
Cleary Gottlieb Steen & Hamilton LLC
Paveletskaya Square 2/3
Moscow, Russia 115054
T: +7 495 660 8500
F: +7 495 660 8505

**FRANKFURT**
Main Tower
Neue Mainzer Strasse 52
60311 Frankfurt am Main, Germany
T: +49 69 97103 0
F: +49 69 97103 199

**COLOGNE**
Theodor-Heuss-Ring 9
50688 Cologne, Germany
T: +49 221 80040 0
F: +49 221 80040 199

**ROME**
Piazza di Spagna 15
00187 Rome, Italy
T: +39 06 69 52 21
F: +39 06 69 20 06 65

**MILAN**
Via San Paolo 7
20121 Milan, Italy
T: +39 02 72 60 81
F: +39 02 86 98 44 40

**HONG KONG**
Cleary Gottlieb Steen & Hamilton (Hong Kong)
Bank of China Tower, 39th Floor
One Garden Road
Hong Kong
T: +852 2521 4122
F: +852 2845 9026

**BEIJING**
Twin Towers – West (23rd Floor)
12 B Jianguomen Wai Da Jie
Chaoyang District
Beijing 100022, China
T: +86 10 5920 1000
F: +86 10 5879 3902

**BUENOS AIRES**
CGSH International Legal Services, LLP-
Sucursal Argentina
Avda. Quintana 529, 4to piso
1129 Ciudad Autonoma de Buenos Aires
Argentina
T: +54 11 5556 8900
F: +54 11 5556 8999

**SÃO PAULO**
Cleary Gottlieb Steen & Hamilton
Consultores em Direito Estrangeiro
Rua Funchal, 418, 13 Andar
São Paulo, SP Brazil 04551-060
T: +55 11 2196 7200
F: +55 11 2196 7299

**ABU DHABI**
Al Sila Tower, 27th Floor
Sowwah Square, PO Box 29920
Abu Dhabi, United Arab Emirates
T: +971 2 412 1700
F: +971 2 412 1899

**SEOUL**
Cleary Gottlieb Steen & Hamilton LLP
Foreign Legal Consultant Office
19F, Ferrum Tower
19, Eulji-ro 5-gil, Jung-gu
Seoul 100-210, Korea
T:+82 2 6353 8000
F:+82 2 6353 8099