"Towards a coherent approach to collective redress"

Comments of the European Competition Lawyers' Forum on the European Commission Staff Working Document

April 2011

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1. Introduction

1.1 Following earlier consultations that were very much focussed upon redress for infringements of the competition rules, the ECLF welcomes the broader remit of the working document. There is no particular reason why victims of infringements of EU competition rules should be afforded preferential treatment relative to victims of other breaches of EU law.

1.2 That said, as a natural reflection of the composition of the ECLF, this response to the consultation will focus on those aspects of the working document that relate to infringements of the competition rules. The composition of the group within the ECLF that has contributed to this response is shown in the Annex to this document.

1.3 It is worth noting at the outset that even since the previous consultations there has been a number of developments in the area. In particular, ECLF members believe that the number of cases brought before national courts continues to increase, with some Member States exhibiting a particular uptick in the levels of private enforcement of the competition rules. Whether this is a "sufficient" level of enforcement that is "sufficiently" dispersed across all categories of claimants, including SMEs and consumers, is an empirical question that should be assessed against the objectives expected to be met by a system of private enforcement of competition rules in the EU and in light of both the factual circumstances and quantum of loss likely suffered.

1.4 If a "gap" remains, in shaping any approach towards collective redress for infringements of the competition rules, some fundamental principles ought to be borne in mind:

(i) The model should be constructed mindful of the fact that, as recognised by the ECJ in *Crehan*, the full effectiveness of the competition rules would be put at risk if individuals were not able to claim damages for loss suffered as a result of an infringement;

(ii) The model should work in harmony with the system for public enforcement of the rules, recognising the different functions served by public and private enforcement, and avoiding undermining the leniency programmes that have proved so successful in detecting cartel activity within the EU;

(iii) The system should strike a fair balance between ensuring the efficient and timely conclusion of collective actions with safeguarding claimants' and defendants' legal rights;

(iv) Any model for collective redress should avoid the excesses of the US system, in particular it should avoid creating incentives for the pursuit of unmeritorious claims and should avoid giving rise to unnecessary litigation; and

(v) Due respect needs to be accorded to the initiatives that have been taken to facilitate collective action in individual Member States and caution needs to be exercised before introducing changes that might upset the balance that has been struck at national level between ensuring the full effectiveness of the EU competition rules and the need to avoid unmeritorious litigation.

1.5 This response first considers the legal basis for any reform of the legal framework relating to collective actions and certain considerations relating to the interrelationship between public and private enforcement of the competition rules. The remainder of this document then considers those aspects of the legal system that are critical to ensuring a coherent and appropriately balanced approach to collective redress within the EU, under the following headings:

(i) Means by which individual claims can be bundled for the purposes of seeking collective redress;

(ii) Issues relating to funding of collective actions;

(iii) Measures of recovery, in particular, issues relating to passing-on;

(iv) Issues relating to disclosure; and

(v) Issues relating to consensual collective resolution as an alternative to litigation.

1.6 To summarise the views expressed in this paper:

(i) The ECLF encourages the Commission clearly to identify the legal basis for proposals in this area and to be sensitive to the respective roles that can most effectively be performed by public and private enforcement of the competition rules.

(ii) The ECLF would be supportive of moves to facilitate representative actions on behalf of groups of consumers and SMEs. Whilst strongly opposed to any moves in the direction of class actions on an opt out basis, there should be some scope for representative actions to be brought on behalf of identifiable but not yet identified claimants provided that suitable limitations apply, for example, on lawyers' remuneration in such cases.

(iii) To the extent that funding is a deterrent to the pursuit of otherwise meritorious and appropriate claims, careful consideration should be given to new alternatives available for the funding of claims.

(iv) There is a need for harmonisation around the extent to which passing-on can be raised as a defence to claims for damages, or to moderate the quantum recoverable.

(v) The ECLF would also be supportive of more convergence around standards for disclosure, recognising that competition cases in particular are often deterred by an absence of evidence, given their fact intensive nature and the asymmetry of information availability as between the parties.

(vi) Finally, whilst the group is opposed to forcing forms of consensual dispute resolution on parties to a collective claim, it acknowledges that these processes have an important role to play in minimising the burden on the courts and in containing the costs associated with litigation. For this reason, the ECLF would be supportive of moves to increase both the efficacy and attractiveness of mediation.

1.7 The ECLF emphasises that a holistic approach needs to be adopted towards any proposals intended to stimulate collective redress. No single proposal can be considered in isolation from any other proposals that the Commission may wish to introduce. It is the overall effect of these measures that will determine if a balanced result is achieved with increased access to justice and appropriate safeguards in place to avoid excessive litigation in European courts.

2. Legal basis for reform

2.1 The possibility of introducing an overarching framework governing consumer collective redress has previously been mooted by the Commission.[1] This provoked material questions from individual Member States as to the legal basis upon which the Commission might introduce such a framework and the degree of procedural autonomy that Member States ought to enjoy when determining the implementation of procedure intended to secure rights/objectives imposed by EU law.

2.2 The consultation paper suggests that a "coherent European framework drawing on the different national traditions could facilitate strengthening collective redress (injunctive and/or compensatory) in targeted areas." However, the consultation paper does not identify what form such a framework might take – whether a directive, regulations or non-binding guidelines. Whatever measures the Commission opts to take (whether binding or non-binding), it would be helpful if the Commission identified the legal basis upon which it relies in doing so. It would also be helpful if the Commission explained how its objectives in facilitating collective redress are connected to the Treaty provision or provisions selected. For example, should the Commission be seeking to make the functioning of the internal market more efficient, it would be helpful for it to explain in greater detail how the implementation of procedures enabling collective redress might contribute to this and consider how the various collective redress models and procedures available meet this objective. Whereas, if the Commission is seeking to harmonise procedures or otherwise remove obstacles to obtaining justice, it would be helpful for it to explain the degree of intervention that it considers is both required and justified in order to meet this objective.

2.3 We note that the EU has previously considered whether to target regulatory reform at collective claims based upon antitrust infringements but that it was considered that this might lead to fragmentation of national procedural rules. In our view, to the extent that there is a need to provide for collective redress in respect of antitrust claims, it is quite possible for such a provision to arise under the overarching framework provided for all consumer collective redress. There is no reason why victims of antitrust infringements should be afforded preferential treatment to other consumers.

[1] See Green Paper on damages actions for breach of EC antitrust rules (COM(2005)672, 19.12.2005) and White Paper on damages actions for breach of EC antitrust rules (COM(2008) 165, 2.4.2008).

3. Interrelationship between public and private enforcement of antitrust damages

3.1 It has been argued that there is a significant link between public and private enforcement of antitrust infringements. The European Commission indicated in its White Paper on damages actions for breach of EC antitrust rules that:

"*More effective compensation mechanisms mean that the costs of antitrust infringements would be borne by the infringers, and not by the victims and law-abiding businesses. Effective remedies for private parties also increase the likelihood that a greater number of illegal restrictions of competition will be detected and that the infringers will be held liable. Improving compensatory justice would therefore inherently also produce beneficial effects in terms of deterrence of future infringements and greater compliance with EC antitrust rules.*"

3.2 The ECLF considers that in devising proposals to address the perceived deficit in collective redress actions a sharper distinction ought to be drawn between the deterrence function that can be most effectively performed by public enforcement and the compensatory function performed by private litigation. Any shift towards using private litigation, including possibilities for collective redress, as a means of outsourcing the deterrence function that has to date been performed by public enforcement would represent a radical change to the system for enforcement of the competition rules within the EU. It would represent a dangerous step in the direction of other systems for enforcement of competition rules whose excesses the working document stresses DG Comp is keen to avoid.

3.3 Even if one were to accept that deterrence is an appropriate objective for a system of private enforcement to pursue, the conclusion of the working document, namely that the absence of an effective legal framework for antitrust damages actions hampers the full enforcement of the antitrust rules and thus has a negative bearing on vigorous competition in an open internal market, can fairly be challenged.[2] Despite the historic lack of a private enforcement culture in the EU, there is an increasing volume of claims being brought in various Member States in order to recover damages suffered as a result of antitrust infringements. As matters stand, with private enforcement still at a nascent stage in the EU as compared to the US, it is difficult to test what contribution private enforcement might make over and above public enforcement to deterring anti-competitive behaviour, if that is indeed an objective that ought properly to be served by a system of private enforcement.

3.4 There is also a need to ensure that any proposals relating to collective redress are proportionate to the deficit in the existing system for private enforcement and the mischief that arises from that deficit. A review of the rapidly evolving situation at Member State level indicates that medium and larger businesses suffering losses are able to obtain redress and are taking steps to do so. To that extent, the existing system for private enforcement is functioning effectively. It appears to be the case that it is only situations where the loss is very small that actions tend not to be brought. This is no different from any other litigation. The introduction of collective redress may allow the bundling of a large number of small claims and make pursuit of those claims cost effective if successful. However, we do not consider that collective redress will so alter the rate of claims

[2] http://ec.europa.eu/competition/antitrust/actionsdamages/index.html.

being brought as to lead to a quantum leap either in the level of compensation from infringers that is returned to consumers/SMEs, or in the deterrent effect of the possibilities for private enforcement.

3.5 It is also worth bearing in mind that there are other policies that the Commission and national competition authorities might use to promote compliance with antitrust law and to deter infringements that may undercut or otherwise be inconsistent with collective redress or other methods of boosting private enforcement actions. For instance, the Commission reportedly has been concerned to protect the content of leniency submissions from disclosure (having apparently written to the US courts informally in respect of the LCD litigation stating that disclosure might undermine the effectiveness of the leniency regime). The concern not to disincentivise leniency applicants competes directly with claimants' need for access to information relating to the infringement so as to have the evidence necessary to demonstrate the effect that the infringement has had on them and so recover any losses suffered. Similarly, with settlement increasingly being pursued as a means of bringing cases to a swift and efficient conclusion, there is likely to be an increase in the proportion of cases concluded on the basis of short form decisions that will be relatively less helpful than conventional decisions to potential claimants. It follows that there is already recognition within the system that the facilitating of private enforcement is a goal that needs to be balanced against the goals to be served by a system of public enforcement.

3.6 Even in terms of the objective of delivering compensation to victims of antirust infringements, collective redress may be a somewhat inefficient or even ineffective tool as compared to the nuanced approach that public authorities are able to take in respect of individual cases. An example of this is the 2006 English independent schools case, in which the UK Office of Fair Trading found that a number of independent fee paying schools had breached competition law by sharing information as to the fees that they intended to charge. These schools each had charitable status and imposition of large fines was likely only to degrade the quality of the services that they offered – effectively penalising their students twice. The Office of Fair Trading accordingly reached an agreement with the schools whereby they admitted the infringement but did not admit that it had an effect on fees (so not immediately opening themselves up to a slew of follow-on damages actions). In return, the schools each paid a nominal fine of £10,000 and all contributed to a £3 million charitable fund to be applied for the educational benefit of affected students. This case therefore provides a useful illustration of the fact that public authorities are able to use the tools available to them in a way to deliver compensation to classes of victim whilst avoiding the expense and uncertainty inevitably associated with litigation.

3.7 The ECLF notes in particular that it is open to competition authorities to seek and accept commitments/undertakings from parties that are the subject of an investigation in terms that seek to compensate victims or a class of victims (which in turn may be seen as a mitigating factor in setting any fine). In circumstances where claims are often deterred by the small amounts recoverable by individuals and SMEs, this may be a more efficient use of resources and more in line with the primary of public enforcement of competition law in the EU than seeking to create a system that "over promotes" litigation. A sensible means of providing general redress would vary in light of circumstances, but does not need to be (a) necessarily monetary; nor (b) the subject of detailed guidance. Attempts at general redress could not preclude any individual bringing a claim; nor could it be "imposed" on the undertaking in question which may legitimately have strong grounds for taking the position that no loss was caused to the alleged victims.

3.8 To contextualise views on this point, in the EU, in contrast to the US, the emphasis has been on public enforcement of antitrust infringements to date. This is, of course, a policy decision and there is no right answer as to how public and private enforcement ought to be weighed against each other: merely a balance to be struck depending upon the activity subject to enforcement action and the type of solution delivered by the cultural context. In the view of the ECLF, whilst private enforcement may be a positive supplement to public enforcement of laws protecting consumers, any proposals for a European legislative scheme or guidance on collective redress must be (a) respectful of the balance that has traditionally been struck between public and private enforcement; (b) proportionate to the deficit in the scheme for private enforcement that arises from a disparate approach to collective redress across the EU; and (c) flexible enough to allow for the development of solutions tailored to the procedural barriers to collective actions, which are inevitably jurisdiction-specific.

4. Class actions v collective actions by representative bodies

4.1 Often the discussion of how to structure a system of collective redress is framed as a narrow debate between "opt-out" and "opt-in", both of which are discussed in more detail below. In that narrow dialogue, the ECLF is clear that it considers that a US-style "opt-out" class action system is not an appropriate form to impose across the Member States and "opt-in" collective actions brought by representative bodies would be better suited to the EU.

4.2 However, the ECLF acknowledges that adopting such a rigid position on its own is insufficient and will do little to contribute to the helpful debate instigated by the Commission in circumstances where we consider that there is a genuine, rather than currently merely perceived, lack of access to judicial redress for individual consumers across the EU. The ECLF, therefore, considers that, without wishing to move the EU toward an 'opt-out' class action culture, it is necessary to explore the possibility of a "hybrid" collective redress system whereby *identifiable*, rather than *currently identified*, claimants comprise the participants in collective actions. The actual amount awarded, and any fees of claimant's lawyers, should not be based on the "not yet identified" class, however.

Class actions

4.3 A coherent EU approach on collective redress should, as much as possible, be based upon the legal and constitutional traditions of the majority of the Member States. Accordingly, ECLF is of the view that the proposition of US-style "opt-out" class actions, allowing claims for damages to be brought on behalf of a class of consumers other than for those who have actively opted out of the litigation, is not the answer to finding an appropriate system for collective redress in the EU.

4.4 We consider that such an approach would be likely to prompt a higher proportion of unsubstantiated claims and could result in unnecessary litigation.

4.5 In this regard, we note that the European Commission has previously reached the same conclusion as the ECLF. In its White Paper on Damages actions for breach of the EC antitrust rules, published in 2008, the Commission conducted a thorough study on the pro's and con's of "opt-in" and "opt-out" litigation,

concluding with a clear rejection of "opt-out" class actions and recommended instead "opt-in" class actions. The study underlying these recommendations by the Commission refers to a number of compelling objections against "opt-out" systems, including (i) costs related to "opt-out" systems compared to "opt-in" systems (high court and lawyers' fees, costs linked to certification and distribution of damages), (ii) constitutional problems by depriving class members of their "day in court", (iii) risk of overcompensation if not all class members eventually claim damages and (iv) principal-agent problems, e.g. inadequate representation. Most importantly, it is observed in the study that an "opt-out" approach would be *"farthest away from traditional legal principles of inter partes litigation and poses the largest problems concerning constitutional and other legal restraints*".

4.6 The vast majority of Member States have "opt-in" mechanisms for collective redress. Whilst there are a few Member States where "opt-out" mechanisms are purported to have been implemented (e.g. Denmark, Portugal and the Netherlands), this does not justify an EU-wide approach based on an "opt-out" system. Indeed, on closer examination of the experience in these three jurisdictions, it is clear that these jurisdictions have restricted systems and not pure "opt-out" class actions and do not provide support for an effective and across the board coherent EU approach on collective redress on the basis of "opt-out".

4.7 For example, in Denmark, "opt-in" still is the primary approach and "opt-out" (a 'secondary model') is only available if a number of strict requirements are met ((i) claims must be so low-value that it cannot be expected that they would be pursued through individual actions (normally below DKK 2,000 or £200); and (ii) that the "opt-in" model is an inappropriate method of resolution). Only a public authority can institute an opt-out action and presently, the option is only available to the Danish Consumer Ombudsman. The court may require security for costs from the representative but practically this is not seen as necessary for any public authority.

4.8 In The Netherlands, the system of "opt-out" is only accepted in the context of settlements and cannot be seen in isolation from the fact that representative organizations cannot claim damages before Dutch courts. The binding settlement mechanism was introduced to – at least partly – fill this gap. The "opt-out" was then introduced merely to avoid violation of article 6 ECHR, through allowing the possibility to step out of the class and initiate own proceedings, and therefore does not reflect an overall preference of the Dutch legislator for "opt-out" over "opt-in".

4.9 Special procedures for class actions on an "opt-out" basis are available in Portugal. These procedures empower individuals, certain consumer associations or representative bodies to bring such actions on behalf of unidentified claimants for specific public interest claims, including consumers' rights. Actions to claim damages by means of a civil class action arising from infringements of Articles 101 and 102 (of the Treaty on the Functioning of the European Union) would run the risk of not being considered by a Portuguese court to be totally within the scope of this legal regime. A judge is required to dismiss immediately the case if they consider that the claim is clearly unlikely to proceed and general penalties for litigation in bad faith are applicable. This procedure has not been used heavily in Portugal to date and the safeguards have not yet been tested fully.

Actions brought by representative bodies

4.10 By contrast, the ECLF considers that "opt-in" collective actions help victims balance the advantages and disadvantages of seeking redress from the court and claimants can freely decide whether or not to become involved and this should be the preferred route for a collective redress system in the EU.

4.11 However, whilst the ECLF considers that an "opt-in" rather than an "opt-out" approach is more appropriate, it recognises that other, perhaps hybrid, mechanisms of aggregating claims should be considered if the problem of how indirect purchasers, often consumers with relatively small claims, are effectively denied access to judicial redress is to be tackled. As discussed in further detail below, we consider that one possible option is for the Commission to explore the use of representative bodies in Member States to bring collective actions on behalf of (i) "opt-in" litigants; and (ii) "identifiable" but not yet identified would-be litigants (provided that these individual litigants actively opt-in once the action is on foot or at least in order to obtain an actual award) (i.e. the hybrid option).

4.12 Collective actions (both follow-on and stand-alone) pursued by qualified entities on behalf of consumers represent a way forward that is preferable to the type of "opt-out" class actions that have brought the US system into disrepute and one that is more consistent with the relative roles played by public and private enforcement within the EU system. Such actions brought by representative bodies may widen access to courts and enable consumers to recover relatively small claims in an efficient manner.

4.13 Notwithstanding the various mechanisms already available in a number of Member States in this regard (e.g. Italy, Spain, UK, the Netherlands, the Czech Republic and Greece), there is, however, at least a perception that claims brought by representative bodies have been used relatively infrequently as a means of securing collective redress on behalf of consumers. This infrequency may be a result of the perception that such collective actions brought by representative bodies have not been without their difficulties – at least in terms of willingness of individuals to come forward and claim what is a relatively small amount – and the perceived "success" of such claims has been relative to date. But this has not been the case for all Member States.

4.14 To that end, some lessons can be drawn from the experience to date by comparing and contrasting those jurisdictions in which actions brought by representative bodies are perceived to have experienced a measure of success in securing redress for large number of consumers (such as in Spain) with those in which such actions have not had the impact anticipated when the relevant legislation was introduced (such as in England and Wales).

England and Wales

4.15 Under legislation that came into force in 2003, it is possible for a previously designated representative body in the UK to bring a follow-on "opt-in" action after a public investigation into breaches of competition law. However, following the perceived failure of the *Replica Kit* case in 2007/2008, the head of legal affairs at Which?, the only currently designated representative body, has stated publicly that Which? is unlikely to bring further representative actions.

4.16 This policy decision reflects in part the lower than expected number of consumers that participated in the claim. Which? advertised for consumers who were affected by the replica football shirts cartel, offering to represent them on a 'no win, no fee basis'. However, the number of named consumers who came forward to join the claim was just 130 initially rising only to 500 shortly before settlement was reached. Which? indicated at the time that the an estimated one million shirts purchased by hundreds of thousands of consumers had been affected by the cartel.

4.17 It was agreed as part of the settlement that each consumer who had joined the damages action and purchased the relevant shirts during the cartel period would receive £20 each (the estimated amount of the overcharge). Customers who did not join the action were entitled under the terms of the settlement to claim £5 or £10 if they provided either the receipt or the shirt to a JJB store. It was reported that this compensation scheme cost JJB Sports just £18,000, compared to the £6.7 million fine imposed by the Office for Fair Trading for JJB's breach of the competition rules.

4.18 Some of the possible reasons why this case failed in England are as follows:

(i) Six years had passed since the cartel resulting in a lack of evidence (e.g. customer receipts);

(ii) Low levels of damages (£20 each) may have led to inertia by the consumers affected;

(iii) Problems in advertising for potential victims; and

(iv) Each claimant had to be listed on a register by a specified date, resulting in small numbers of consumers coming forward and potentially large numbers missing out.

Spain

4.19 In Spain, there is a possibility for representative claims by consumer and user associations, both for groups of consumers that can be identified and for groups of consumers that cannot be easily identified ("diffuse interests").

4.20 In the case of claims on behalf of identified individuals, the judgment will specify the amount of damages to be awarded to each individual. In diffuse interest type claims, each individual consumer must seek to enforce the judicial decision and the court may specify a time-limit within which claims must be brought. Where harmed consumers are identifiable but did not opt-in to the action, the judgment may define the conditions and features that those consumers who did not opt-in needed to fulfil in order to be eligible for compensation.

4.21 It has been argued that Spain has the '*most used and most successful of all the group actions in the Member States*'[3]. Some of this success may well be owed to extraneous factors rather than specific form of legislation in place. In particular, there has been a longstanding and heightened awareness of the need for effective forms

[3] Louis M Solomon 'A Failed Experiment' (IFLR October 2010)

of collective redress borne out of the 1981 rapeseed oil case when a batch of defective oil entered the food chain in Spain and killed 650 people, affecting around 22,000.

4.22 However, there are also a number of specific procedural factors that may have facilitated the greater prevalence of collective actions in Spain.

4.23 First, there are extensive requirements for identifying and notifying potentially affected consumers of the litigation, which is likely to raise awareness. Publication of the representative action is necessary in order to inform members of their potential interest. For identifiable groups of consumers, the representative body has the power to request that the court take appropriate measures to identify and define the group, including requiring the defendant to assist in the identification process (the representative body must offer a financial guarantee to cover the defendant's associated expenses). The Spanish courts have proven to be receptive to the adoption of various measures of preliminary inquiry, including forcing defendant companies to share not only personal data of affected consumers but also financial information.[4] Secondly, consumers can sign up to collective actions for free. In combination with the procedures for identifying and informing consumers of the litigation, this may well go some way to overcoming the consumer inertia which often arises in "opt-in" systems. Finally, the representative body is generally not liable for court fees payable on initiation of the collective action, which removes a disincentive that might otherwise deter such claims.

Conclusions

4.24 First, the ECLF considers that it should be relatively straightforward for Member States to confer a representative status on bodies. It is important that it should be possible to do this not only by officially designating representative status on a long term basis, but also by *ad hoc* certification on a case by case basis in respect of a particular anti-trust infringement. There is a strong case for specifying in advance the criteria that should be satisfied by any group wishing to represent a group, not least in terms of objectivity and independence. This applies with particular force to the extent (a) that the position of representative bodies is to be enhanced; and (b) that representative actions on the part of SMEs are permitted. Specifically, representative bodies should not be allowed to a have a pecuniary interest in the outcome of the case. Such arrangements might be incompatible with the need to act in the interests of those who they represent. As an important procedural safeguard, a defendant should be given the right to be heard by the court as to whether the group fulfils the relevant criteria.

4.25 Secondly, the comparison between the respective prevalence of collective actions in England and Wales and in Spain suggests that it is important to have procedures in place by which potential claimants can be identified. This is likely to require something going beyond simply publication of the initiation of proceedings in those media channels most likely to reach the potential claimants, but also some court-supervised mechanism to permit the representative body to make more pro-active inquiries about potential claimants, such as the ability to require the defendant to make contact details available to the representative body, as has been

[4] A court of first instance has recently ordered a commercial bank to disclose to a consumer association all information on clients who had entered in certain financial swap arrangements. The order was upheld on appeal.

the case in Spain. Due process would require that a defendant in those circumstances should have the right to apply to the court to oppose any such direction, which might compel the defendant to share otherwise confidential information with the representative body.

4.26 Thirdly, it seems that representative actions should not be confined to circumstances where each and every claimant can be identified prior to initiation of the proceedings, nor to circumstances where each and every claimant has consented in writing to the representative action. Whilst any move towards an "opt-out" class actions would not be defensible for the reasons discussed above, there ought to be scope for a representative body to initiate proceedings on behalf of *identifiable*, but not yet *identified* individuals. The outcome of such proceedings could not be and should not be an award of damages to the representative body, but should instead provide a basis for claims to recover damages by individuals who were identifiable by reference to the set criteria, provided that they come forward with their claims to enforce the judgment within a short period from determination of the representative action. This may operate in a way similar to the Spanish system described above, where the judgment will establish criteria for any identifiable claimant to come forward and enforce the judgment within a specific time limit. There may be a need for some publication of the outcome of the proceedings for this to be made a meaningful possibility. If the concept of representative actions were to be extended in this way, the outcome of the representative proceedings should also be binding on all those within the relevant class (provided appropriate notice is given), not merely those who have been identified prior to the outcome of the proceedings or who have come forward with claims to enforce the judgment after determination of the representative claims.

4.27 The exercise of comparing the features of those jurisdictions where representative actions have been relatively more successful with those in which representative actions have failed to fulfil their initial objectives does not suggest that any material adjustment to the usual rules on costs, namely the loser pays principle, is warranted. However, we consider that an important safeguard to explore in an adverse costs regime would be to ensure that any liability for costs is limited to the representative body and should not fall to the consumers it represents who should be ring-fenced from liability. Nonetheless, there may be some scope to adjust the court fees payable when a representative action is brought by an association representing the interests of individual consumers, in particular where a claim by each of those individuals would have benefitted from an exemption from court fees.

4.28 Following the above analysis, it is clear that the "opt-out" US class action system is not appropriate for incorporation in this context. More suitable would be a representative action whereby the representative body can be allocated the power to bring representative claims on a long-term or *ad hoc* basis, with a list of clear criteria established for each representative body to meet prior to their election. This representative action ought to extend to not only individual consumers, but also small and medium sized businesses. It is also vital to establish a strong system of defining, identifying, and notifying the 'class' of claimants. The system may be best served by allowing for claimants to be *identifiable* rather than *identified* so as to allow for the enforcement of a judgment not only by those who have opted in to the claim, but also by those victims who fall within the test for the represented group and who come forward after the judgment is delivered. While the adverse costs position is not one which will necessarily encourage a greater number of representative actions, it is not necessary to adjust the basis of this rule provided the consumers themselves are ring-fenced from liability for costs.

5. Funding issues

Introduction

5.1 To the extent that the Commission considers the level of collective redress to be too low in the EU and that a material factor in this regard is funding, the availability of and options with respect to claim funding is an issue the Commission may want to investigate in some detail. Whether this is indeed a material factor is an empirical question. In this regard, the Commission may wish to make adequate enquiries / review submissions from relevant parties that indicate that, but for the lack of funding, they would have brought an appropriate and meritorious claim.

5.2 If such a gap exists, the ECLF encourages the Commission to carry out a study of the different forms of funding permitted in EU Member States. If the study reveals that suitable types of funding are not available in a significant number of Member States, the Commission may want to consider introducing a legislative package designed to permit such funding.

5.3 ECLF does not support the use of scarce public resources to facilitate collective redress.

Recovery of costs

5.4 ECLF opposes any modification of the "loser pays" principle. Any adoption of the US "no costs rule" under which attorneys' fees are not ordinarily recoverable in private litigation (including in the area of antitrust) should be opposed in order to avoid the excesses of this system.

Professional funders

5.5 Professional funding enables claimants – both individual and collective – that would otherwise not have the resources to pursue justice in the courts. There are already a number of options available. However, it is possible that the Commission may wish to further consider this area to the extent there is a need to facilitate this type of financing for all types of litigation on a Europe-wide basis.

5.6 In the UK, several professional funders have listed on AIM.[5] It is the ECLF's understanding that these companies typically fund high-value commercial actions and have not, to date, funded claims for collective redress.[6] To increase funding of European claims, the Commission may consider removing, or reducing, the liability of professional funders to pay the costs of the defendant in the event that the claim is unsuccessful. However, in such circumstances the claimant would have to remain exposed to the defendant's costs and applications for security costs.

[5] Alternative Investment Market, sub-market of the London Stock Exchange.

[6] Indeed, some AIM-listed funding companies specifically exclude class actions from their investment portfolios – see, for example, http://www.juridicainvestments.com/about-juridica.aspx.

Insurance coverage

5.7 "Before-the-event" insurance, which a client may already hold before legal proceedings arise, typically covers some or all of the client's own potential costs liabilities in any subsequent proceedings. In addition, "after-the-event" insurance is available to claimants and defendants to provide a fund to meet the costs of representative entities incurred by opposing parties in the event that the insured is ordered to pay such costs following legal proceedings. Legal costs insurance provides effective cover to claimants for exposure to its own legal costs and those of opposing parties. In some jurisdictions, lawyers are required to discuss the availability of legal costs insurance with all clients where there is potential liability for adverse costs and this could usefully form part of wider reform proposals.[7]

5.8 Similar to professional funders, insurers will assess the risks involved in any litigation and may reflect this in determining the premium charged, and indeed whether insurance is available at all. This becomes an important factor in collective redress actions where the size and complexity of the litigation may discourage insurers from providing cost-effective cover to claimants. Therefore from a funding perspective it may be desirable to address some of the perceived complexity of collective claims as part of proposals to facilitate collective redress in order to boost the level of capacity within this part of the insurance market.

Assignment

Claim assignment can facilitate the bringing of collective actions. By increasing the size of the claim, external funders may be more willing to provide funding/bring action. Moreover, claim assignment can result in efficiencies and costs reductions. The ECLF understands that assignments of claims are already possible in a number of Member States, including the UK[8] and Germany,[9] and would question whether any EU legislation is necessary at this time. To the extent assignment of claims are not possible in Member States, legislation/ guidelines may be appropriate.

Contingency fee arrangements

5.9 Introducing widespread contingency fee arrangements in the EU could result in a significant increase in actions for collective redress and, potentially, could help facilitating access to justice, in particular for consumers and SMEs. The ECLF, however, is mindful of the potential material risks involved (partly dependent upon the type of contingency fee envisaged) and the fact that this form of funding may be controversial in certain jurisdictions. In the section below, the ECLF provides detail on certain aspects of contingency fee funding which the Commission may find of interest in evaluating the merits of this system.

7 Rule 2.03(1)(d)(ii) and (g) of the Solicitors' Code of Conduct 2007.

8 See, for example, *Enron Coal Services Ltd (in liquidation) v English Welsh & Scottish Railway Ltd* [2009] CAT 7 where the administrators of Enron Capital & Trade Resources Ltd assigned their rights in a "follow-on" damages claim against English Welsh & Scottish Railway Ltd to Enron Coal Services Ltd (in liquidation).

9 See, for example, Federal Court of Justice, 7 April 2009, Case No. KZR 42/08 where over 30 claimants assigned their claims against six members of a cement cartel to CDC Cartel Damages Claim SA, a Belgian stock corporation founded with the sole purpose of enforcing the claims.

5.10 The traditional conditional fee agreements, such as "no win no fee", or arrangements where lawyers give substantial discounts on standard hourly rates, and in the event of success are made whole and receive an uplift up to 100 *per cent.* of time cost, have arguably improved access to justice for claimants with limited resources, including in collective antitrust actions.[10] The ECLF expects such conditional fee arrangements to remain a viable source of funding for certain claims.

5.11 It may be argued that the use of contingency fee arrangements are a natural progression beyond conditional fee agreements. It could, for example, be argued that the basic principle is the same: the claimant's law firm shares part of the financial risk, in the form of reduced or nil hourly rates, in return for a payment in the case of success (typically determined based on the level of recovery) and that contingency fee funding would align the interest of lawyers and clients by incentivising early settlement to the benefit of over-loaded judicial systems in Member States.

5.12 ECLF notes that funding by means of contingency fees has been permitted at least since 2009 in several EU countries with different legal traditions including Estonia, Finland, Hungary, Italy, Lithuania, Slovakia, Slovenia and Spain.[11] Poland introduced contingency fees in 2010.

5.13 Moreover, the UK government recently announced a package of reforms to civil litigation funding, which appears to represent a move away from conditional fee agreements in favour of contingency fee arrangements. The proposed legislation includes a number of changes limiting the scope of recoverability under conditional fee agreements, with the abolition of the recoverability of the success fee and any after-the-event insurance premium from the losing side.[12] If implemented, contingency fee arrangements will be allowed in all types of civil litigation.

5.14 Even if such a system is introduced, it is important to have in place real safeguards and limits. Thus, the proposed UK legislation safeguards against abuses by requiring the costs recovered from the losing side to be set off against the contingency fee, reducing the amount payable by the claimant to any shortfall between the costs recovered and the contingency fee. Similarly, in Poland, contingency fees are capped at 20% of the award made to the claimant[13] so as to avoid some of the excesses traditionally associated with contingency fees.

5.15 In analysing the pros and cons of contingency fees the Commission should study the effect of this funding on litigation in those Member States where this is permitted.

[10] See, for example, litigation brought against members of the air cargo cartel described at https://www.aircargoclaims.eu and http://www.claimsfunding.eu.

[11] *Source: Review of Civil Litigation Costs: Final Report*, Lord Justice Jackson (December 2009), Ch. 12 para. 1.4.

[12] *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations: The Government Response*, Ministry of Justice (March 2011), at para 5.

[13] Pursuant to Art 5 of the Act of 17 December 2009 on Pursuing Claims in Group Proceedings (Polish Journal of Laws No 7/2010, item 44).

It is noteworthy that setting attorney's fees in this manner is a departure from the general rules and is not found anywhere else in Polish legislation. The contingency fee is only one of two possible fee arrangements available in the Polish class action regulation. The other arrangement consists of establishing a fixed fee by agreement between the group and the attorney, with no reference made to the recovered sum.

6. Quantum recovery

6.1 Whilst collective actions might be encouraged by a more permissive approach to quantum recovery in such cases, there are strong reasons not to depart from the compensatory measure of damages that generally applies. In particular, any model that permitted recovery over and above compensation would encourage vexatious litigation and harm the leniency systems that exist within the EU.

6.2 Where action may be required as part of any initiative to encourage collective redress is in relation to the question of whether defendants should be able to claim that claimants passed on loss further down the supply chain so that they cannot claim compensation, either at all or to the extent claimed. As explained below, attempts to exclude the passing-on "defence" may effectively stymie any attempt to develop collective actions.

6.3 Direct customers of an infringer may pass on an illegal overcharge imposed on them to their own customers, who may in turn do the same right down the distribution chain to the final consumer. It is considered correct that these final, indirect purchasers should be allowed to claim compensation as they are harmed by the initial infringement. It follows on from this principle that the fact that direct purchasers have passed on the overcharge should be able to be used as a defence to a claim for compensation by the direct purchaser.

6.4 It is also considered important that the passing on defence is accepted in all Member States, otherwise the situation could arise where direct purchasers pursue claims in Member States which do not recognise the defence and indirect consumers pursue claims against the same defendant in Member States which do recognise the defence. This unfortunate situation already exists nowadays following the introduction of a legal provision in Germany[14] in 2005 which arguably excludes the passing-on defence. In order to avoid double jeopardy (defendant pays twice for the same overcharge to direct and indirect purchasers), the Karlsruhe Court of Appeal has recently held[15] that the exclusion of the passing-on defence would, in fact, imply that claims by indirect purchasers could no longer be pursued. This principle could not reasonably be applied across the EU (e.g. the High Court in the UK cannot be expected to reject a claim by indirect purchasers simply because the Karlsruhe Court of Appeal had already awarded damages to the direct purchaser), in particular, given that it appears difficult to reconcile with the ECJ's judgments in *Crehan* and *Manfredi*.

6.5 However, it is not considered appropriate to introduce a rebuttable presumption that an overcharge has been passed on to the indirect purchaser. Although this would make it easier for consumers to prove they have suffered a loss, it may facilitate over-compensation of consumers and make it too difficult for direct purchasers to bring claims. Instead, the burden of proof should rest on the party alleging pass-on (typically the defendant and the indirect purchaser). Disclosure mechanisms (discussed in more detail below) should instead be in place to ensure that parties are able to obtain reliable evidence on the extent to which an overcharge has been passed on particularly where the burden of proof lies with the defendant. Similarly, there should be no conflicting presumptions (no passing-on is presumed in claims by direct purchasers, while

[14] Section 33 (3)(2) of the Act against Restraints of Competition.
[15] Judgment of 11 June 2010.

passing-on is presumed in claims by indirect purchasers), given that they would not be compatible with the compensation principle.

7. Disclosure

7.1 It is recognised that major obstacles to pursuing damages occur if parties are not required to disclose evidence, particularly in competition law infringements due to the fact-intensive nature of competition cases and the asymmetry of the parties. It is perhaps no coincidence that the courts in England and Wales have seen a relatively large number of claims, given the nature of the disclosure rules that apply in that jurisdiction. Proposals for a minimum standard of *inter parties* disclosure in antitrust cases, including collective actions, should therefore be supported. The categories of documents to be disclosed should, however, be tightly defined. The evidence must be relevant and its disclosure both necessary and proportionate. The requirements will prevent speculative "fishing expeditions" for evidence which may or may not exist.

7.2 Comprehensive sets of rules on disclosure of evidence in the possession of the opponent or third parties exist principally in Member States with a common law tradition. However, Member States of the civil law tradition have various examples of disclosure requirements, providing that courts can order opponents or third parties to hand over evidence in their possession, if the claimant specifies this evidence sufficiently and if it is relevant to the case.

7.3 It is suggested therefore to provide for a set of minimum standards on disclosure, comparable to those requirements for evidence disclosure in international arbitration cases (see for example IBA Rules on the Taking of Evidence in International Arbitration, May 29, 2010). This means that evidence should only be provided based on a description of each requested document sufficient to identify it, or a description in sufficient detail (including subject matter) of a narrow and specific requested category of documents that are reasonably believed to exist. As regards electronic documents, it is recognised that electronic searches may be required to obtain relevant evidence. For this purpose, the requesting party should identify specific files, search terms, names of individuals or other searching methods relevant to the case at hand so that the evidence can be provided in an efficient and economical manner.

7.4 For this purpose, a request for disclosure should describe in detail how the requested documents are material for the case and why the requesting party assumes that the requested documents are in the possession of the other party. Furthermore, a request for disclosure should also explain whether the documents are in the possession of other parties and why it would be unreasonable for the requesting party to access the requested information in other ways. Any request for disclosure should be weighed against its relevance to the case and in light of the burden imposed on the party of whom disclosure is requested.

7.5 Even if the requirements mentioned are satisfied, a judge should retain the possibility to reject a request of disclosure in case of overriding reasons on the part of the counterparty. This could be necessary in case of, for example, documents that are business secrets and whose disclosure could cause material harm to the counterparty. However, the extent of this exception should be limited and it should not apply if the legitimate concerns of the counterparty can be addressed. For example, in case of company-sensitive information, a judge should first consider appointing a third party with a duty to maintain confidentiality, to make a

selection and copies of relevant documents. If a judge grants a request of disclosure, a party should still be able to claim damages in case of abuse of rights, for example, if it turns out that the documents are used to discover and copy inventions of a competitor.

7.6 It is important that disclosure should not undermine the leniency programme. It is suggested that corporate statements submitted in support of leniency applications should be exempted from any disclosure requirement in order to prevent disclosure becoming a deterrent to the making of such applications. This exemption should apply regardless of whether the leniency application is accepted, rejected or leads to no decision. This exemption should not apply to contemporaneous documents provided by way of support in a leniency application.

7.7 The implementation of disclosure rules in some jurisdictions will prove to be difficult and controversial. Nevertheless, it is important that a minimum standard is, in practice, applied in a broadly consistent way across Europe.

8. Collective consensual resolution

8.1 Arbitration is often included among ADR procedures. However, following the Commission excluding arbitration in its Green Paper on alternative dispute resolution in civil and commercial law[16] on the basis that it is "*closer to a quasi-judicial procedure than to an ADR as arbitrators' awards replace judicial decisions*", our comments here will focus, therefore, upon mediation.

8.2 This group considers that no form of *consensual* dispute resolution can or should be made mandatory in the context of collective actions for compensation. We refer to the definition of mediation in a recent European directive[17] (the "Mediation Directive"): "*a structured process…whereby two or more parties to a dispute attempt by themselves, on a voluntary basis, to reach an agreement on the settlement of their dispute with the assistance of a mediator*". The notion that numerous parties should be forced to mediate, in circumstances where it may be against their will, cuts across the very spirit and purpose of such a form of alternative dispute resolution. Indeed, the Commission came to the same conclusion in its Green Paper: "*it might serve no purpose to oblige someone to participate in an ADR procedure against his will insofar as the success of the procedure depends on his will*".[18]

8.3 Moreover, a mandatory regime for mediation could result in specific adverse consequences for the parties. First, Member States are currently obliged under the Mediation Directive to ensure that parties "*who choose*" mediation are not subsequently prevented from initiating judicial proceedings or arbitration as a result of the expiry of limitation or prescription periods.[19] If mandatory mediation were to be introduced, it would be manifestly unfair to impose a regime that could lead to claimants losing their right to pursue judicial redress in the courts by the inflexible imposition of limitation or prescription rules.

16 COM/2002/0196.
17 Directive 2008/52/EC of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters.
18 Green Paper, paragraph 64.
19 Meditation Directive, Article 8(1).

8.4 Second, in most cases, the costs of the mediation (in particular, the fees and expenses of the mediator) are borne by the parties (usually in equal shares). If mediation were to be mandatory, it would seem inappropriate to impose the payment of such costs upon parties who had no desire to mediate. This is especially true in the context of a collective action: the obligation to pay a share of the costs could discourage potential claimants from joining (or withdrawing if an opt-out principal were applied) the action. Further, the logistics of collecting contributions for the payment of costs from multiple parties could be difficult, time-consuming and costly in itself.

8.5 Third, the representation of multiple claimants as part of a collective action in a mandatory mediation could give rise to a number of difficulties. For example, the selection of the representative, the remuneration of the representative, the confidentiality of communications between the representative and the claimants, and obtaining the claimants' consent to the representative's actions and decisions (including, most importantly, consent to an eventual settlement that is concluded by the representative with the respondent's representative).[20] These issues may be more difficult to resolve and manage in a case where the whole procedure of mediation was imposed upon the claimants. It may be necessary for the representative to obtain some form of mandate from the individual claimants to bind each claimant to the agreed settlement.

8.6 Fourth, Member States are obliged under the Mediation Directive to ensure that it is possible for the parties to request that a written agreement resulting from mediation be made enforceable (subject to certain exceptions).[21] As in the case of limitation and prescription periods, it would be essential to ensure that this provision has been properly transposed into law by all Member States prior to making mediation mandatory. It would be pointless to require parties to participate in an ADR procedure that might not result in an effective, enforceable outcome.

8.7 However, whilst its effectiveness largely depends upon the voluntary participation of, and effort put in by, the parties, the potential value of mediation is widely recognised.[22] Measures should be taken to increase the efficacy and attractiveness of mediation such that voluntary mediation by the parties in collective actions could be encouraged.

8.8 Such measures could include the following:

(i) developing a procedure that ensures that claimants in a collective action have the opportunity to voice their views regarding the selection of the mediator;

(ii) establishing rules/guidelines that ensure that claimants are properly represented in the mediation and that claimants have a voice in influencing the strategy;

(iii) facilitating funding mechanisms to cover the cost of the mediation;

[20] Regarding the validity of consent to an eventual agreement in the mediation, see paragraph 83 of the Green Paper.
[21] Mediation Directive, Article 6(1).
[22] See, e.g., Mediation Directive, paragraph 6.

(iv) setting sensible time limits for the duration of a mediation;

(v) developing procedures for the review and approval of settlements concluded through mediation, to ensure that the rights of the parties are respected including, for example, the right of an individual to be excluded from the settlement;

(vi) considering the development of a pre-action protocol (akin to the system in place in England & Wales) such that the parties are encouraged to (i) have an effective exchange of information by way of a "letter before claim" from the claimants and a "response before claim" from the defendant(s) prior to the claimants instituting proceedings such that the heart of any dispute can be identified early on the process; and (ii) following the exchange of information and the position of the parties, the parties explore the possibility of mediation before the case proceeds extensively in the courts or arbitral tribunal.

European Competition Lawyers' Forum
30 April 2011

ANNEX 1 – Participants

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