

European Commission Announces Proposals for Damages Actions and Collective Redress in Competition Actions

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On June 11, 2013, the European Commission announced two proposals of interest to companies operating within the European Union. The [first proposes](#) damages actions for private enforcement of competition laws. The [second recommends](#) a common set of principles regarding collective redress in several areas, including competition law. These proposals suggest a developing trend abroad toward empowering businesses and consumers who claim to be injured by alleged anticompetitive conduct.

The proposal for collective redress endorses a common, or “horizontal,” framework across all member states. The proposal contends that the availability of collective redress – for both injunctive and compensatory relief – will ensure consumer protection and improve enforcement of competition laws, while also serving economic growth and facilitating access to justice. Pursuant to the proposal for private actions in competition cases, claimants would be entitled to pursue compensatory damages for the actual loss incurred, lost profits, and interest. In cartel actions, there would be a rebuttable presumption of harm if an infringement occurred.

Under the collective redress proposal, consumers, businesses, or third-party representative entities would be allowed to initiate an action, but the claimants would be required to opt-in to actions for damages; the collective would not be allowed to represent a broad class of claimants like in the U.S. system. Also, to avoid conflicting results in regulatory actions, collectives would either proceed as follow-on actions or they would likely be stayed by a court pending final disposition of the regulatory action. Further complicating collectives, member states are encouraged to allow cross-border claims by foreign parties to proceed in their courts where appropriate, but the courts would be allowed to apply multiple nations’ laws where implicated. In addition, the damages proposal endorses offensive and defensive pass-on. The availability of pass-on theories could undermine the commonality of claims among collective members based on the amount, if any, of an overcharge passed on to downstream customers.

Based on the recommendations under each proposal, courts would have an important role in how collective actions will proceed. First, the collective cannot proceed unless “admissibility conditions” are satisfied to weed out frivolous or non-meritorious claims or claims ill-suited to proceed as a

collective. Second, courts should review settlements and verify they protect the rights and interests of all parties involved. Finally, courts would have a significant role in ensuring the scope of discovery is “proportionate” and abides by limits on the disclosure and use of evidence obtained from regulators.

Despite its ambitious goals, the collective redress proposal likely will not lead to significant change in litigation practice any time soon, even when combined with the expansion of private actions for damages. First, adoption of these procedures has been delayed; the Commission proposed that member states adopt compliant procedures within two years (once the European Parliament issues the directives). Second, concerns about the “abuses” in U.S. class actions led the Commission to eliminate punitive damages and contingency fees, stating that all compensation should go to consumers, and restricting the availability of third-party financing. These limitations might undermine incentives to initiate and maintain private collective actions. Third, the collective redress proposals are similar to the United Kingdom’s current system of opt-in, follow-on actions. These actions in the United Kingdom have proven to be of limited effectiveness, leading to a proposal to allow for opt-out, standalone actions.

The potential divergence between the Commission’s proposed opt-in procedures and the United Kingdom’s out-out proposal (and other member states’ procedures) could eventually lead to important, potentially outcome-determinant venue disputes early on in the litigation. More information regarding the United Kingdom’s proposal is available [here](#).

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