



RESPONSE OF THE UNITED STATES CHAMBER INSTITUTE FOR LEGAL REFORM TO THE CONSULTATION ON COLLECTIVE REDRESS

The U.S. Chamber Institute for Legal Reform (“ILR”) is pleased to submit comments in response to the European Commission’s consultation on collective redress.

ILR is a not-for-profit public advocacy organisation affiliated with the U.S. Chamber of Commerce, the world’s largest business federation, representing the interests of more than three million businesses of all sizes and sectors, as well as state and local chambers and industry associations. ILR’s mission is to ensure a simple, efficient and fair legal system. Since ILR’s founding in 1998, it has worked diligently to limit the incidence of litigation abuse in U.S. courts and has participated actively in legal reform efforts in the United States and abroad.

I. INTRODUCTION

ILR has vast experience with the U.S. class action system and is therefore able to offer key insights into the effects of collective litigation on consumers, defendants, and the administration of civil justice, making it well positioned to play a meaningful role in this consultation.

As a threshold matter, ILR applauds the Commission’s statements that European collective actions should not duplicate the problems that class actions pose in the United States. ILR is concerned, however, that despite the Commission’s statements, the Commission has not adequately considered how to prevent that from occurring. EU collective actions – like U.S. class actions – would encourage abusive litigation practices precisely because *any* procedure that permits a representative to aggregate the claims of hundreds, if not thousands, of individuals empowers that representative to threaten a defendant with catastrophic loss. As a result, the representative can use this power to extort money from a defendant, even if the underlying claims have little chance of success. In the United States, plaintiffs are able to use this unequal bargaining power to extract what respected jurists call “blackmail settlements” from defendants.¹ This is an *inherent* problem with collective litigation that can be mitigated by adopting certain safeguards, but cannot be eliminated.

¹ *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (quoting Judge Henry Friendly).

In addition, ILR disagrees with the Commission's assertion that the U.S. class action experience would not be duplicated in Europe because the features of the U.S. legal system that it believes are most responsible for these problems, i.e. "the availability of punitive damages, the absence of limitations as regards standing . . . , the possibility of contingency fees for attorneys[,] and the wide-ranging discovery procedure for procuring evidence," are not present in Europe.² In fact, these features are already beginning to appear in Member States' legal systems, and the EU does not have the authority to prohibit Member States from adopting more of them going forward. To the contrary, any Member State that wishes to adopt any of these features will remain free to do so regardless of any EU-imposed collective redress system. And there is good reason to fear that they may do so. After all, the Commission itself has considered some such measures. For example, DG Comp's 2007 Green Paper raised the prospect of "double damages" against companies that violate antitrust rules;³ and DG Comp's 2009 White Paper raised the prospect of collective actions that could be commenced either by individual claimants or consumer associations and proposed procedures for extensive discovery in antitrust actions.⁴ In addition, several Member States already permit "success fees" (which are akin to contingency fees), and some Member States actually permit (or in the case of the UK, will soon permit)⁵ contingency fees to varying extents. In short, ILR believes that it is only a question of time before more of Europe's traditional safeguards against litigation abuse are eroded – and that such erosion, coupled with adoption of a collective redress regime – would result in an explosion of meritless, abusive litigation.

The potential economic and societal costs of such an explosion cannot be overstated. In the United States, permissive rules governing litigation – coupled with societal attitudes – are a substantial drag on the nation's economy. One 2007 study estimated that the annual cost of the United States' liberal tort system was \$865 billion, which constituted an annual "tort tax" of \$9,827 on a family of four.⁶

For these reasons, ILR strongly urges the Commission to study whether a need exists for collective redress *at the EU level* that would justify the risks a collective litigation regime would pose to the internal market, and whether the Commission has the ability to impose safeguards that will in fact eliminate the risks. As discussed below, ILR does not believe that a need for greater access to collective litigation has been demonstrated. In the cross-border context, which is where the EU might have a legal basis for adopting measures on collective redress, significant steps have already been taken in a variety of areas including access to legal aid, jurisdiction, recognition and enforcement of judgments, applicable law and service of documents. In contrast with these measures, it is unclear how EU measures on collective redress would enhance the resolution of cross-border disputes.

² *Public Consultation: Towards a Coherent European Approach to Collective Redress*, Commission Staff Working Document (hereinafter, "Consultation Paper") at 9.

³ *Green Paper: Damages Actions for breach of the EC antitrust rules*, COM(2005) 672 final at 2.3.

⁴ *White Paper on Damages actions for breach of the EC antitrust rules*, COM(2008) 165 final at 2.2.

⁵ Ministry of Justice, *Reforming Civil Litigation Funding and Costs in England and Wales – Implementation of Lord Justice Jackson's Recommendations: The Government Response*, at 13 (March 2011). Contingency fees are currently prohibited in civil litigation in England and Wales.

⁶ See Lawrence McQuillan and Hovannes Abramyian, *The Tort Tax*, Wall St. J., Mar. 27, 2007, at A18.

The Commission refers to “[u]ncertainty and perceived difficulty” accessing redress in the narrow area of cross-border electronic commerce.⁷ The appropriate response would be to provide information to address any uncertainty and to analyse the extent to which the *perceived* difficulty actually exists. Instead, the Commission appears to be contemplating measures on collective redress that would involve radical changes to the way some jurisdictions deal with both cross-border and purely domestic disputes. Even if the need for such measures had been demonstrated, which ILR questions, whether a regime for collective redress should be imposed at the EU level, or whether the Member States would be better able to address any need at the national level, is an issue ILR urges the Commission to consider further.

II. THE INAPPROPRIATENESS OF A TOP-DOWN REGIME

Before addressing the substance of the Consultation Paper, ILR questions whether the consultation or any of the materials contributing to the debate more broadly have demonstrated a real need for more collective redress and, even if such a need were demonstrated, whether the EU is best placed to respond. The Commission emphasizes the “diversity of existing national systems and their different levels of effectiveness” as a reason to impose an EU-wide collective redress system on the Member States.⁸ But each of those Member States has promulgated a legal system that reflects its national policies and priorities, and each of those systems reflects what the Member State considers to be the optimal balance among consumer protection, due process, litigation costs and myriad other competing factors. Although the Commission, if it were a national government, might have implemented a legal system that focused more on consumer compensation and less on due process or containing litigation costs, that does not render any Member State’s legal system any less “effective.”

Notably, the consultation document does not identify a *need*, in *any* Member State, to impose an EU-wide collective redress regime on *all* the Member States. Rather, the Consultation Paper suggests that the varying Member States’ legal systems “*may* undermine the enjoyment of rights by citizens and businesses and gives rise to uneven enforcement of those rights.”⁹ ILR urges that this unsupported supposition cannot be a basis for imposing a collective redress regime, with its inherent risks, on the Member States.

ILR’s observation that the Commission should not impose any new requirements on the legal systems of the Members States is in part a restatement of the principle of subsidiarity. Each of the Member States already has a court system that provides redress to individual claimants. The legal right to compensation for harms done exists in every Member State. Those Member States that believe collective redress has a place in their legal systems have already adopted some form of it. Unquestionably, claimants can, and already do, obtain compensation for injuries at the national level. ILR believes that implementing a collective redress regime at the EU level and then imposing it upon the Member States would be contrary to the principle of subsidiarity. Inasmuch as collective redress has already been established in some Member States, it simply is not the case that the objectives of the proposed action (i.e. the introduction of collective redress as a means for enforcing EU law – an objective which is questionable in itself) “cannot be sufficiently achieved by the Member States . .

⁷ Consultation Paper at 4.

⁸ *Id.* at 10.

⁹ *Id.* at 10.

. but can . . . be better achieved at Union level.”¹⁰ Indeed, any legislation adopted in violation of the principle of subsidiarity may itself be declared invalid by the Court of Justice.¹¹

In addition, the Commission will have great difficulty articulating a valid legal basis for legislation imposing mechanisms for collective redress at the EU level. The Commission has certainly not demonstrated that the requirements of Article 114 of the TFEU (the approximation of laws to aid the establishment and functioning of the internal market) are met. The fact that disparate undesirable elements already exist in the litigation systems of some Member States does not create grounds for the imposition of undesirable elements upon other Member States that have so far been successful in keeping these elements out of their legal systems. The Commission should consider whether any collective redress proposal, far from facilitating the creation and functioning of the internal market, would in fact *harm* the internal market in precisely the way in which the U.S. economy has been harmed by class actions. Similar problems exist with any other Treaty legal bases that may be proposed.

ILR addresses these issues further in its answers to questions 3, 4, 5 and 6.

III. PRIVATE COMPENSATION *VERSUS* PUBLIC ENFORCEMENT

While the Commission casts collective redress as “a possible instrument to strengthen the enforcement of EU law,”¹² ILR respectfully disagrees that collective redress can appropriately serve this function. The enforcement of EU law is properly the responsibility of public enforcement authorities. To the extent the Commission believes public enforcement is lacking (and nothing in the Consultation Paper suggests it is), the correct response is to augment the public enforcement authorities – not to delegate their powers to private parties whose primary motivation in most cases will be to obtain a financial award or settlement.

Public enforcement necessarily involves policy judgments by the authority bringing the enforcement action. A claimant who has a personal monetary stake in a case is ill-suited to make these policy judgments, as the U.S. class action experience has amply demonstrated. Although plaintiffs frequently couch their suits as seeking injunctive relief, there is inevitably a monetary component – and the suits are almost always driven by the prospect of attorneys’ fees rather than justice for consumers. Accordingly, to the extent the Commission believes that public enforcement in the EU is lacking, ILR urges the Commission to study ways to improve it.

In addition to punishing wrongdoing, public enforcement can also be an effective means to provide compensation to victims of unlawful activity. In the United States, for example, the Securities and Exchange Commission’s (the “SEC”) “Fair Funds” mechanism demonstrates one possible approach to meeting the dual goals of public enforcement and private compensation. Each year, the SEC collects substantial remedial payments in the form of civil penalties from securities law violators. In 2010, for example, these recoveries amounted

¹⁰ Article 5(3) of the Treaty on European Union. See Consolidated version of the Treaty on European Union (“TEU”) and the Treaty on the Functioning of the European Union (“TFEU”), OJ C 83, 30.3.2010, p.1.

¹¹ Article 263 TFEU, and Article 8 of Protocol 2, TFEU.

¹² Consultation Paper at 2.

to \$2.8 billion.¹³ Since 2002, the SEC has been able to place these recoveries into “Fair Funds” to be distributed to investors harmed by the punished conduct.¹⁴ The funds are then distributed under plans that must be approved either by a court or by the SEC after a period for public comment. The amounts of money that the SEC has transferred to date have been significant: since 2002, 128 Fair Funds have been created, and \$6.9 billion has been returned to investors.¹⁵

The Fair Funds mechanism has clear advantages over the U.S. private securities litigation system. The SEC, as a government agency staffed by experts and charged with a public purpose, can ensure that funds are distributed only when recovery is justified on the merits, rather than for the more self-interested reasons that generally motivate private litigants and their lawyers. In addition, attorneys’ fees and other costs do not reduce the amount available for Fair Fund distributions.¹⁶

The Fair Funds mechanism is a useful model that the Commission should consider for achieving the dual aims of public enforcement and compensation. ILR urges the Commission to study such alternatives to collective litigation as a means to enforce EU law before imposing a collective redress regime on the Member States.

ILR addresses these issues further in its answers to questions 1 and 2.

IV. OVERVIEW OF ILR’S RESPONSES

Despite ILR’s strong misgivings about implementing collective redress in Europe, it responds below to the Commission’s questions. In preparing its responses, ILR has sought to provide a framework for establishing a collective redress system that minimizes lawsuit abuse to the extent possible. Towards that end, ILR’s comments generally incorporate six broad themes:

- **Alternative Dispute Resolution (“ADR”).** In response to questions 12, 15, 16, 17 and 31, ILR argues that ADR would be superior to collective litigation as a mechanism for providing collective redress. ADR is an out-of-court process whereby parties agree to a tailored, scalable and efficient mechanism to resolve their dispute. ADR is most effective when the parties control the process and participate in it by choice. ILR believes that the Commission can have a valuable role to play in informing potential claimants and defendants about their rights and about available ADR schemes that they can use to resolve their disputes. ILR vigorously opposes *requiring* parties to use ADR, but believes that an active information campaign, spearheaded by the Commission, regarding the benefits to parties of *choosing* to use ADR would be beneficial for both claimants and defendants. In addition, ILR believes that the Commis-

¹³ See Government Accountability Office (“GAO”), *SEC’s Financial Statements for Fiscal Years 2010 and 2009*, GAO-11-202, at 17 (15 November 2010).

¹⁴ Sarbanes-Oxley Act, Pub. L. No. 107-204, § 308(a), 116 Stat. 745 (codified at 15 U.S.C. § 7246(a)).

¹⁵ See GAO, *SEC Fair Fund Collections and Distributions*, GAO-10-448R, at 31 (22 April 2010).

¹⁶ See Paul S. Atkins, Comm’r, SEC, *Remarks before the ILR* (16 February 2006) (observing that “we do not allow any of the funds from the SEC action to be paid to private lawyers”), <http://tinyurl.com/6yxhbt4>.

sion should carefully consider the responses to the recent DG SANCO ADR consultation and consult further on ADR best practices. ILR would support the creation of a set of non-binding guidelines for the Member States to consider in implementing ADR schemes. ILR addresses the role existing public bodies can play in providing information in its answer to question 13.

- **Qualification (certification).** Before any action is permitted to proceed collectively, the claimants should be required to demonstrate that a collective proceeding is the best possible mechanism for resolving their claims. In other words, there must be clear standards for a collective action to proceed, and a court must determine early in the life of the litigation whether it can fairly be resolved on a collective basis. ILR addresses qualification in response to questions 7, 11 and 20.
- **Funding.** Funding mechanisms for collective actions should be tailored to mitigate the risks of lawsuit abuse while still providing access to justice. Two important corollaries of this principle are: preserving the “loser pays” rule, and discouraging funding mechanisms for collective actions that involve “investors” – be they attorneys, third-party litigation financing (“TPLF”) companies, or private representative organisations – profiting from successful lawsuits. These measures safeguard against frivolous claims, and are consumer-friendly.
 - The “loser pays” rule enables consumers who have meritorious claims to retain competent professionals, whose fees likely will be paid by the losing defendant.
 - Discouraging investments by third parties in lawsuits would preserve consumer control over lawsuits and ensure higher recoveries for the claimants if they prevail. Investments in lawsuits take various forms. Attorneys who work on contingency, as opposed to on an hourly fee basis, develop a personal monetary stake in the outcome of the case that does not necessarily coincide with the claimant’s best interests. Similarly, as discussed in detail below, TPLF companies harm consumers by vitiating their control over their cases and by taking a portion of their recoveries, and harm defendants by reducing the downside to filing frivolous claims. The Commission therefore should encourage Member States to ban TPLF in collective litigation. In addition, encouraging Member States to prohibit private representative organisations from funding collective actions also would preserve consumer control over cases. Such organisations advocate for particular causes and would thus have an incentive to advance their own interests through litigation.

ILR discusses these funding issues in its answers to questions 7, 11, 20, 21, 25, 26 and 27.

- **The Nature of the Parties Involved.** Where collective actions exist, they should only be instituted by lead claimants who have suffered an actual injury at the hands of the defendant. Such persons will be most motivated to seek fair and effective compensation and to vindicate their rights.
 - Only where lead claimants are not in a position to institute suit on their own should third parties be able to commence representative collective actions on their behalf. To the extent that representative entities do become involved, those enti-

ties should always be public bodies with the expertise to distinguish meritorious cases from speculative claims.

- In no event, however, should private representative organisations, such as consumer associations or NGOs, be authorized to commence collective actions. ILR is concerned that private representative organisations might recruit claimants to highlight particular causes instead of offering their services to assist needy consumers in obtaining fair compensation.

ILR discusses these issues in its answers to questions 7, 11, 20, 22 and 23.

- **Opt-in/Opt-out.** One of the biggest lessons of the American class action experience is that opt-out class actions result in apathy, lawyer-driven lawsuits and lawsuit abuse. Opt-in procedures are vastly superior to opt-out procedures both in deterring abusive litigation and in protecting the rights of all group members because they ensure that the only individuals who participate in – and are bound by – a lawsuit are those who affirmatively seek to be a member of the group. In addition, the ability of lead claimants in an opt-out regime to assert claims on behalf of potentially thousands of consumers without their authorisation robs the potential group members of their legal autonomy,¹⁷ possibly contravening the constitutions of some Member States that, like the European Convention on Human Rights, prohibit compromising individuals’ rights without their consent. ILR discusses these and other reasons why opt-in actions are superior to opt-out actions in its answers to questions 7, 11, and 20.
- **Forum shopping.** Defendants should only be amenable to suit in the jurisdictions in which they operate or in which they would be amenable to suit according to the ordinary rules on jurisdiction. Claimants should not be allowed to shop far and wide for a friendly jurisdiction in which to bring suit. ILR addresses forum shopping in its answers to questions 7, 11, 14, 20 and 30.

V. RESPONSE TO CONSULTATION QUESTIONS

Below we address each of the Consultation Paper’s 34 questions in turn, using the Commission’s headings and numbering.

Added Value of Collective Redress for Improving the Enforcement of EU Law

1. *What added value would the introduction of new mechanisms of collective redress (injunctive and/or compensatory) have for the enforcement of EU law?*

First and foremost, ILR points out that the enforcement of EU law, in the sense of public enforcement, should not be “privatized.” This task is, and should remain, the responsibility of public enforcement authorities, including the Commission itself. This point is addressed further in response to question 2.

¹⁷ Indeed, in a February 2008 opinion on collective redress, the Economic and Social Committee noted the tension between the autonomy principles of the European Convention on Human Rights and opt-out proceedings, which could bind an individual without his or her consent. See Alison Brown, *EU Developments in Relation to Cross-Border Actions for Collective Redress*, in *International Comparative Legal Guide to Class and Group Actions 2010* (Global Legal Group Ltd. 2010) at 4. This tension is particularly acute in cases that require individual proof to determine liability and damages.

To the extent that the question relates to the enforcement of private individual rights derived from EU law, ILR notes that mechanisms to enforce those rights already exist. ILR agrees that enforcement can be complex, but any desire to facilitate (and therefore encourage) lawsuits must be carefully weighed against the risks of doing so.

ILR believes that introducing new mechanisms of compensatory or injunctive collective redress would not add significant value for the enforcement of private individual rights derived from EU law. Moreover, any value that might be added would be outweighed by the costs and risks associated with such mechanisms. Nor is ILR convinced of the merits of expanding injunctive collective redress.

Collective compensatory redress would not add significant value. The introduction of new mechanisms of collective compensatory redress would not create new substantive rights for EU citizens. Accordingly, any added value would have to be derived from the collective nature of the procedures. On a simplistic analysis, such procedures might seem more efficient than multiple individual claims, but such an analysis fails to account for the additional layers of complexity and risk of distorted incentives they introduce. Collective litigation carries the risk that individuals' rights will not be adequately ensured (in that the collective aim, or the aim of the representative or lead claimants, might not correspond to the individual aim) and, conversely, that defendants will be unable, as a practical matter, to contest individuals' entitlement to damages. ILR doubts whether safeguards could be introduced that would sufficiently mitigate all of these risks.

Any added value would be outweighed by the costs and risks. Moreover, even if a collective redress mechanism would add value, it must be balanced against the potential costs and risks associated with collective compensatory redress. As explained further below in ILR's responses to questions 7 and 11, the damages involved in collective litigation can potentially be huge. This creates incentives for speculative claims. The threat of such claims can itself lead defendants to agree to settlements, regardless of the merits of the case. The cost of this kind of activity to businesses, and to European society, must be taken into account when assessing the net impact of introducing new mechanisms of collective compensatory redress.

Collective injunctive relief. In ILR's view, if the Commission is considering extending the scope of EU measures on collective injunctive relief beyond the field of consumer protection, it must first carefully assess the scope of existing mechanisms for bringing a stop to illegal behaviour. First, ILR notes that the range of issues falling within the existing consumer protection ambit of the Directive on Injunctions¹⁸ is extensive. Injunctions may be sought to protect the collective interests of consumers in a variety of areas including consumer credit, package holidays, ecommerce, marketing of medicinal products and distance sales of financial services.¹⁹ Second, as the Commission acknowledges in its Consultation Paper, Member States have also already provided for some form of collective injunctive relief in order to comply with their obligations under the Aarhus Convention.²⁰ Third, there may be

¹⁸ Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (Codified version), L 110, 1.5.2009, p.30.

¹⁹ These are some of the areas covered by the Directives listed at Annex I of the Directive on Injunctions.

²⁰ Consultation Paper at 8.

other areas in which possibilities for what amounts to collective injunctive relief already exist at national level. In the area of competition law, for example, the Commission should consider the extent to which national competition authorities are already empowered to order businesses to bring to an end activities that infringe competition rules.

It is important to take into account these considerations because, while enhancing the availability of injunctive relief would be preferable to introducing collective compensatory redress at the EU level, it is questionable whether it would add any real value in light of the possibilities that are already in place.

Nor would there be any merit in permitting individuals to commence proceedings for collective injunctive relief. In the United States, private claimants may seek injunctive relief in class actions, but invariably, they also seek money damages. This should not come as a surprise since, as more fully explained in response to question 2, collective redress is primarily concerned with financial reward and not enforcement of the law. ILR does not believe that there would be significant interest in collective injunctive relief from individuals in the EU. Except in cases where harm is caused by an ongoing infringement, injunctive relief will be of no use to claimants themselves. Claimants are only likely to commence proceedings if there is the prospect of financial compensation. That being the case, there is no compelling reason to increase the possibilities for individuals to seek injunctive relief as a means of promoting collective interests, particularly given the existing possibilities mentioned above.

2. *Should private collective redress be independent of, complementary to, or subsidiary to enforcement by public bodies? Is there need for coordination between private collective redress and public enforcement? If yes, how can this coordination be achieved? In your view, are there examples in the Member States or in third countries that you consider particularly instructive for any possible EU initiative?*

If private collective redress is introduced, which ILR opposes, private parties nonetheless must not be able to take over or supplement the enforcement roles of public authorities. ILR would, however, support a system of public enforcement that accounts for a defendant's liability to private parties and thereby ensures that fines levied against the defendant are not disproportionate.

Enforcement of EU law should only be entrusted to public bodies. The role of public bodies in enforcing the law should not be conflated with the choice of private parties to commence litigation. Public bodies, including both the Commission in its enforcement capacity and national bodies entrusted with enforcing EU law, perform an indispensable function by investigating and imposing sanctions where appropriate. In carrying out that function, these bodies are frequently called upon to consider what is in the public interest. By contrast, the overwhelmingly predominant interest of private parties in commencing litigation is the prospect of financial reward. Accordingly, while individuals must be able to enforce their legal rights, their choosing to do so should not be considered a supplementary form of law enforcement.

Public enforcement should take account of liability for collective claims. If collective redress is further developed across the EU, ILR would support measures to ensure: (i) that public bodies take account of businesses' exposure to collective claims when imposing fines; and/or (ii) that fines are made available for redistribution in a manner similar to the U.S. SEC's Fair Funds mechanism. Otherwise, the combined burden of punitive fines and

compensatory damages that businesses may be liable to pay could easily become disproportionate to any wrongs they may commit.

As the Commission now readily acknowledges in competition cases, the fines it imposes can, on some occasions, be a fatal blow to the companies fined. In 2008 and 2009, DG Comp received nine inability-to-pay applications following the imposition of competition-law fines, pleading that the applicants would be bankrupted if the Commission enforced the fines imposed. In 2010, 32 out of the 69 companies fined submitted inability-to-pay claims. DG Comp reduced the fines for nine of those companies. As Commissioner Almunia has stated, “our fines must remain large, because companies need to understand that cartels do not pay. *But at the same time my objective is not to put companies out of business.*”²¹ Creating EU-wide collective redress mechanisms that will likely be used in cases that follow the Commission’s enforcement decisions, will invariably lead to opportunities for claimants to bankrupt companies. In cases in which companies are eligible to have their fines reduced because of inability to pay, they would also likely lack sufficient funds to pay any compensation in a collective damages claim. ILR questions the appropriateness of requiring a company to pay a fine, thereby emptying its coffers – before any private actions commence. Instead, it would be more just to compensate individuals with valid claims out of the fines collected in enforcement actions.

3. *Should the EU strengthen the role of national public bodies and/or private representative organisations in the enforcement of EU law? If so, how and in which areas should this be done?*

As stated above, ILR believes that public law enforcement should be conducted by public bodies. To the extent that a deficiency can be demonstrated in the public enforcement of EU law, then public bodies should be strengthened to meet that need. On no account should public law enforcement be “outsourced” to private, profit-motivated individuals or, especially, to private representative organisations.

To the extent that question 3 is intended to mean “Should the EU strengthen the role of national public bodies and/or private representative organisations in the enforcement of EU law *through collective redress*,” ILR first reiterates the view that introducing mechanisms for collective redress would not improve the enforcement of EU law.

If such mechanisms were introduced at the EU level notwithstanding ILR’s opposition, they should be designed primarily to permit individuals who believe they are entitled to compensation to commence actions themselves. This will assist in ensuring that claims are brought by parties with genuine grievances who are motivated to seek fair compensation, rather than by third parties with their own agendas.

The primary role of national public bodies should be to provide objective information to individuals – first, about their rights under EU law, and second, about available procedures (including out-of-court procedures) for obtaining redress. ILR accepts that private organisations may also choose to disseminate information. But this should be in addition to, not in place of, the objective information provided by public bodies.

²¹ SPEECH/11/268 - Joaquín Almunia, Vice President of the European Commission responsible for Competition Policy, *Cartels: the priority in competition enforcement*, 15th International Conference on Competition: A Spotlight on Cartel Prosecution, Berlin (14 April 2011).

As a secondary role (discussed below in response to question 22), national public bodies such as ombudsmen would be best placed to initiate collective proceedings on behalf of groups of individuals who are not in a position to commence proceedings themselves (provided those bodies can satisfy qualifying requirements as further discussed in response to question 23). This role should never be entrusted to private representative organisations, such as consumer associations, which are more likely than public bodies to pursue claims that fulfil their own agendas. Nor should it be entrusted to any organisation with a financial interest in the outcome of the procedure, including law firms.

4. *What in your opinion is required for an action at European level on collective redress (injunctive and/or compensatory) to conform with the principles of EU law, e.g. those of subsidiarity, proportionality and effectiveness? Would your answer vary depending on the area in which action is taken?*

In ILR's opinion, any EU measure that attempts to impose mechanisms for collective redress on Member States would fail to conform with all three EU law principles identified (subsidiarity, proportionality and effectiveness). ILR also doubts whether the EU has the legal basis to adopt such measures.

1. Subsidiarity.

Any attempt to adopt harmonising or approximating measures in the area of collective compensatory redress would have to comply with the principle of subsidiarity. In ILR's view the Commission has not yet demonstrated that the measures being contemplated would comply with this fundamental principle and, in ILR's view, such measures would not comply. The principle of subsidiarity requires that:

in areas which do not fall within its exclusive competence, the [EU] shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.²²

In other words, subsidiarity sets boundaries for the scope of EU action and requires that, even if there is a legal basis for EU action, it should only be taken if it would be more appropriate than action at the national or regional level. The principle applies to all legislation in areas outside the EU's exclusive competence (and the EU has no exclusive competence when it comes to the creation of redress mechanisms).²³ Once legislation has been adopted, its legality may be reviewed by the Court of Justice of the European Union, including its compliance with the principle of subsidiarity. The Court of Justice may void any legislation that does not comply with this principle.²⁴

²² Article 5(3) of the TEU.

²³ The areas in which the EU has exclusive competence are customs union, competition policy to the extent that it concerns the internal market, monetary policy for the euro zone states, conservation of marine biological resources and common fisheries policy, common commercial policy (i.e. EU trade policy), and entry into international treaties in certain circumstances. *See* Article 3 of the TFEU.

²⁴ Article 263 of the TFEU. The Court's jurisdiction in actions on grounds of infringement of the subsidiarity principle is also expressly recognised by Article 8 to Protocol No. 2.

The threshold question therefore is: assuming the policy objective is legitimate (which ILR would contest), can this objective “be sufficiently achieved by the Member States?”

As a starting point, no case can be made for the EU imposing a litigation system (such as a collective redress mechanism) to be used in purely national or domestic cases. Member States are manifestly better placed to create and maintain procedures and rules for purely national cases. Therefore, subsidiarity would require that all cases not having cross-border elements be excluded entirely from the scope of any proposal to create a collective redress mechanism.

As the Consultation Paper observes, “[e]xisting mechanisms to compensate a group of victims harmed by illegal business practices vary widely throughout the EU.”²⁵ These differences exist because Member States have proven themselves competent to create their own systems of redress. In some cases, the differences between Member States’ national procedural rules derive from centuries of legal tradition. It would be absurd to suggest that Member States are not as well placed as the EU to address, create and adjust their own legal procedures. Therefore, what can the EU “better achieve” in this area than the Member States?

Even if one argues that the EU may be well placed to play a role in facilitating the resolution of impediments in cross-border cases, extensive judicial cooperation mechanisms already exist. For example, issues relating to jurisdiction and similar matters can be addressed through instruments such as the Brussels I Regulation,²⁶ without imposing new and alien litigation systems upon Member States that have long traditions of managing their domestic procedures without EU intervention.

In sum, no case has been made that EU action would be more appropriate than Member State action.

2. *Proportionality.*

Under the principle of proportionality, the content and form of Union action “shall not exceed what is necessary to achieve the objectives of the Treaties.”²⁷ Leaving aside momentarily questions regarding the compatibility of the objectives with the Treaties, the question is: what is the demonstrated *necessity* for EU action to create an EU-wide collective compensatory redress mechanism? ILR believes that no such necessity exists or has been demonstrated.

The Commission refers in its consultation documents to difficulties perceived in the manner in which individuals may claim redress within the EU. ILR accepts that some cases can be complex – this is in the nature of litigation. But *every* Member State already has a legal mechanism to provide for redress in accordance with its own legal traditions and systems, and cross-border claims are already facilitated by measures such as the Brussels I Regulation. If such national mechanisms are open to improvement, they should be improved. However, imposing a new, alien, risky, burdensome, top-down, one-size-fits-all collective redress

²⁵ Consultation Paper at 9 (citing a 2008 study of collective redress mechanisms in the EU).

²⁶ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition of enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1.

²⁷ Article 5 of the TFEU.

model on Member States would far exceed what is *necessary* to address the perceived failings in the Member States' systems of redress.

3. *Effectiveness.*

The Court of Justice has found that “in the absence of Community rules in the field, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from Community law, provided . . . that they do not render virtually impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).”²⁸ The principle of effectiveness requires that rights derived from EU law can, in fact, be effectively exercised. ILR understands that if rights were, in fact, impossible to exercise effectively, then effectiveness may be a relevant principle in this debate.

It is therefore necessary to consider the extent to which rights derived from EU law can be effectively exercised at present and, if there are areas where they cannot be effectively exercised, what would be the proper scope of any EU action to achieve such effectiveness.

In the Consultation Paper, the Commission acknowledges the possibility of rights being enforced on an individual basis but asserts that individual lawsuits “are often not an effective means to stop unlawful practices or to obtain compensation for the harm caused by these practices.”²⁹ However, even if that were accepted, the fact that there may in some cases be shortcomings in the effectiveness of individual procedures does not necessarily mean that collective procedures are required to remedy those shortcomings.

Even if difficulties in exercising rights derived under EU law could be identified in some Member States, ILR believes that the principle of effectiveness does not give the EU grounds to replace *all* national redress systems with a Commission-sponsored collective model simply because *some* aspects of *some* national systems could be improved.

In assessing whether national law makes rights excessively difficult to assert or enforce, the Court has recalled that “each case which raises the question whether a national procedural provision renders the exercise of rights conferred by the Community legal order on individuals impossible or excessively difficult must be analyzed by reference to the role of that provision in the procedure, its progress and its special features, viewed as a whole, before the various national instances. In that context, it is necessary to take into consideration, where relevant, the principles that lie at the basis of the national legal system, such as the protection of the rights of the defence, the principle of legal certainty and the proper conduct of the proceedings.”³⁰ Thus, at most, the principle of effectiveness (if relevant to this debate at all), might permit an individual to assert that a particular national provision, when weighed against the particular features of the national legal system and the context and purpose of that

²⁸ Joined Cases C-430/93 and C-431/93 *Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten*, [1995] ECR I-4705, ¶ 17, and Case C-129/00 *Commission of the European Communities v. Italian Republic*, [2003] ECR I-14637, ¶ 25.

²⁹ Consultation Paper at 4.

³⁰ Case C-312/93 *Peterbroeck v. Belgian State*, [1995] ECR I-4599 ¶ 14, and *van Schijndel and van Veen*, ¶ 19.

provision, fails to ensure the effectiveness of EU law as it relates to that individual's case. If so, that individual could legitimately challenge the provision in question.

The principle of effectiveness cannot be used by the Commission, however, as a basis for imposing an EU-wide collective redress regime simply because the Commission may believe that Member States' court systems should be more efficient in awarding compensation to claimants. Simply put: "effectiveness" is a safeguard, not a mandate for the Commission to oust national procedural rules in favour of an EU-wide model.

4. *Legal basis.*

In order for the EU to create or impose pan-EU collective redress mechanisms, an appropriate legal basis must be identified – i.e., a provision of the EU Treaties that confers on the EU institutions the competence to make law with a particular aim and content.³¹ This is because the EU can only act within the limits of the powers conferred on it by the Member States. Where legislation is adopted in excess of those limits, that legislation is void.

The requirement that a legal basis for legislation must exist extends beyond merely identifying a potentially relevant provision of the Treaty. Rather, the determination must be objective and the recitals to the legislation must explain the reasons for it and the selection of the legal basis. These requirements ensure that the legislative conduct of the institutions is amenable to judicial review by the EU Courts and that EU citizens can understand how legislation affects their rights. There have been a number of cases in which Courts have struck down legislation where institutions have failed to specify an adequate legal basis for it. For example, an EU directive on tobacco advertising was annulled on the basis that its primary aim was promoting consumer health – as opposed to facilitating advertising, which was the claimed legal basis.³²

In its draft White Paper on damages actions for breach of EC antitrust rules, the Commission did not specify a legal basis for any action to be taken in the area of collective redress, a fact that was noted by the European Parliament.³³ Even the Commission's draft directive on damages actions for breach of EC antitrust rules, which was never published, was apparently silent as to its legal basis.³⁴ Similarly, the issue of legal basis was not ad-

³¹ Article 2(6) of the TFEU states, "The scope of and arrangements for exercising the Union's competences shall be determined by the provisions of the Treaties relating to each area."

³² Case C-376/98 *Federal Republic of Germany v. European Parliament and Council of the European Union* [2000] ECR I-8419. Other cases emphasising the threat to the validity of legal instruments if the wrong legal basis is chosen include: *Case C-300/89, Commission v. Council* (Titanium Dioxide), *Case C-155/91, Commission v. Council* (Environmental Waste), *Case 45/86, Commission v. Council* (Generalised Tariff Preferences), *Case 302/87, Parliament v. Council* (Comitology), *Case C70/88, European Parliament v. Council* (Chernobyl) and *Case C84/94 United Kingdom v Council* (EC Working Hours Directive).

³³ European Parliament resolution of 26 March 2009 on the White Paper on damages actions for breach of EC antitrust rules (2008/2154(INI)).

³⁴ Jesus Alfaro and Tim Reher, *Towards the Directive on Private Enforcement of EC Competition Law: Is the Time Ripe?*, in *The European Antitrust Review 2010*, Global Competition Review (available online with subscription at: http://www.globalcompetitionreview.com/reviews/19/sections/67/chapters/738/private-antitrust-litigation#ftn_17).

dressed in the DG SANCO Green Paper on consumer collective redress or in the consultation paper that followed it.³⁵

The Commission may believe that it has the legal basis on which to act based on Article 114 of the TFEU, which provides for the adoption of measures “for the approximation of the provisions laid down by the law, regulation or administrative action of Member States which have as their object the establishment and functioning of the internal market.” While the scope of Article 114 is broad, the crucial questions regarding its application can be expressed in the following terms: (i) do the preconditions for harmonisation exist; and (ii) is the proposed action consistent with the functioning of the internal market?³⁶

As to the first question, the Commission appears to make preliminary arguments in the Consultation Paper supporting the conclusion that the harmonisation of different mechanisms for consumer redress across the Member States could improve the functioning of consumer markets across the EU. For the reasons identified above, ILR believes that action in this area would respect neither the subsidiarity nor proportionality principles. In addition, ILR would observe that a collective redress system that sought to impose procedures on purely domestic litigation could not be justified by reference to internal market principles. Even if a collective redress mechanism were limited to cross-border cases, the conditions for harmonisation cannot be said to exist because EU legislation already exists to facilitate cross-border cases (and some of the relevant legislation is itself under review). Furthermore, the link between the proper functioning of the internal market and the ability to sue on a collective basis is far from established.

As to the second question, ILR believes that imposing collective redress upon the Member States would *not* be consistent with the functioning of the internal market because it would represent a retrograde step for the EU’s economy and would expose all EU businesses, and ultimately consumers, to the excesses and costs that have been witnessed in the United States, despite efforts to contain the abuses in the U.S. system.

The legal basis for the development of collective injunctive relief via the Directive on Injunctions³⁷ was Article 114 of the TFEU. The aims of mechanisms for compensatory collective redress, however, would differ from those of the Directive on Injunctions in two crucial respects:

First, the Directive on Injunctions aims to protect the interests of consumers in general; hence the collective interests it seeks to protect are “interests which do not include the cumulation of interests of individuals who have been harmed by an infringement.”³⁸ Simi-

³⁵ See the Green Paper at note 3; and DG SANCO, *Overview of the results of the Consultation on Consumer Collective Redress*, http://ec.europa.eu/consumers/redress_cons/docs/overview_results_coll_redress_en.pdf.

³⁶ See the Opinion of Advocate General Fennelly in Case C-376/98 *Federal Republic of Germany v. European Parliament and Council of the European Union* and Case C-74/99 *R v. Secretary of State for Health and Others ex parte Imperial Tobacco Ltd and Others*, ¶ 93.

³⁷ Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers’ interests, OJ L 166, 11.6.1998, p.51 which has since been codified as Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers’ interests (Codified version), OJ L 110, 1.5.2009, p.30.

³⁸ Recital (3) to the Directive on Injunctions (Codified version).

larly, the Regulation on Consumer Protection Cooperation³⁹ provides for cooperation between national authorities to address infringements that harm, or are likely to harm “collective interests of consumers,” defined as: “the interests of a number of consumers that have been harmed or are likely to be harmed by an infringement.”⁴⁰ Compensatory collective redress, on the other hand, is aimed at securing damages in an amount equivalent to the aggregate loss suffered by a particular group or class of individuals.

Second, the Directive on Injunctions aims to stop unlawful practices wherever they occur in the EU, rather than allow the perpetrators to simply relocate to another Member State. It thereby seeks to eliminate practices that distort competition. By the time an action for damages is contemplated, however, it is quite possible (if not likely) that the practice complained of has already ceased. The goal of an imposed collective redress mechanism would not be to eliminate any distortion in trade among Member States; rather, it would be to compensate individuals for their losses after the event (which national law is perfectly capable of doing).

Therefore, it would be wrong to assume that the use of Article 114 of the TFEU as a legal basis in relation to the Directive on Injunctions implies that the same legal basis could be used to impose collective compensatory redress mechanisms.

Nor, in ILR’s view, could Article 81 of the TFEU provide an adequate legal basis despite references in 81(2) to measures aimed at ensuring “effective access to justice” and “the elimination of obstacles to the proper functioning of civil proceedings, if necessary by promoting the compatibility of the rules on civil procedure applicable in the Member States.” This is the case for the following reasons:

First, in accordance with Article 81(2), measures aimed at ensuring effective access to justice and promoting the compatibility of the rules on civil procedure applicable in the Member States must be adopted for the purposes set out in Article 81(1) which states: “The Union shall develop judicial cooperation in civil matters *having cross-border implications...*” (emphasis added). In ILR’s view, Article 81 does not therefore confer power on the EU to impose new mechanisms of redress which (unless confined to cross-border disputes) would have significant implications for the way Member States’ legal systems accommodate claims which might not have substantial cross-border implications.

Second, the Commission has not demonstrated (and there is no reason to presume) that collective redress is required to provide effective access to justice. As stated, Member States are already required to ensure that EU citizens have effective means of enforcing their rights derived under EU law and are best placed to determine whether those means should include collective procedures. In ILR’s view, by way of contrast with essential services such as legal aid, collective procedures are not required for effective access to justice and in fact give rise to substantial *injustice* as a result of their tendency to promote lawsuit abuse.

³⁹ Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws (the Regulation on consumer protection cooperation), OJ L 364, 9.12.2004, p.1.

⁴⁰ Article 3, paragraphs (b) and (k) of the Regulation on Consumer Protection Cooperation.

Other possible legal bases might be considered by the Commission, but ILR believes that equal problems would arise in relation to all remotely plausible alternatives.

5. *Would it be sufficient to extend the scope of the existing EU rules on collective injunctive relief to other areas; or would it be appropriate to introduce mechanisms of collective compensatory redress at EU level?*

As a preliminary issue, ILR questions the premise of this query; by asking whether extending the scope of injunctive relief would be “sufficient,” after all, it implies that a need has been identified for the extension of collective redress to begin with. All the Commission states in the Consultation Paper, however, is that there is great divergence among Member States’ approaches to collective redress. The different approaches taken by Member States are the result of differing circumstances, legal cultures and attitudes towards collective redress that prevail at the Member State level. Accordingly, the question appears to take for granted one of the key issues the consultation is intended to determine – i.e. whether there is a need for EU measures on collective redress.

Quite apart from its concern about the way the question is phrased, ILR takes the view that the expansion of collective redress would not significantly improve the enforcement of EU law (see response to question 1). If the scope of collective injunctive relief were to be expanded, it would be important to put safeguards in place to ensure that the bodies given standing to seek injunctive relief will act responsibly.

Finally, ILR strongly discourages adopting collective compensatory redress mechanisms at the EU level. In addition to the issues raised in response to question 4 (particularly concerning the principles of subsidiarity, proportionality and legal basis), there is a real risk that the introduction of mechanisms of collective compensatory redress will lead to speculative or even abusive litigation. As stated in response to question 1, the costs and risks associated with such abuse weigh heavily against the introduction of collective compensatory redress.

6. *Would possible EU action require a legally binding approach or a non-binding approach (such as a set of good practices guidance)? How do you see the respective benefits or risks of each approach? Would your answer vary depending on the area in which action is taken?*

For the reasons set out in response to question 4 (above), ILR believes that introducing legally binding measures on collective redress could not be validly achieved under EU law. In addition and in the alternative, ILR would argue that legally binding measures are not desirable. If the harmonisation of Member States’ laws on collective redress were attempted then the measures adopted could not adequately deal with differences between various legal systems’ procedural laws. This is not only a result of there being no legal basis for attempting to harmonise basic procedural laws, but also the practical difficulties associated with drafting measures to be implemented across all the jurisdictions of the EU. Legally binding measures would risk creating a situation where the effectiveness of collective redress would remain uneven and incentives would exist for forum shopping.

If action is contemplated despite ILR’s view that the case for action has not been made, a non-binding approach would be preferable as it would allow Member States to pro-

ceed at a pace, and in a manner, that they determine to be appropriate to their respective legal systems.

ILR's view would be the same regardless of the area in which action is taken.

General Principles to Guide Future EU Initiatives on Collective Redress

7. *Do you agree that any possible EU initiative on collective redress (injunctive and/or compensatory) should comply with a set of common principles established at EU level? What should these principles be? To which principle would you attach special significance?*

As noted above, ILR strongly opposes the introduction of an EU-wide collective redress system and does not believe any need for such a system exists. Even if existing consumer redress mechanisms were insufficient, moreover, ILR does not believe that the risks that would be posed by top-down EU-wide collective redress would be justified. Nevertheless, in the event the Commission implements such a system, ILR believes that five principles must be adhered to in order to safeguard against the types of litigation abuse to which collective litigation is most susceptible – and to provide a fair and efficient dispute resolution mechanism for both claimants and defendants:

First, claimants must be required to demonstrate that a collective action is the best possible mechanism for resolving their claims before the lawsuit is allowed to proceed on behalf of the group. In other words, there must be clear standards for a collective action to proceed, and a court must determine early in the life of the litigation whether it can fairly be resolved on a collective basis.

Second, the types of mechanisms available to fund collective actions should be tailored to deter frivolous litigation.

Third, the rights of all potential individual group members must be respected, and no group members should have their rights compromised in a collective proceeding without their consent.

Fourth, collective actions should provide adequate compensation to claimants who have been injured, but punitive damages and *cy pres* awards should not be available.

Fifth, defendants should not be haled into jurisdictions in which they do not operate to defend against collective claims.

ILR discusses these principles, and their practical ramifications, below:

1. *Lawsuits Purporting To Be Collective Must Be Qualified By The Court Before Proceeding As Collective Actions.*

No lawsuit should be allowed to proceed as a collective action unless the court determines, at the outset of the case, that a collective action is superior to all other procedures. In making this determination, the court should apply established criteria that are designed to ensure that proceeding on a collective basis will be both fair and efficient. Requiring courts to make such a determination at the outset of a case would protect potential claimants from being swept into a group proceeding when other procedures are preferable to protect their rights

and advance their claims. It would also ensure that collective actions only proceed where the defendant can fairly defend itself against the group on a collective basis (i.e., there would be no need for individualised evidence). In the U.S. class action regime, this qualification procedure is known as the “class certification” requirement. Any collective action regime should impose the following four requirements, which are similar to those in the U.S. system:

A. *Predominance Of Common Issues/Cohesiveness*

This requirement is intended to ensure that before a collective action is permitted to proceed on its merits, a court must determine that all of the claims of the proposed group members can be adjudicated fairly in a single proceeding and established through common proof. More specifically, courts must decide whether the proposed collective action comports with the principle that “trial for one can serve as trial for all” – i.e., the relevant facts and law as to each class member’s claim are such that adjudicating one group member’s claim (or significant issues related to that claim) *necessarily* resolves the claims (or the same significant issues) for the other group members.

B. *Adequacy*

“Adequacy” means that any person who seeks to be a representative claimant must be willing and able to represent the group adequately. This safeguard protects group members by ensuring that any representative claimant who purports to speak for them and compromise their rights shares the same interests they do and is motivated and informed about the suit. Among other things, an adequacy requirement will help ensure that a representative is not seeking to file a lawsuit in order to extort a fast “sweetheart” settlement for him or herself and his or her attorney, while casting aside the remaining group members.

C. *Typicality*

“Typicality” means that the claims of the representative claimant must be typical of the claims of the claimant group. This safeguard is intended to ensure that only those claimants who advance the same factual arguments may be grouped together in a collective action. The typicality requirement protects group members by ensuring that the representative claimant’s incentives align with those of other group members – and that he or she can fairly represent their interests.

D. *Numerosity*

“Numerosity” means that a collective action should not proceed unless there are so many potential claimants that no other form of dispute resolution would be practical. This safeguard does not require establishment of a specific numerical threshold for claimant groups; rather, it requires courts to assess whether any purported collective action involves a sufficiently large number of potential claimants under the circumstances to make individual proceedings impractical.

2. *Potential Funding Mechanisms For Collective Actions Must Provide Access To Justice, But Must Be Tailored To Guard Against Lawsuit Abuse.*

Litigation abuse is fundamentally driven by financial incentives – it occurs in jurisdictions where it is profitable to engage in abusive litigation, and it does not occur in jurisdictions where it is not. Legal culture and social conventions may mitigate such incentives to

some degree, but ultimately, they do not deter parties from bringing claims of little merit if it is otherwise financially rewarding to do so. Accordingly, lawsuit financing must be structured to remove monetary incentives for abusive litigation, while still providing access to justice for claimants who are legitimately aggrieved. This principle has two practical ramifications:

A. *Any Collective Action Regime Must Preserve The “Loser Pays” Rule.*

The “loser pays” rule is a particularly important safeguard against litigation abuse in the context of collective actions. Without this rule, if claimants can retain solicitors on a contingency- or success-fee basis (which is already possible in some Member States), collective litigation is essentially a one-way gamble. Claimants have little to lose by filing frivolous suits on behalf of hundreds or even thousands of consumers; at the same time, however, defendants face enormous expense and risk in defending themselves against these suits, even if they are frivolous. Thus, the “loser pays” rule is critical to ensure that the parties operate on a level playing field.

At the same time, the “loser pays” rule also benefits claimants with meritorious claims by enabling them to retain competent attorneys and other professionals, with the expectation that their legal costs will be reimbursed by the defendant at the conclusion of the litigation. For these reasons, the “loser pays” rule must be preserved in collective litigation.

B. *The Commission Should Discourage Funding Mechanisms that Permit Investors To Profit from Successful Cases.*

The second practical ramification of this principle is that any initiative that promotes collective litigation must also discourage investments in lawsuits, either in the form of contingency fees or TPLF.

With respect to contingency fees, ILR understands that some Member States already permit them in some circumstances, but believes that their further spread – especially into collective cases – should be discouraged strongly. In the context of collective redress systems, contingency fees are particularly problematic. They incentivize attorneys to bring potentially lucrative claims, regardless of merit, and then to prosecute the litigation and structure any settlement in a way that maximizes their own return, rather than the compensation to the claimants. At the same time, because collective actions involve hundreds or thousands of claims, they provide defendants the opportunity to buy substantial peace from the claimants’ attorney who controls the litigation. And because the claimants’ lawyer is the only person on the claimants’ side with a significant interest in the case, the lawyer is typically willing to agree to any terms offered by the defendant that will reimburse the attorney’s investment and provide him or her a profit. For this reason, the “sweetheart settlement” problem – where the claimants’ attorney negotiates with defendants for large fees and very little in the way of claimant recovery – is heightened in collective cases where attorneys are paid on contingency.⁴¹ Accordingly, the Commission should discourage Member States from permitting

⁴¹ The most notorious examples of sweetheart settlements are the infamous “coupon settlements,” in which defendants pay significant lawyers’ fees directly to class counsel and provide low-value coupons for the defendants’ products or other low-value awards to the class members. U.S. class actions had a long and tortured history with coupon settlements until the enactment of reform legislation in 2005, which limited the practice. Before that reform, one of the most infamous coupon settlement cases was *Kamilewicz v. Bank of Boston Corp*, 100 F.3d 1348 (7th Cir. 1996). In that case, the plaintiffs were

the use of contingency fees and encourage those Member States that already permit them to restrict their availability.

Moreover, if contingency fees (or other “no win, no fee” arrangements) are permitted in the absence of the “loser pays” rule, then they also have the effect of completely insulating claimants from the risks of litigation. Not only will a claimant not have to pay the other side’s costs if unsuccessful, it will not have to pay its own. Accordingly, where contingency fees are permitted, it is even more important that the “loser pays” rule applies so that claimants cannot pursue speculative claims without taking on any risk at all.

In addition to discouraging contingency fees, the Commission should encourage Member States to prohibit TPLF. Experience has shown that TPLF encourages the filing of frivolous litigation and exerts undue settlement pressure on defendants by providing claimants with the resources to continue litigating claims regardless of merit. These dangers are exacerbated in collective proceedings, which already exact substantial leverage against defendants based on their sheer size and the potential for enormous exposure (regardless of merit).

TPLF also exacerbates another fundamental problem with collective litigation – that it is generally controlled by attorneys rather than group members. When a third-party funder is involved in collective redress proceedings, the consumers (who generally have only a small stake in the outcome) are squeezed out of the picture, and the lawsuit essentially becomes a collaboration between lawyer and funder. Thus, the funding company will have the power to steer the direction of the litigation – and it will have every incentive to do so in a way that serves its pecuniary interests, rather than the claimants’.

3. *No Potential Individual Group Member May Have His Or Her Rights Compromised Without His Or Her Consent.*

Collective redress mechanisms strive to resolve numerous claims – hundreds, if not thousands – in a single proceeding and without the personal involvement of almost all of the claimants. This creates a real risk that individual group members’ rights may be compromised without their consent. To guard against this danger, any collective redress regime must be opt-in only: i.e., collective actions must proceed only on behalf of claimants who have affirmatively chosen to be part of the litigation. This is a critical safeguard because opt-out collective litigation robs individuals of their legal autonomy and creates opportunities for legal abuse.

Opt-out group proceedings are contrary to fundamental legal principles because they give a representative party the power to assert claims on behalf of people without their consent. The only individuals excluded from the case are those who hear about the litigation and

mortgagor-borrowers from the defendant mortgage bank. They alleged that the defendant held too much money in escrow with respect to their mortgage loans. As a result of a sweetheart settlement in the case, each borrower had a miniscule sum of up to \$8.76 added to his or her escrow account, while class counsel received between \$8.5 and \$14 million in fees. Even more shockingly, under the sweetheart settlement, the bank withdrew up to \$90 from each plaintiff’s escrow account to pay class counsel’s fees. The end result was a net loss for the plaintiffs and a windfall for the lawyers who purportedly represented them. *Bank of Boston* was just one of a number of cases illustrating the dangers of collusive settlements. For additional examples, see John Beisner, Matthew Shors, and Jessica Miller, *Class Action “Cops:” Public Servants or Private Entrepreneurs?*, 57 Stan. L. Rev. 1441 (2005).

affirmatively submit a form saying they do not wish to participate. Individuals who do not know about the proceeding and individuals who have no interest in asserting claims – but, for one reason or another, do not opt out – are included. The ability of a representative party to assert claims on behalf of consumers without their authorisation robs the potential group members of their legal autonomy because individuals can become participants in litigation that they do not support – or that they outright oppose. Moreover, an opt-out system can expose unwitting consumers to direct litigation risks, such as court-imposed obligations, penalties or cost awards.

Opt-out proceedings thus contravene the constitutions of some Member States that prohibit compromising individuals' rights without their consent. In Germany, for example, one author has argued that collective litigation cannot supplant the Model Case Act:

From a German perspective no individual person may lose his right under a class action ruling or settlement if he did not actively choose to participate in the proceedings. This argument alone makes clear that the German legal system is incompatible with an opt-out system of collective redress.⁴²

Opt-out systems also hurt consumers because they put lawyers in charge of very large cases involving groups of mostly apathetic claimants, with no real client accountability, which, as discussed above, is a root cause of the “sweetheart” settlement problem. By contrast, in opt-in proceedings, the groups tend to include only claimants who are personally and actively interested in pursuing their rights. Thus, the likelihood of counsel acting against the group's interest is greatly diminished.

4. *Successful Collective Actions Should Result In Compensatory Damages Only, Not Punitive Damages Or Cy Pres Awards.*

The goal of private litigation should be to compensate injured claimants. As discussed above, punishing defendants that have violated the law or seeking to deter them from future misconduct should remain the exclusive responsibility of public authorities. At the same time, private collective litigation should not be used as a vehicle to promote social causes.

A. *Collective Litigation Is Not A Law Enforcement Mechanism.*

ILR believes that the Commission should not confuse private compensation with public enforcement, particularly when there is no evidence that public enforcement in the Member States is lacking. Indeed, public enforcement is generally superior to private enforcement mechanisms. Because government regulators typically have experience and expertise in the areas that they regulate, they are usually far better positioned than private individuals to ascertain whether and to what extent consumer protection violations actually occur. Government regulators are also better positioned to make the policy judgments that surround every enforcement decision than private claimants who have a direct financial stake in a matter. In addition, public actors are generally less likely to pursue frivolous claims than private actors. This is so because public actors are required to act in the public interest and therefore must

⁴² Ralf Deutmoser and Marla Weston, *Status of Collective Redress in Germany – Expansion Uncalled For*, in International Comparative Legal Guide to Class and Group Actions 2010 (Global Legal Group Ltd. 2010) at 17.

pursue litigation that furthers public ends, and prosecuting claims lacking in merit rarely furthers public objectives. By contrast, effectively deputizing private claimants to act as regulators would duplicate the U.S. class action system, which has evolved into a pseudo-private enforcement mechanism in which defendants are forced to settle claims of questionable merit for fear of a runaway punitive damages verdict.

B. *Collective Litigation Is Not A Mechanism To Promote Social Objectives.*

Again, the goal of collective redress, if implemented, must be to provide compensation to claimants who have actually been injured by the defendant. Just as private collective litigation does not have any proper role in law enforcement, it is also ill-suited to promote social objectives through *cy pres* awards distributions. *Cy pres* awards do not provide compensation to injured group members – and thus depart from the objectives of the judicial system. The bedrock of civil justice is that a claimant who is injured can seek compensation for his or her injuries; using civil litigation to redistribute wealth to charities – at the expense of group members – turns that fundamental goal on its head. As Professor Martin Redish of Northwestern University School of Law aptly put it: *cy pres* awards merely “creat[e] the illusion of compensation.”⁴³

In addition, *cy pres* awards often spawn conflicts of interest between the presiding judge and the absent group members and between group counsel and the group. In U.S. class actions, the lawyers often propose a *cy pres* award that benefits a charity with which the judge or his or her family is affiliated. This creates – at the very least – an appearance of impropriety. As one critic of *cy pres* relief noted: “allowing judges to choose how to spend other people’s money ‘is not a true judicial function and can lead to abuses.’”⁴⁴ *Cy pres* awards also create the potential for conflicts of interest between group counsel and the absent group members, particularly where group counsel has a relationship with the recipient charity. One class action settlement in a United States antitrust case, for example, included an award of \$5.1 million of unclaimed settlement funds to the claimants’ lawyer’s alma mater.⁴⁵ The diversion of funds to an organisation in which class counsel has such a personal interest clearly runs counter to class counsel’s duty to “fairly and adequately protect the interests of the class.”⁴⁶

⁴³ Martin H. Redish, Peter Julian & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 649 (2010).

⁴⁴ Adam Liptak, *Doling Out Other People’s Money*, N.Y. Times, Nov. 26, 2007, available at <http://www.nytimes.com/2007/11/26/washington/26bar.html> (quoting former federal judge David F. Levi); see also *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 236 F.R.D. 48, 53 (D. Me. 2006) (“Federal judges are not generally equipped to be charitable foundations: we are not accountable to boards or members for funding decisions we make; we are not accustomed to deciding whether certain nonprofit entities are more ‘deserving’ of limited funds than others; and we do not have the institutional resources and competencies to monitor that ‘grantees’ abide by the conditions we or the settlement agreements set.”).

⁴⁵ See Ashley Roberts, *Law School Gets \$5.1 Million to Fund New Center*, GW Hatchet (3 December 2007).

⁴⁶ Fed. R. Civ. P. 23(a)(4); see also *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997) (“Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent.”); *Sipper v. Capitol One Bank*, No. CV 01-9547, 2002 WL 398769, at *4 (C.D. Cal. Feb.

Finally, *cy pres* awards create the potential for representative parties to steer money to a favoured charity to satisfy their own financial interests. For example, in a recent AOL *cy pres* settlement that was heavily criticized in the United States, one of the named claimants was employed by one of the recipient charities.⁴⁷ *Cy pres* awards, accordingly, must not be available in collective cases.

5. *Defendants Should Not Be Subject To Suit In Jurisdictions In Which They Do Not Operate.*

This principle seeks to address the potential problems of forum shopping – i.e., the ability for claimants to select among various jurisdictions in bringing their claims. As a practical matter, forum shopping has two components – claimants “shop” for a favourable court in which to bring their suit, and they “shop” for favourable law under which to assert their claims. A claimant’s ability to forum shop is therefore enhanced if a court is open to claims arising in other jurisdictions.

In the United States, claimants’ ability to shop for the most claimant-friendly forums in which to bring lawsuits has led to uncertainty on the part of would-be defendants about which jurisdictions’ laws apply to them – and an increased volume of litigation in jurisdictions with reputations for being anti-defendant. Prior to the enactment of federal class action reform legislation, this problem led to the creation of “magnet” jurisdictions – otherwise unremarkable rural counties that became magnets for hundreds of class action lawsuits because the courts consistently handed down claimant-friendly rulings.

To prevent forum shopping among the Member States, any collective redress regime must provide that a claimant may bring suit only in the jurisdiction where the defendant is resident or in which it would be amenable to suit under ordinary jurisdiction or venue rules; for example, the jurisdiction in which an injury was allegedly suffered by the claimants.

ILR discusses forum shopping further in its response to question 30, below.

8. *As cited above, a number of Member States have adopted initiatives in the area of collective redress. Could the experience gained so far by the Member States contribute to formulating a European set of principles?*

No comment.

9. *Are there specific features of any possible EU initiative that, in your opinion, are necessary to ensure effective access to justice while taking due account of the EU legal tradition and the legal orders of the 27 Member States?*

No comment.

28, 2002) (“A central concern of the Rules of Civil Procedure governing class actions is ensuring that the class action format is not hijacked by parties . . . to their own ends at the expense of the other class members.”).

⁴⁷ Brief for Objector-Appellant at 7-8, *Nachsin v. AOL, LLC*, No. 10-55129 (9th Cir. 20 July 2010).

10. Are you aware of specific good practices in the area of collective redress in one or more Member States that could serve as inspiration from which the EU/other Member States could learn? Please explain why you consider these practices as particularly valuable. Are there on the other hand national practices that have posed problems and how have/could these problems be overcome?

No comment.

11. In your view, what would be the defining features of an efficient and effective system of collective redress? Are there specific features that need to be present if the collective redress mechanism would be open for SMEs?

In responding to this question, ILR does not draw a distinction between SMEs and other types of companies. ILR does not believe that SMEs should be treated differently from other companies with respect to access to justice.

An efficient and effective system of collective redress would incorporate procedures designed to achieve the principles of collective redress set forth above. In particular, any efficient and effective system of collective redress would include:

1. A Rigorous Collective Action Qualification Procedure

As discussed above, in order to determine that a collective action is the best possible mechanism for resolving a particular dispute, the court should conduct a hearing, at the outset of each case, to qualify the case as a collective proceeding. At this hearing, the court should determine if the proposed collective action satisfies the predominance/cohesiveness, adequacy, typicality and numerosity elements discussed above in response to question 7. Again, the aim of this process is to determine whether common facts or issues of law predominate over individual facts or issues of law, such that a single trial could fairly adjudicate the claims of every member of the claimant group. Only if a single trial could do so should a collective action be allowed to proceed.

2. Retention Of The “Loser Pays” Rule

As discussed above, the “loser pays” rule is an invaluable safeguard against lawsuit abuse. In England and Wales, the rationale for the rule has been expressed as follows:

The main principle that underlies the rule is that if one party *causes* another unreasonably to incur legal costs he ought as a matter of justice to indemnify that party for the costs incurred. A defendant who has wrongfully injured a claimant and who has refused to pay the compensation due should pay the costs that he has *caused* the claimant to incur, so that the claimant receives a full indemnity. A claimant who brings an unjustified claim against a defendant so that the defendant is forced to incur legal costs in resisting that claim should indemnify the defendant in respect of the costs he has *caused* the defendant to incur.⁴⁸

⁴⁸ *Arkin v. Borchard Lines Ltd and others* [2005] EWCA Civ 655; [2005] 3 All ER 613 at 619, dicta of Lord Phillips.

The “loser pays” rule enables an injured claimant to receive full compensation without having to share his or her proceeds with lawyers; at the same time, it ensures that a wrongly accused defendant does not have to bear the costs of defending itself against a claim that was without merit. In addition, the rule creates beneficial incentives for both claimants and defendants to carefully consider the cost of bringing a lawsuit – i.e., it is “of fundamental importance in deterring plaintiffs from bringing and defendants from defending actions they are likely to lose.”⁴⁹

3. *A Ban On TPLF*

As noted above, the Commission should encourage the Member States to ban TPLF in any collective litigation regime. TPLF and collective actions are a dangerous combination, because they work together to create enormous leverage against a defendant regardless of whether a claim has merit. By helping would-be claimants shift their costs to others, TPLF encourages claimants’ attorneys to test claims of questionable merit in massive collective actions, knowing that the enormity of the potential risk will often force defendants to settle collective actions on sub-optimal terms rather than roll the dice at trial.

TPLF is also troubling in the collective litigation arena because there is no practical way to obtain permission from all the potential claimants before entering the third-party funding agreement. Thus, the funding arrangement is essentially occurring without the consent of the claimants.

Relatedly, TPLF also exacerbates one of the fundamental problems with aggregate litigation – i.e., that it is generally controlled by attorneys rather than claimants. In a large collective action, the average claimant often has very little money at stake; as a result, the lawyers control the direction of the case without any real accountability to their clients. While this phenomenon has resulted in questionable settlements in the U.S. (as discussed above), lawyers are at least subject to fiduciary obligations and ethical rules – and they face real consequences if they violate these duties. When a collective action is funded by a third party, however, that third party effectively controls the progress of the litigation – without any inherent concern for the claimants themselves and without the fiduciary obligations of a lawyer.

In addition, TPLF tends to prolong litigation. The presence of a third party funder in a case encourages claimants to reject reasonable settlement offers because of the need to share their proceeds with the funder. By the same token, third party funding companies likely would reject settlement offers that do not reimburse their complete investment. Either way, the presence of a third party with a profit motive will make early, beneficial settlements less likely – just as contingent attorneys’ fees do in the United States.

Finally, TPLF has no place in collective actions because the funder’s share of damages reduces any relief obtained by the claimants. Even when no funder is present, the actual payout to collective action claimants is often reduced, because the losing defendant does not fully reimburse the claimants’ legal costs. If a third-party funder is added to the mix, the slice that goes to claimants would be even smaller.

⁴⁹ *Roache v. News Group Newspapers Ltd* (1992) [1998] EMLR 161 at 166 per Bingham MR.

4. *Strict Regulation Of Contingency Fees*

Like TPLF, contingency fees also increase the potential for abuse. They provide lawyers with a direct interest in the financial outcomes of cases and therefore a motive to influence the course of litigation in a manner that does not necessarily align with the best interests of their clients. This inherent conflict of interests is exacerbated in the context of collective actions where the value of damages claimed can be tremendous, and the bond between the attorney and the claimants at large relatively weak. Accordingly, the Commission should take steps to discourage Member States from allowing contingency fees in collective cases and encourage them to adopt strict regulations where contingency fees are already permitted. As suggested above, it would be naive to view contingency fees as a damaging feature of the U.S. class action system that would not be replicated in the EU given that contingency fees are already permitted in Member States such as Poland and Italy, and soon will be in civil litigation in the UK.⁵⁰

5. *A Requirement That Collective Actions Be Opt-In Only*

Above, ILR discusses the reasons why opt-in litigation is critical to protect claimants' rights in collective actions. But opt-in litigation is also superior to opt-out litigation in preventing the types of abusive lawsuits that harm defendants. The U.S. experience has amply shown that opt-out collective actions impose substantial settlement pressure on defendants, independent of the merits of the litigation. As adopted in the United States, for example, the opt-out procedure allows claimants to subject defendants to massive potential financial exposure simply by filing suit – the class action filing automatically brings every putative class member's claim into the proceeding. The settlement pressure generated in such circumstances is so great and so disconnected from the merits of the case that it leads to “blackmail settlements.”⁵¹ Moreover, the pressure on defendants to settle claims regardless of merit incentivises claimants' attorneys to file non-meritorious claims. Opt-out procedures thus inevitably lead to lawsuit abuse.

In this respect, it bears noting that the potentially devastating effects of an adverse collective litigation judgment are felt not only by the defendants themselves, but reverberate throughout the economy. In 2008, the German Association of Chambers of Industry and Commerce released a publication showing that the direct cost to the U.S. economy of class actions is \$250 billion.⁵² The same publication also cited data showing that 35 percent of all issuers sued in securities class actions that were settled between 1996 and 2006 went into

⁵⁰ See note 5, above.

⁵¹ *Rhone-Poulenc Rorer*, 51 F.3d at 1298.

⁵² Deutlmoser and Weston, *Status of Collective Redress in Germany*, at 16 (citing German Association of Chambers of Industry and Commerce, *Collective Redress: A Common Frame of Reference*, November 2008, www.DIHK.de) (The German Association of Chambers of Industry and Commerce article cites a March 2006 presentation by Professor Westerholt to the Association in Frankfurt). Deutlmoser and Weston also note, correctly, that the defendants' litigation exposure is “not only borne by the companies, but also by the consumers by way of, for example, increased prices.”

bankruptcy or de-listed from a major stock exchange before their respective settlement hearings.⁵³

6. A Ban On Punitive Damages

As discussed in the introduction and in ILR's response to questions 2 and 7, collective actions are not public enforcement proceedings and should not be treated as such. Collective actions serve to provide compensation to injured claimants – nothing more. They are ill-suited to serve as a vehicle for punishing defendants who violate the law because the lead claimants have a personal pecuniary interest in the proceeding, which would necessarily conflict with dispassionate, expert policy judgments that precede any regulatory enforcement action.

This problem is highlighted by the case of class actions that are often brought in the U.S. to enforce securities regulations. Rarely do the proceeds in such suits come from an individual accused of wrongdoing – instead, the corporation almost always pays out any settlement proceeds.⁵⁴ As a result, such suits essentially penalise current investors to pay off claims brought by prior investors (and to pay their lawyers). When punitive damages are awarded in such suits, the “circularity” problem is exacerbated because they result in even bigger recoveries that punish innocent shareholders rather than the wrongdoers. For this reason, it is critical to carefully balance competing public interests before bringing an enforcement action – and to determine whether such an action is in the best interests of all affected constituencies. A private claimant – who will profit from any collective case – is not in the right position to make this determination. Accordingly, only disinterested public officials should be empowered to bring public enforcement actions.

7. A Ban On Cy Pres Relief

As noted above in ILR's response to question 7, collective proceedings are not an appropriate mechanism to promote social welfare objectives. Accordingly, *cy pres* awards should not be allowed in collective litigation.

8. Jurisdiction And Venue Provisions To Prevent Forum Shopping

For the reasons discussed above, any efficient and effective collective action regime must not permit forum shopping. Defendants should only be amenable to suit in the jurisdictions in which they operate or in which they would be amenable to suit according to the ordinary rules on jurisdiction.

⁵³ *Id.* (citing Laura Simmons and Ellen Ryan, *Securities Class Action Settlements: 2006 Review and Analysis*, 2007, http://securities.stanford.edu/Settlements/REVIEW_1995-2006/Settlements_Through_12_2006.pdf, at 14).

⁵⁴ See Committee on Capital Markets Regulation, *Interim Report 78* (November 2006), <http://tinyurl.com/35gayn>; see also Donald C. Langevoort, *U.S. Securities Regulation and Global Competition*, 3 Vir. L. & Bus. Rev. 191, 199 (2008) (“By and large, the money paid in judgments, settlements, and legal fees comes out of either the corporate treasury or an insurance policy, and is thus funded by the company’s shareholders, not the individual wrongdoers.”).

9. *An Effective Summary Judgment Procedure*

Any efficient and effective system of collective redress should also include a summary judgment procedure that would empower the court, at the outset of each case, to determine whether a claim or defence has any real prospect of success. Such a procedure would prevent meritless cases from clogging the courts' dockets and would protect defendants in such suits from having to continue to pay defence costs in cases that have no merit. Conversely, summary judgment can also speed the resolution of meritorious claims in favour of claimants.

In addition, an effective summary judgment procedure should empower the courts to grant partial summary judgment on any issues for which summary judgment is proper. This would narrow and streamline the issues that would need to be resolved by trial.

10. *Restrictions on Discovery*

One of the reasons U.S. class actions are so expensive is that claimants are empowered to conduct broad discovery on topics not directly relevant to the claims at issue. Given the burden defendants must bear in responding to discovery, particularly in the age of electronic data and email, claimants often conduct discovery regarding irrelevant matters simply to pressure defendants to settle. This practice is known as a "fishing expedition." Any effective and efficient collective redress regime must guard against such tactics by restricting discovery.

Most of the Member States recognize the dangers posed by discovery and do not permit it. In those Member States where discovery does not already exist, it should not be allowed at all in any collective proceeding.

In those few Member States where discovery does exist, it should be strictly limited and targeted to the claims and parties in the litigation. These limitations, moreover, should be imposed by law, not merely left to the discretion of the judge in each case. Moreover, where such limited discovery is allowed, any discovery procedures should include mechanisms to safeguard defendants' confidential materials against disclosure. In this respect, a specific procedure should be implemented to shield from disclosure documents turned over to public authorities in the context of leniency programs. Permitting claimants to discover such documents would deter companies from self-reporting wrongdoing to the public authorities and would be counter to the public interest.

11. *A Procedure To Coordinate And Manage Related Lawsuits*

Because collective proceedings are potentially lucrative for claimants and their attorneys, establishing a collective redress regime in Europe creates the risk that, once a collective suit is filed in one jurisdiction, claimants in other jurisdictions will file "copycat" suits. Such copycat suits would require defendants to expend resources defending multiple lawsuits in multiple jurisdictions at the same time. Such suits also pose the risk of inconsistent judgments in different courts, with inconsistent results for claimants. To guard against these risks, any collective redress regime must include a procedure to coordinate and manage multiple lawsuits that are brought against the same defendant with respect to the same subject matter.

In addition, as part of a procedure to coordinate and manage related lawsuits, any directive on collective redress should provide that claims and issues decided in collective litigation are *res judicata* and cannot be re-litigated in future collective cases against the same defendant concerning the same subject matter. Similarly, any person who is a member of a claimant group in a collective case cannot become a member of a claimant group in any other case against the same defendant concerning the same subject matter. Every claimant should be entitled to “one bite at the apple” to prove any claims against a defendant before a court. If the court rejects the claimant’s claims, he or she should not be able to sue the same defendant in another court. Such conduct would unfairly prejudice defendants by requiring them to expend resources re-litigating issues, and would promote forum shopping by claimants seeking ever more permissive courts in which to try their claims.

12. How can effective redress be obtained, while avoiding lengthy and costly litigation?

Collective litigation is *inherently* costly and lengthy, because it is a procedure that attempts to resolve fairly the claims of numerous individuals in a single proceeding. Rather than engage in collective litigation, then, ILR believes claimants would be better served if they used some form of ADR. ILR generally supports ADR as a fair and efficient alternative to litigating claims, and ILR believes the Commission can play an important role in providing guidance on ADR best practices to the Member States and in providing information on available ADR schemes to potential claimants and defendants.

ADR is efficient, flexible and can be tailored to address the specific needs of the parties or the complexities of the case. As a result, ADR tends to result in lower costs for all parties than court-based litigation. From the point of view of consumers, this makes it a more accessible avenue for resolving disputes. From the point of view of businesses, it often results in less time and expense than court-based litigation. In this regard, the element of finality provided by binding ADR mechanisms is beneficial, but ILR also recognises the value of non-binding mechanisms. Ultimately, the choice of whether binding or non-binding ADR is most appropriate in any given case should be left to the parties. Finally, since ADR can be a low-cost and efficient dispute resolution mechanism, it is often less susceptible than court proceedings to abusive practices by parties.

Any best practices guidelines for ADR in Europe must include safeguards against abusive practices. As ILR notes throughout this response, collective proceedings are generally susceptible to abuse – whether they occur in litigation or as part of an ADR scheme – because the potential liability involved once multiple claims have been aggregated can be huge. This creates incentives for third parties, including lawyers and TPLF providers, to take control of the proceedings for their own gain. For this reason, even in a collective ADR scheme, certain safeguards must be put in place to prevent abuse. One of the most important safeguards against abuse of a collective ADR regime is to establish a “qualification” standard of the type discussed above. Specifically, courts or ADR bodies must decide – before a matter is allowed to proceed on a collective basis – whether the group members’ claims implicate the same facts and the same law. Only under that circumstance would proceeding on a collective basis be appropriate.

In addition, any collective proceedings must be carried out in a way that does not vitiate the parties’ control over the ADR process. Five critical safeguards flow from this principle:

First, just as with collective litigation, any collective ADR proceeding must be “opt-in,” because each consumer must make the affirmative decision to join the claimant group and have his or her rights determined by that process. This is so even if the parties agreed to resolve potential disputes through ADR at the time of the sale or other transaction that gave rise to their dispute, because a representative party does not possess the power to institute an ADR proceeding on behalf of others without their knowledge. In opt-out collective cases, only the representative claimant has made the affirmative decision to commence the case; the other members of the group have made no such decision and lack any control over the process. (Indeed, some members may not even know about the proceeding.) In other words, although they may have consented to resolve any potential dispute they have with a company through ADR, they have not consented to participate in any and all disputes that other parties purport to have with that company. No consumer could grant such consent at the time of sale because so many aspects of any potential collective claim would remain to be determined, and the consumer would lack sufficient information on which to base consent. Given this lack of consent, it would be unfair and improper to purport to bind individuals to the outcome of ADR proceedings that they did not affirmatively join.

Second, even where individuals do take affirmative steps to opt in, they must be made aware of the effect their participation could have on their right to have recourse to the courts further down the line. In representative collective ADR, they must also be made aware that the representative will act in the interests of the group as a whole and not necessarily in the interests of the individual.

Third, it must be ensured that where representative organisations are involved in commencing ADR procedures, they do so at the behest of consumers rather than on their own initiative – and that they act in the consumers’ best interests at all times. Ideally, consumers themselves should act as representative claimants or they should be represented by public bodies (such as State-appointed ombudsmen).

Fourth, any collective ADR scheme must ensure that the ADR outcome is limited to those parties involved and – where appropriate – is final. In other words, if a consumer opts in to a collective binding ADR, he or she should be barred from later participating in any other ADR or judicial proceeding relating to the same claim. By the same token, if a consumer accepts an outcome in a collective ADR scheme that is non-binding, he or she should be prohibited from participating in subsequent proceedings arising from the same claim. At the same time, any collective ADR outcome must be limited so as to apply only to the participants in the immediate proceeding. For example, if an arbitrator rules against a business and in favour of a group of consumers in a collective ADR proceeding that the parties agreed would be binding, that ruling should be recognized and upheld by the courts in the event that a party later re-opens the dispute in litigation.

Fifth, any evidence or arguments shared with the ADR body by any party during the proceeding must be protected from disclosure to non-parties and should not be used by or against any party in any other ADR proceeding. The risk of such disclosure is particularly acute in the context of collective proceedings, because there may be numerous claimants receiving information about the case, most of whom do not appear personally before the mediator or arbitrator.

Principle 2: The importance of information and the role of representative bodies

13. How, when and by whom should victims of EU law infringements be informed about the possibilities to bring a collective (injunctive and/or compensatory) claim or to join an existing lawsuit? What would be the most efficient means to make sure that a maximum of victims are informed, in particular when victims are domiciled in several Member States?

ILR submits that the emphasis here should be on informing citizens and businesses of their rights rather than informing them of the court procedures available to them. Only when citizens are aware of their rights under EU law can they assert those rights in a way that might avert disputes, or know when they may have a weak claim. There are many reasons why consumers may be dissatisfied with the level of service they receive, and most businesses would encourage them to communicate their dissatisfaction. This enables businesses to improve their offerings. In some cases, consumers will have valid claims under the law, but in others they will not. Accordingly, ILR objects to the use of the word “victim” in this question. Potential claimants should not be categorised as “victims” until their claims are established.

Informing individuals of all the possibilities. Where individuals make an informed judgment that their rights *have* been infringed, they should be given access to information setting out the full range of options available. This should include possibilities to commence litigation in the courts, but such proceedings should be commenced only as a last resort. Individuals should first be encouraged to approach businesses with a view to resolving disputes amicably, including through ADR where appropriate.

Informing individuals of how to join an existing lawsuit. Although ILR is not convinced of the need for collective compensatory redress in the EU, it welcomes the Commission’s focus on how individuals might “join” existing lawsuits since this implies an opt-in model. For the reasons explained in response to questions 7 and 11, opt-in models are vastly preferable to opt-out models of collective redress.

ILR submits that potential claimants should not be informed about an existing lawsuit until it has been qualified (or certified) by a court for collective treatment. As discussed in response to questions 7, 11 and 20, qualification is an important safeguard against abuse. Any attempt to gather claims ahead of qualification would be premature and would enable claimants or their representatives to threaten defendants with the prospect of mass liability.

Following qualification, the task of informing potential claimants should either be performed by public bodies or by the lead claimant under the supervision of the court. Under no circumstances should this role be performed by claimant law firms or other third parties with a financial interest in maximizing the value of a claim. Appropriate public bodies might include members of the European Consumer Centres Network (ECC Net), which could share information on existing cases and direct consumers who contact them rather than having to rely on the media to reach out to potential claimants.

Means of communicating with potential claimants. The use of mass media to reach potential claimants is of particular concern to ILR in light of its experience with the U.S. litigation culture. The EU must seek to avoid uncontrolled use of mass media to whip up potential claims, many of which may be frivolous, or to publicize ongoing litigation. This might be seen by some as an effective way of communicating across national boundaries, but it

would likely come at the price of increased nuisance litigation. Instead, communicating with potential claimants in several Member States should be entrusted to public bodies such as the ECC Net or conducted by claimants themselves who could place court-approved notices in national newspapers.

14. How could the efficient representation of victims be best achieved, in particular in cross-border situations? How could cooperation between different representative entities be facilitated, in particular in cross-border cases?

As stated in response to question 22, ILR strongly opposes allowing private organisations to act as representatives in collective actions. If collective compensatory redress is to be introduced at the EU level, claims should be initiated by claimants themselves who allege they have suffered harm and therefore have a genuine interest in seeking redress. To the extent that representative organisations become involved, they should only be public organisations that meet criteria set out in law (see response to question 22).

In cross-border situations, potential claimants could be directed to the claimant or public organisation leading a case by their local European Consumer Centre or, in the area of financial services, by a member of FIN-NET. These organisations have experience performing this kind of role and would be well equipped to inform potential claimants of the full range of options available. It may be that in many cross-border cases, it will be more appropriate for consumers to be directed to ADR bodies rather than become involved in court-based procedures.

The involvement of private representative organisations should be restricted. There is a risk that organisations in some Member States would be more willing and better resourced to initiate court-based procedures. Those Member States could become attractive jurisdictions for collective actions, with the organisations concerned reaching out to recruit potential claimants in other Member States. Instead, the onus should be on claimants who are motivated by genuine grievances to take advantage of the information and assistance that pan-European networks such as the ECC Net are able to provide. This should ensure access to the full range of options for cross-border dispute resolution, not only to court-based procedures.

Principle 3: The need to take account of collective consensual resolution as alternative dispute resolution

15. Apart from a judicial mechanism, which other incentives would be necessary to promote recourse to ADR in situations of multiple claims?

ILR refers the Commission to its response to DG SANCO's consultation on ADR and to its answer to question 12, above. In ILR's view, the key concepts that underpin ADR are consent and control. ADR works best where parties choose the type of scheme they wish to use, enter into it voluntarily and retain control of the procedure throughout.

ILR has reservations about the use of judicial mechanisms as a means of promoting ADR. The Commission states in its Consultation Paper that, "[t]he availability of an effective judicial redress system should act as a strong incentive for parties to agree out of court."⁵⁵ ILR agrees with this statement to the extent it implies that parties entering into set-

⁵⁵ Consultation Paper at 20.

tlement negotiations should have confidence that they will have recourse to fair court-based procedures if a settlement is not reached. ILR disagrees with the statement, however, to the extent that it envisages sanctioning parties for failing to agree to a settlement, or being coerced into pursuing consensual dispute resolution by the threat of expensive court-based litigation.

In ILR's view, there should be no need to impose sanctions as a means of promoting ADR. The clear advantages of ADR over court-based litigation should provide sufficient incentives for parties to consider the use of ADR. In general, ADR schemes offer cheaper and faster procedures for dispute resolution. Parties may also find the flexibility of ADR procedures useful where multiple parties are involved, but since collective ADR is not yet well developed, parties should be allowed a considerable margin of discretion as to when, and under what circumstances, they are willing to consent to its use.

16. Should an attempt to resolve a dispute via collective consensual dispute resolution be a mandatory step in connection with a collective court case for compensation?

ILR supports the use of consensual dispute resolution in appropriate cases. Any means by which disputes can be amicably resolved without resorting to costly and time-consuming court-based procedures should be encouraged. However, consensual procedures, by their very nature, require parties to enter into negotiations voluntarily. Indeed, in ILR's view, consent should be the basis for all forms of ADR.

In this respect, however, ILR stresses that when consumers and businesses have agreed as part of the terms of a sale to use ADR in the event of any dispute, the parties' agreement should be enforceable provided this does not result in consumers being treated unfairly. ILR understands that under Council Directive 93/13/EEC of 5 April 1993,⁵⁶ ADR provisions in consumer contracts may be unenforceable against consumers if disputes later arise. In other words, consumers may consent to ADR once a dispute arises, but consent contained in a consumer contract prior to the dispute might not be binding on the consumer. In some cases this mechanism may serve to protect consumers' interests. In other cases, however, the use of ADR may benefit both parties by providing a cheaper and more efficient means for resolving their dispute. Those benefits may be unrealised if the parties cannot have confidence in the agreement to use ADR or face the possibility of the resulting award being set aside. It would therefore be a positive step if Council Directive 93/13/EEC were amended, or the Commission were to publish guidance, so as to clarify the steps businesses could take to ensure that ADR agreements entered into at the time of a sale are considered to be fair. Alternatively, it might be possible for certain ADR schemes to be endorsed as having sufficient safeguards in place for them to be identified in ADR clauses of consumer contracts without those clauses being considered to be unfair. ILR is confident that such steps could be taken without undermining consumer protections. Such steps could also offer significant encouragement to investment in ADR schemes.

Although it might be appropriate to require parties to demonstrate that they have properly considered ADR prior to initiating court-based proceedings, parties should not be penalized where they have legitimate reasons for choosing to litigate. Accordingly, great

⁵⁶ Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts, OJ L 95, 21.4.1993, at 29.

care would have to be taken in drafting such a proposal. While there would be merit in requiring parties to “attempt” to resolve disputes by consensual procedures – in the sense that they should be expected to give such procedures due consideration and perhaps discuss the possibility with potential claimants – insisting that they should enter into such procedures where there are legitimate reasons for having recourse to the courts, or that they should persevere with such procedures where there is no reasonable prospect of resolution, would merely result in wasted time and expense.

17. How can the fairness of the outcome of a collective consensual dispute resolution best be guaranteed? Should the courts exercise such fairness control?

As a matter of general principle, ILR submits that the fairness of a consensual outcome should not need to be “guaranteed.” When parties enter into a consensual process, they should do so fully informed of whether the outcome will be binding on them. If they consented to be bound, then their views on the fairness of the outcome should not be an issue for the courts. If they did not consent to be bound, then they will be entitled to reject the outcome. In reality, however, evidence shows that most parties to non-binding ADR do choose to comply with the outcome.⁵⁷

Nonetheless, parties who agree to request a ruling from the courts on the legality of ADR should not be prevented from doing so. ILR also recognizes that the analysis becomes more complicated where consensual dispute resolution is conducted without the participation of all the parties concerned such as, for example, in the Dutch procedure for mass settlement. In such cases, the court will play an essential role in protecting the interests of those parties that did not give affirmative consent but may nevertheless be bound by the settlement. In any event, as ILR argues above in response to question 12, all collective ADR procedures should be opt-in only.

18. Should it be possible to make the outcome of a collective consensual dispute resolution binding on the participating parties also in cases which are currently not covered by Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters?

It is not clear from this question precisely how the Commission envisions extending the scope of Directive 2008/52/EC. ILR has therefore considered a number of possibilities:

- **National disputes.** Directive 2008/52/EC currently applies to mediation of cross-border disputes only. ILR would assume that making the outcome of mediation of national disputes subject to a similar mechanism would fall outside the legal basis for Directive 2008/52/EC given that Article 81 of the TFEU⁵⁸ only confers power on the EU to, “develop judicial cooperation in civil matters *having cross-border implications*” (emphasis added).

⁵⁷ See DG SANCO, *Study on the use of Alternative Dispute Resolution in the European Union, Final Report* (16 October 2009) at 55. The median compliance rate for ADR schemes issuing a non-binding recommendation was found to be 90%.

⁵⁸ The equivalent provision of the TFEU to Article 65 of the Treaty Establishing the European Community, which provided the legal basis for Directive 2008/52/EC.

- ***Other forms of ADR besides mediation.*** Recital (11) of Directive 2008/52/EC states that the directive “shall not apply to . . . processes of an adjudicatory nature such as certain judicial conciliation schemes, consumer complaint schemes, arbitration and expert determination or to processes administered by persons or bodies issuing a formal recommendation, whether or not it be legally binding as to the resolution of the dispute.” ILR would not object to the possibility of parties seeking to make the outcome of such procedures binding if they so choose. However, where parties have already consented to a binding procedure this step will not be necessary, and where they have consented to a non-binding procedure, evidence shows they will likely comply with the outcome in any case.
- ***Cases where not all parties explicitly give consent.*** Directive 2008/52/EC requires Member States to ensure that the parties to mediation, or “one of them with the explicit consent of the others” can request that written agreements resulting from mediation be made enforceable.⁵⁹ If the Commission contemplates this requirement being extended to a situation where not all parties give their explicit consent, then it should proceed with extreme caution. As stated in response to question 17, where the possibility exists of binding potential claimants who did not affirmatively join a procedure, the court will play an essential role in protecting the interests of those who did not give explicit consent. The risks posed in this situation, moreover, provide an additional ground for limiting collective ADR to opt-in procedures only.

19. Are there any other issues with regard to collective consensual dispute resolution that need to be ensured for effective access to justice?

No comments.

Principle 4: Strong safeguards against abusive litigation

20. How could the legitimate interests of all parties adequately be safeguarded in (injunctive and/or compensatory) collective redress actions? Which safeguards existing in Member States or in third countries do you consider as particularly successful in limiting abusive litigation?

Safeguards against abusive litigation are the foundation of an effective and efficient collective redress system. Without safeguards, any collective redress system would quickly become bogged down in frivolous claims and would be unable to provide effective or efficient compensation to injured claimants, or to protect the rights of wrongly-accused defendants. Therefore, the criteria for an effective and efficient collective redress system that ILR identified in its answer to questions 7 and 11 apply equally here:

1. A rigorous collective action qualification procedure. As discussed above, in order to determine that a collective action is the best possible mechanism for resolving a particular dispute, the court should conduct a hearing, at the outset of each case, to qualify the case as a collective proceeding. The purpose of this process is to determine whether common facts or issues of law predominate over individual facts or issues of law, such that a single

⁵⁹ Article 6, paragraph 1 of 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, OJ L 136, 24.5.2008, p.3.

trial could fairly adjudicate the claims (or substantial issues within the claims) of every member of the claimant group.

2. Retention of the “loser pays” rule. The “loser pays” rule is one safeguard that already exists in Europe that is an effective check on abusive litigation.

3. A ban on third-party litigation financing. The Commission should encourage the Member States to ban TPLF in collective litigation. TPLF and collective actions are a lethal combination because both practices encourage the filing of meritless litigation, both exact leverage on defendants regardless of whether a suit is valid and both diminish the role of the claimants on whose behalf the litigation is supposedly proceeding.

4. Strict regulation of contingency fees. The Commission should discourage Member States that do not already allow contingency fees from introducing them, particularly in the context of collective actions. Those Member States that do permit contingency fees should be encouraged to adopt strict regulations on the manner and circumstances in which they may be used.

5. A requirement that collective actions be opt-in only. Opt-in litigation is superior to opt-out litigation both to protect claimants’ rights and to prevent the types of abusive lawsuits that harm defendants.

6. A ban on punitive damages and cy pres relief. As discussed above, collective actions are not public enforcement proceedings, and should not be treated as a vehicle to punish wrongdoing or to promote social welfare objectives. Collective actions serve to provide compensation to injured claimants – nothing more.

7. Jurisdiction and venue provisions to prevent forum shopping. Defendants should only be amenable to suit in the jurisdictions in which they operate or in which they would be amenable to suit according to the ordinary rules on jurisdiction.

8. An effective summary judgment procedure. As discussed above, any collective redress regime should include a summary judgment procedure which would empower the court, at the outset of each case, to determine whether the action can be resolved as a matter of law without further litigation. Such a procedure would prevent frivolous cases from clogging the courts’ dockets and would also protect defendants from continuing to spend money defending themselves in actions that have no legal merit.

9. Restrictions on discovery. As discussed above, defendants bear a heavy burden in responding to discovery requests, particularly in the age of electronic documents and email. To alleviate this burden and protect defendants from “fishing expeditions” by claimants, discovery procedures in collective actions should be restricted. In those Member States where discovery is not already permitted in civil litigation, it should not be introduced in collective proceedings. In those Member States where discovery already exists, its should be limited by law to relevant documents, and any discovery procedures should include mechanisms to safeguard defendants’ confidential materials against disclosure.

10. A procedure to coordinate and manage related lawsuits. As discussed above, because collective proceedings are potentially lucrative for claimants, establishing a collective redress regime in Europe creates the risk that claimants in various jurisdictions will file “copycat” actions. To guard against this eventuality, procedures should be created to coordi-

nate and manage multiple lawsuits against the same defendant arising out of the same subject matter. Such procedures should also provide that claims and issues decided in collective litigation cannot be re-litigated in future collective cases against the same defendant concerning the same subject matter and that any person who is a member of a claimant group in a collective case cannot become a member of a claimant group in any other case against the same defendant concerning the same subject matter.

In addition to implementing these safeguards as part of any collective redress regime, any directive from the Commission on collective redress should also reflect that collective redress is a purely *procedural* mechanism that does not expand any substantive rights – or eliminate any protections for defendants. In the United States, the law is clear that use of the class action device cannot vitiate basic protections to which a defendant would be entitled in other litigation. This is one feature of U.S. class actions the Commission should duplicate.

21. Should the “loser pays” principle apply to (injunctive and/or compensatory) collective actions in the EU? Are there circumstances which in your view would justify exceptions to this principle? If so, should those exceptions rigorously be circumscribed by law or should they be left to case-by-case assessment by the courts, possibly within the framework of a general legal provision?

In the context of collective redress, the “loser pays” principle should never be relaxed. It is an invaluable and necessary safeguard against lawsuit abuse by persons pressing claims of dubious merit. In addition, the “loser pays” rule ensures that claimants with meritorious claims are not forced to forfeit a large portion of their recovery to their attorneys.

To the extent there is any concern that the “loser pays” rule deters the filing of meritorious claims, as discussed in ILR’s response to question 22, below, ILR believes that a public organisation operating at the EU level or coordinated across the Member States may commence a representative action on behalf of an identified group of claimants who could have commenced – but were unable to commence – a collective action on their own. Such public bodies should always be liable and able to pay successful defendants’ costs.

If exceptions to the “loser pays” principle must be permitted, they should be carefully circumscribed by law. Otherwise, national courts’ approaches to the principle could diverge, undermining its efficacy and creating an incentive for forum shopping.

22. Who should be allowed to bring a collective redress action? Should the right to bring a collective redress action be reserved for certain entities? If so, what are the criteria to be fulfilled by such entities? Please mention if your reply varies depending on the kind of collective redress mechanism and on the kind of victims (e.g. consumers or SMEs).

Collective actions, if and where permitted, should be instituted by lead claimants, whether consumers or SMEs, who have suffered an actual injury at the hands of the defendant. In contrast with third party representatives, whether public or private, such persons have a natural incentive to seek fair and effective compensation and to vindicate their rights – rather than to raise their profile, advance a particular cause or simply generate a profit. For the most part, only such lead claimants can satisfy the adequacy and typicality criteria discussed above in response to question 7.

Alternatively, where lead claimants are unable to institute suit on their own, public organisations that operate at the EU level or are coordinated across the EU Member States should be able to commence a representative action, *but only on behalf of an identified group of claimants who could have commenced a suit on their own*. The involvement of third parties who have not suffered any harm and may have their own agendas is not ideal, but restricting such involvement to public bodies should go some way towards ensuring that representatives will form an impartial view of whether claims have any basis in law. Such bodies should be required to consider, and to inform claimants of, all available options to resolve the disputes including ADR. The Commission may wish to consider consulting on best practices guidelines on how public bodies should assess when it is appropriate to act as a representative claimant.

In no event, however, should private representative organisations, like consumer associations or NGOs, be authorized to commence collective actions. Although private representative organisations can play a valuable societal role, their work often involves advocating for the interests of particular groups, interests or causes, and in some cases seeking money from public and private sources to do so. For that reason, ILR is concerned that private representative organisations likely would recruit claimants to highlight particular causes, not to assist them in obtaining fair compensation. For this same reason, as discussed below, private representative organisations should not play any role in exerting influence on collective litigation through funding.

ILR's answer would be the same whether one of the parties is an individual or an SME. ILR disagrees fundamentally with the notion that a relevant distinction exists between big businesses and small businesses.

23. *What role should be given to the judge in collective redress proceedings? Where representative entities are entitled to bring a claim, should these entities be recognised as representative entities by a competent government body or should this issue be left to a case-by-case assessment by the courts?*

Just as in individual proceedings, the judge in collective proceedings should determine the facts and the law – and should be empowered to enter summary judgment on any claim or issue, where appropriate.

Before the trial phase of the case, however, the judge must also qualify the case to proceed as a collective action, as discussed above in ILR's response to question 7. Whether a case is qualified is a matter for the judge alone to decide, but any law implementing collective redress must clearly set forth the elements of predominance/cohesiveness, adequacy, numerosity and typicality, upon which the judge must make his or her decision. Where any of these elements has not been met, the law must provide that the judge cannot qualify the case. In addition, given the importance of qualification, a judge's decision to qualify a case for collective treatment (or deny such qualification) should be immediately appealable to a higher court.

With respect to representative entities, the law should provide for a two-step qualification process:

First, the criteria for any representative entities that may be able to commence collective proceedings must be clearly set out in any EU legislation to avoid the risk that particular

Member States will have more permissive standing requirements than others. This is necessary in order to mitigate incentives for forum shopping. As discussed above in response to question 22, only public bodies operating at the EU level or coordinated across the Member States should be permitted to commence representative actions.

Second, as noted above, the judge in every collective case must qualify the representative entity before it may proceed to represent the claimant group. Part of the qualification process would entail testing whether the specific claimants on whose behalf the public body has brought suit have claims in common with – and typical of – the claims of the rest of the claimant group.

If collective redress measures are adopted at the EU level, close attention will have to be paid to the consistent implementation of these safeguards across Member States. Otherwise, differences are likely to emerge in qualification standards – or the standards for serving as representative claimants – resulting in the type of harmful forum shopping experienced by the U.S.

In addition to consistent implementation by Member State legislatures, steps will have to be taken to ensure that national courts apply new procedures in a uniform manner. This may be difficult in jurisdictions where no procedures for collective compensatory redress currently exist. In jurisdictions where such procedures do exist, on the other hand, it will be important to avoid judges relying on past experience to guide their application of new procedures that are bound to differ in some respects. It will therefore be necessary to invest significant time and resources in training judges across the Member States at a time when public finances are under severe strain.

24. Which other safeguards should be incorporated in any possible European initiative on collective redress?

ILR discussed the safeguards it believes must be incorporated into any collective redress regime in response to question 20, above.

Principle 5: Finding appropriate mechanisms for financing collective redress, notably for citizens and SMEs

25. How could funding for collective redress actions (injunctive and/or compensatory) be arranged in an appropriate manner, in particular in view of the need to avoid abusive litigation?

ILR recognizes that safeguards against litigation abuse cannot be so strict as to limit claimants’ access to justice. As noted above, the preservation of the “loser pays” principle should be a source of assistance to claimants with meritorious claims since it means they would be reimbursed for at least a portion of their legal costs if the lawsuit is successful. In this respect, ILR notes that the “loser pays” rule should not deter claimants from filing collective actions since the *per claimant* contribution required to satisfy any order to pay a defendant’s legal costs likely would be lower than in an individual action.⁶⁰

⁶⁰ Based on hypothetical examples, a report produced by Civic Consulting and Oxford Economics for DG SANCO found that the *per claimant* costs of collective actions are lower than the costs of individual actions. Although the finding relates to the claimants’ costs of bringing an action rather than specifi-

In addition to retaining the “loser pays” rule, other options for funding collective actions include:

- **Requiring group members to pay security for costs.** As a condition of opting into a collective action, claimants could be required to pay a security for the defendant’s costs into a court-administered fund. If the claimants are successful, the fund would be returned to them. If the defendant prevails, its costs would be drawn from the fund. A similar funding mechanism currently exists in Denmark.⁶¹
- **Self-funded legal aid schemes.** A self-funded legal aid scheme would provide money for claimants to prosecute collective actions and would retain a portion of any damages awarded to successful claimants in order to fund future cases. Such a scheme should also be required to pay any defence costs awarded to a prevailing defendant. Similar schemes operate in Hong Kong and Ontario.⁶²
- **Collective cases brought by public bodies.** As noted above in response to question 22, ILR believes that public organisations should be able to commence a representative action where lead claimants are unable to institute suit on their own, but only on behalf of an identified group of claimants who would be entitled to commence a suit on their own. In such cases, public bodies should be able to cover their costs, including any liability for the defendant’s costs in the event that the defendant prevails. In addition, as with self-funded legal aid schemes, public bodies could be authorised to retain a portion of any award to claimants they represent solely in order to defray the costs of supporting future collective actions. Under no circumstances, however, should money retained in this way be used for other purposes as this would create an incentive to use collective redress as a way of generating revenue.
- **Controlling costs.** Ultimately, one of the most effective ways to make justice affordable would be to make it less expensive. In this respect, courts overseeing collective cases could play a valuable role in managing their cases to streamline the issues to be resolved and reduce the amount of time cases remain pending on the docket.

26. *Are non-public solutions of financing (such as third party funding or legal costs insurance) conceivable which would ensure the right balance between guaranteeing access to justice and avoiding any abuse of procedure?*

For the reasons stated in response to Questions 7, 11 and 25, ILR opposes third-party funding in collective redress and urges the Commission to encourage the Member States to ban TPLF in connection with any collective redress regime. As ILR notes, TPLF increases the amount of money available to bring litigation and therefore encourages the filing of more – often frivolous – suits. It also creates settlement pressure on defendants by providing the

cally to adverse costs, it seems fair to assume that the same would be true of liability for defendants’ costs. See *Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union: Final Report*, (August 2008) at 63-64.

⁶¹ *Id.* at 60-61.

⁶² The Hong Kong scheme is described in Civil Justice Council, *Improved Access to Justice – Funding Options & Proportionate Costs*, (August 2005) at 15-17. On the Ontario scheme, see Jackson LJ, *Review of Civil Litigation: Preliminary Report – Volume I*, (May 2009) at 180.

resources to continue litigating claims regardless of merit. These dangers are exacerbated in collective proceedings, which already exact substantial leverage against defendants based on their sheer size and the potential for enormous exposure.

ILR does not oppose after-the-event (“ATE”) insurance as a means to fund collective cases, but stresses that such insurance must not act as a type of contingency fee. If ATE insurance is available to fund collective cases, the Commission should encourage the Member States to prohibit ATE insurance providers from waiving premiums in unsuccessful cases. If insurers are permitted to waive premiums in such cases, the effect will be that claimants are entirely insulated from risk when commencing proceedings and will not be deterred from making speculative claims. (This is exactly the perverse incentive that contingency fees – coupled with the absence of the “loser pays” principle – provide in the United States.)

In addition, where a party that uses ATE insurance prevails in litigation, that party should not be able to recover the ATE insurance premium from the losing party. It is unfair to expect a losing party to pay the cost of the successful party’s ATE insurance. In addition, in England and Wales, where ATE insurance premiums have been recoverable, they generate disproportionate costs. ATE insurance premiums should reflect the risk involved in commencing a claim. Where ATE insurance premiums are recoverable, however (and where the insurance provider waives the premium for unsuccessful claims), the insured has no incentive to seek the best available deal with regard to the premium. As Lord Justice Jackson has argued in England and Wales, if ATE insurance premiums were not recoverable, market forces would likely operate to drive down premiums to a level that better reflects the actual risk being insured.⁶³

27. Should representative entities bringing collective redress actions be able to recover the costs of proceedings, including their administrative costs, from the losing party? Alternatively, are there other means to cover the costs of representative entities?

Representative entities should be subject to the “loser pays” principle just as any other party should be. They should therefore be able to recover costs from the losing party when they win but, equally, should have to pay costs to the winning party where they lose. This should ensure that representative entities conduct a realistic case analysis before taking on a case.

Unsuccessful defendants should only have to pay a representative entity’s direct costs as a result of the litigation. If representative entities could recover their administrative costs, they would have no incentive to operate efficiently.

28. Are there any further issues regarding funding of collective redress that should be considered to ensure effective access to justice?

No comment.

⁶³ Jackson LJ, *Review of Civil Litigation Costs: Final Report*, (December 2009) at 88. The UK Government has since announced that ATE premiums will cease to be recoverable from the losing party in civil litigation (see note 5).

Principle 6: Effective enforcement in the EU

29. Are there to your knowledge examples of specific cross-border problems in the practical application of the jurisdiction, recognition or enforcement of judgments? What consequences did these problems have and what counter-strategies were ultimately found?

No comments.

30. Are special rules on jurisdiction, recognition, enforcement of judgments and/or applicable law required with regard to collective redress to ensure effective enforcement of EU law across the EU?

Jurisdiction. ILR is concerned that existing EU rules regarding jurisdiction (i.e., the Brussels I Regulation),⁶⁴ combined with a collective redress regime, would provide claimants with the opportunity to forum shop. The introduction of mechanisms for collective redress at the EU level would provide claimants across the EU with the same access to collective redress in principle, but it would also highlight important procedural differences among the Member States' legal systems. The result would be that, within the scope allowed by the Brussels I Regulation, claimants would have an incentive to selectively commence proceedings in the jurisdictions with the most advantageous procedural rules (e.g., those with the most claimant-friendly rules on disclosure and inspection of documents).

To restrict the potential for forum shopping it is essential that under no circumstances should any measures on collective redress result in the watering down of the current rules for the purposes of collective proceedings. A lead claimant should not be permitted to commence collective proceedings in any jurisdiction where he would not be entitled to commence proceedings on an individual basis. And other potential claimants should not be permitted to join existing proceedings unless the court overseeing those proceedings can establish jurisdiction over their claims in accordance with the existing rules.

Any other approach would enable claimants to coordinate their actions and initiate collective proceedings in jurisdictions that are perceived as claimant-friendly. The result would be the types of "magnet jurisdictions" that developed in the U.S. and led to the enactment of class action reform. As the U.S. experience amply demonstrated, the existence of such forums engenders great expense and inefficiency. But even more troubling, it distorts the application of law by promising claimants better results if they manipulate their claims so that they can appear in "friendly" courts.

The EU is not in a position to address all the differences among the Member States' legal systems that would create incentives for forum shopping. There is no legal basis, for example, for harmonising domestic civil procedure rules such as those governing the disclosure and inspection of documents. It would therefore be preferable not to address collective redress at the EU level. However, if measures are adopted at the EU level despite these concerns, it is critical to include the safeguards set out in response to question 20, above. For example, encouraging the Member States to ban TPLF in collective litigation and banning punitive damages would prevent certain jurisdictions from adopting those features and

⁶⁴ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition of enforcement of judgments in civil and commercial matters, OJ L 12, 16.1.2001, p. 1.

thereby making themselves particularly attractive to potential claimants. Efforts should also be made to restrict the level of disclosure permitted in collective litigation to a fair minimum.

Enforcement. ILR supports the Commission’s recent conclusion that in light of the significant differences that exist between Member States’ approaches to collective redress, “the required level of trust cannot be presumed at this stage”⁶⁵ to abolish the *exequatur* procedure for judgments in proceedings for collective compensatory redress. ILR is concerned, however, that the Commission would propose abolition of *exequatur* for such judgments in the event that this consultation is followed by the adoption of harmonising or approximating measures on collective redress and is even entertaining the idea of doing so absent such measures.⁶⁶ In light of the significant disparity that currently exists among the Member States’ approaches to collective redress, considerable time will have to pass before there can be sufficient trust in other Member States’ systems to justify removing obstacles to the enforcement of collective judgments across borders. That would be the case even if harmonising measures are adopted in the near future, which ILR opposes.

Applicable law. As with the issue of jurisdiction, ILR does not believe special rules are called for in relation to applicable law. It is imperative, however, that the current rules should not be watered down. To the extent that the same law does not apply to multiple individual claims, those claims should not be grouped, and potential claimants whose claims fall to be determined under different national laws should not be allowed to participate in the same representative proceedings. To allow otherwise would result in an unacceptable level of uncertainty as to which laws will govern legal relationships. Parties should be allowed to agree on a common set of laws for the resolution of collective disputes after they have arisen if they wish. However, consensual ADR is the proper setting for such agreements – not court-based litigation.

Multiple case management. As noted above, any mechanism for collective redress must include a procedure to manage duplicate or similar cases against the same defendant to prevent copycat litigation and inconsistent judgments. Existing rules that permit parties to apply for cases to be consolidated where a risk of irreconcilable judgments exists should be strengthened to ensure that multiple collective lawsuits regarding the same subject matter cannot proceed against the same defendant. These rules protect defendants from having to defend multiple lawsuits, and they also protect injured claimants from having their cases effectively hijacked by later-filing claimant groups who have their own goals in the litigation.

31. Do you see a need for any other special rules with regard to collective redress in cross-border situations, for example for collective consensual dispute resolution or for infringements of EU legislation by online providers for goods and services?

Collective consensual dispute resolution. ILR refers the Commission to its response to DG SANCO’s consultation on ADR. In general, ILR supports the use of ADR where parties consent to the procedure followed and retain control of the process. To some extent, collective ADR would be better suited to the resolution of cross-border disputes because the

⁶⁵ *Proposal for a Regulation of the European Parliament and of the Council on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Recast)*, COM (2010) 748 final, at 7.

⁶⁶ *Id.* at 7-8.

procedures involved can be adapted to the needs of the parties, provided this takes place only with the parties' informed consent.

Since collective ADR is not yet well developed, however, ILR cautions against the development of special rules that would promote particular features in collective ADR. Like any form of collective procedure that aggregates claims for compensation, the sums of money involved in collective ADR create incentives for abuse. As in collective litigation, safeguards should be in place to prevent such abuse. Certification standards should be established according to which ADR bodies, or the courts supervising negotiation of a collective dispute, can determine whether a case is suitable for collective treatment.

In addition, collective ADR should be subject to five critical safeguards set out in response to question 12, above. These can be summarised as follows:

1. Any collective proceedings must be "opt-in."
2. Individuals must be made aware of the effect their participation may have on their right to have recourse to the courts.
3. Representative organisations should only commence ADR at the behest of consumers, rather than on their own initiative.
4. The outcome of ADR must be limited to those parties that elect to participate and, where appropriate, should be final.
5. Evidence shared with ADR bodies must be protected from disclosure to non-parties and from use against the disclosing party in other proceedings.

Infringements of EU legislation by online providers of goods and services. In ILR's view, the fundamentals of online business are the same as for sales through traditional channels; thus, the same dispute resolution concerns and principles should generally apply. Special procedures for parties that contract online may be useful in some cases, but not where the cases involve complex legal or factual disputes.

32. Are there any other common principles which should be added by the EU?

In response to question 7, ILR discussed the core principles that should guide any implementation of collective redress in Europe:

First, claimants must be required to demonstrate that a collective action is the best possible mechanism for resolving their claims before the lawsuit is allowed to proceed on behalf of the group.

Second, the types of mechanisms available to fund collective actions should be tailored to deter frivolous litigation.

Third, the rights of all potential individual group members must be respected, and no group members should have their rights compromised in a collective proceeding without their consent.

Fourth, collective actions should provide adequate compensation to claimants who have been injured, but punitive damages and *cy pres* awards should not be available.

Fifth, defendants should not be haled into a jurisdiction in which they do not operate to defend against collective claims.

Scope of a Coherent European Approach to Collective Redress

33. Should the Commission's work on compensatory collective redress be extended to other areas of EU law besides competition and consumer protection? If so, to which ones? Are there specificities of these areas that would need to be taken into account?

No. ILR does not support action on collective redress at the EU level, particularly in light of the risk of abusive litigation and forum shopping.

34. Should any possible EU initiative on collective redress be of general scope, or would it be more appropriate to consider initiatives in specific policy fields?

As discussed above, ILR does not support action at the EU level in the manner contemplated because it does not believe that the case has been made for such a radical overhaul of the EU's litigation system, and it does not believe that the risks have been appropriately considered. If an EU initiative is advanced notwithstanding these concerns, it would be preferable for it to be general in scope.

ILR does not believe grounds exist for imposing a new litigation system in the 27 Member States. Therefore, it certainly does not support imposing multiple new litigation systems across the Member States, broken down by policy field. Particularly in light of the likely increase in the volume of litigation that the creation of any collective redress system will bring, such an approach would impose an impossible burden on already-stretched national legal systems.

Before any general new litigation system is imposed, however, it would be essential for the EU to develop a profound understanding of the likely consequences in each Member State *and* in each policy field. A thorough impact assessment of these elements prior to any action is, in ILR's opinion, essential.

29 April 2011