RESPONSE TO THE EUROPEAN COMMISSION'S WHITE PAPER
"Damages Actions for Breach of the EC Antitrust Rules"
COM (2008) 165

The Institute for Legal Reform ("ILR") is a not-for-profit public advocacy organization affiliated with the United States Chamber of Commerce, the world's largest business federation, representing more than three million members, including many European-owned businesses. Additionally, many of ILR's members maintain European affiliates which comprise significant proportions of these members' activities.

ILR's mission is to ensure a simple, efficient, and fair legal system for all Americans. Since its founding in 1998, ILR has worked diligently to limit the incidence of litigation abuse in U.S. courts and has been an active participant in numerous legal reform efforts at both the state and federal level. In addition, since 2002, ILR has conducted an annual survey evaluating the performance of the various U.S. courts and ranking them in terms of overall efficiency and fairness to litigants. Due to ILR's members' business activities in Europe, ILR is deeply invested in the orderly administration of justice and the evolution of European legal regimes.

In light of this experience, ILR is well positioned to comment on the proposals in the White Paper.

ILR understands that the primary objective of the Commission is to ensure that "all victims of infringement of EC Competition law have access to effective redress mechanisms so that they can be fully compensated for the harm they suffered." With this submission, ILR hopes to contribute to the EU's discussion of policy choices to ensure that consumers have access to effective redress mechanisms throughout the EU's internal market. However, as the Commission recognizes, measures aimed at improving access to justice carry with them the potential for litigation abuse, and it can be difficult to strike the balance between encouraging parties with meritorious claims to initiate litigation and opening the door for frivolous lawsuits. Through its vast experience with U.S. federal and state legal systems, ILR is intimately aware of the difficulty that U.S. policy-makers have had in striking that balance and is cognizant of the mistakes that those policy-makers have made in their attempts to facilitate access to the courts and to enhance judicial efficiency. The purpose of ILR's comments is to advise the Commission about the American experience so that it may take steps to avoid making the same mistakes.

ILR also notes that several important cases are pending before European national courts. These may well shape the EU's policy options in the months to come. ILR hopes that it and other interested parties will have the opportunity to submit additional comments at a later stage, once the vision of antitrust private enforcement within the Community – as well as how such a vision would be practically implemented – becomes more clear.

I. EXECUTIVE SUMMARY

In its Comments on the White Paper, ILR focuses on two areas of concern which it hopes that the Commission will address. ***First***, despite the Commission's clear intention to create a balanced proposal which discourages frivolous litigation, the White Paper's proposed framework lacks sufficiently concrete measures to protect against the long-term threat of litigation abuse. More specifically, in ILR's opinion, the White Paper underestimates the incentives that its proposed framework would create for litigation abuse and assumes that the proposed framework will be implemented in a particular manner and in a particular legal landscape – assumptions that are likely to prove incorrect. ***Second***, the White Paper fails to address many of the significant problems inherent in having the White Paper's proposed framework administered at the Member State-level. With the proposed framework being potentially administered by 27 separate, co-equal legal regimes, it is likely that (a) parties will engage in forum-shopping and seek to exploit differences in practice between jurisdictions and (b) coordination problems will arise, as cases involving the same claims and evidence will be litigated in multiple jurisdictions simultaneously without any mechanism in place to provide cross-border communication and cooperation.

To address these concerns, ILR makes the following recommendations:

- To reduce the risk that the White Paper's damages proposals will give rise to litigation abuse, ILR recommends that the Commission (1) tighten the standard of proof for establishing an entitlement to damages, so as to minimize the extent to which a party may recover estimated damages rather than actual damages; (2) recommend that Member States prohibit, or maintain existing prohibitions, on exemplary or punitive damages; and (3) propose that prejudgment interest be calculated from the date when the action was filed, rather than the date when the claim arose.

- To protect against both present and future litigation abuse, ILR recommends that the Commission minimize the amount of discretion commended to the Member States in the White Paper's proposed framework to the extent possible, by (1) providing more guidance to the Member States on how to implement the White Paper's recommendations and (2) making affirmative recommendations on key relevant issues, such as the preservation of "loser pays" rule and restrictions on contingency fee and third-party funding arrangements.

- To discourage forum-shopping and minimize the risk of certain Member States becoming "magnet jurisdictions" for abusive litigation, ILR recommends that the Commission (1) include a rigorous venue standard in the White paper's proposed framework and (2) modify the White Paper's proposed framework to ensure that (a) a

Member State may only certify entities to bring representative actions in that Member State, and (b) a Member State cannot apply its law to claims arising in another jurisdiction, but rather must apply the law of the jurisdiction in which the claim arose.

- To ensure the fair and efficient administration of the White Paper's framework across all Member States, ILR recommends that the Commission incorporate formal rules on cross-border coordination and cooperation for courts adjudicating private damages actions under Article 81 or 82 in any further iteration of the White Paper's proposals. Specifically, ILR suggests that the Commission adopt rules mandating (or at least providing incentives for) consolidated discovery whenever multiple courts in different jurisdictions are adjudicating cases predicated on the same alleged misconduct, and requiring courts from different Member States to cooperate in the apportionment of damages and the administration of settlements.

II. OVERVIEW

As an initial matter, ILR believes that the Commission's concern that the White Paper's proposals not lead to litigation abuse – expressed repeatedly in both the White Paper and the accompanying Staff Working Paper – is both admirable and well-founded. The rise of litigation abuse in U.S. courts during the 1980s and 1990s was in large part the product of policy-makers failing to appreciate the extent to which legislative efforts to expand access to the courts could be misused and exploited; the Commission's affirmative effort to guard against frivolous and abusive litigation is therefore an important first step in preventing a similar scenario in Europe. Furthermore, ILR also strongly supports the Commission's decisions to recommend against the creation of "opt-out" class actions and to reject the following proposals from the 2005 Green Paper on the grounds that those proposals would invite litigation abuse:

- Shifting the burden of proof in private antitrust litigation to the defendant in certain circumstances

- Waiving the "loser pays" rule followed by virtually all EU jurisdictions except in cases where the plaintiff acted in a manifestly unreasonable manner

- Giving courts the power to award double damages to plaintiffs in horizontal cartel cases

Litigation abuse is most likely to occur in legal systems where a plaintiff can impose significant potential costs on a defendant regardless of the merits of his or her cause of action, and where the cost for bringing frivolous litigation is relatively low. Indeed, this dynamic is the fundamental reason for the litigation crisis that the U.S. has experienced over the past forty years. The rise of the modern, opt-out class action and the growth of punitive damage awards, combined with the American traditions of contingency fees and no "loser pays" rule, created a structure in which plaintiffs could threaten defendants with massive potential exposure on the basis of allegations wholly lacking in merit without subjecting themselves to significant financial risk. On balance, because of the decisions discussed above, the proposed system set out in the White Paper does appear to be less vulnerable to litigation abuse than the American system. Simply put, the absence of opt-out class actions coupled with no double damages means the potential pay-off from a large class action would be lower than it is in the United States, while the preservation of the "loser pays" rule and the plaintiff's traditional burden of proof means that the cost of bringing a frivolous lawsuit would be higher.

The White Paper's proposals, however, are not risk-free, and ILR does believe that, absent further modification of the document, there is a significant likelihood that Europe will experience many of the litigation problems that have plagued U.S. courts in recent decades. ILR has two principal areas of concern with the White Paper's recommendations.

Inadequate safeguards against the long-term threat of litigation abuse. ILR's principal area of concern is that, although the White Paper does propose some affirmative measures to prevent litigation abuse, it does not go far enough in proposing safeguards against abusive activity. The White Paper still appears to be grounded in the belief that Europe's traditionally non-litigious legal culture will provide substantial protection from litigation abuse and therefore only modest measures are necessary to keep frivolous lawsuits in check. In ILR's view, this confidence is misplaced. No jurisdiction deliberately invites baseless litigation. Indeed, before the "access to justice" reforms of the 1960s, the United States was nowhere near as litigious as it is today. What drove litigation abuse in the United States is what drives litigation abuse in any society – it became cost-effective for plaintiffs to engage in litigation abuse, *i.e.*, the benefits of engaging in such conduct outweighed the costs. Thus, if the White Paper makes it cost-effective to bring abusive litigation, such litigation is likely to occur, regardless of European legal tradition.

There are two reasons why the framework proposed in the White Paper does not adequately protect against litigation abuse. First, although the White Paper suggests that it creates only modest incentives to bring suit, implementing the White Paper's recommendations would result in a significant increase in the potential recovery that a plaintiff could obtain through private antitrust litigation, conceivably rivaling the recovery available under U.S. antitrust law. As the U.S. experience illustrates, potential recoveries of such magnitude, when combined with collective action mechanisms, make frivolous litigation almost inevitable. In these circumstances, plaintiffs are able to subject defendants to such massive potential exposure that a defendant often settles rather than run the risk (however small) of a judgment that would put the defendant out of business – as Judge Richard Posner once remarked, these settlements are "blackmail settlements,"[1] in that defendants are essentially compelled to settle by the threat of a catastrophic judgment, regardless of the merits of the claims at issue. Traditional European mechanisms for preventing frivolous litigation, such as the "loser pays" rule, are likely to be inadequate in the face of such incentives to suit for two reasons: (1) the "loser pays" rule will often not be at issue in complex litigation, because the parties will settle the litigation long before the plaintiffs' claims actually are adjudicated; and (2) once it becomes sufficiently profitable to bring frivolous litigation, third-party funders can employ a business model that mitigates the effect of "loser pays" through cost-spreading.

Second, although the White Paper appears to assume that its proposals will operate in a particular legal landscape and will be implemented in a particular fashion, there is a strong

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

chance that neither assumption will prove to be true. Even assuming that Member States' legal systems contain sufficient safeguards to prevent frivolous litigation at present, there is no guarantee that those safeguards will remain robust in the future. Indeed, some traditional European safeguards, such as the prohibition on contingency fee and third-party funding arrangements, have eroded substantially in many Member States in recent years.[2] Similarly, although the White Paper states that its proposals are balanced, there is no guarantee that they will be uniformly implemented in a balanced fashion. This is what occurred in the United States: although some of the initial access-to-justice measures adopted by U.S. policy-makers, including the modern class action device, appeared fairly modest on their face, expansive judicial interpretations of those reforms coupled with a changing legal landscape transformed those measures into vehicles for litigation abuse within a couple of decades.[3] Put simply, the White Paper presumes that the costs of bringing abusive litigation will remain high, when these costs could easily decline or disappear in coming years.

Inadequate attention to the problems inherent in devolving the administration of the White Paper's proposed framework to the Member States. ILR's second principal area of concern is that the White Paper's proposals do not adequately address the problems inherent in creating a uniform framework for private litigation which will be administered by 27 separate, co-equal legal regimes. Under the White Paper's approach, each Member State has the authority to adjudicate Article 81 and 82 damages actions and each Member State has jurisdiction to adjudicate claims arising in other Member States. Furthermore, as separate sovereign entities, courts of one Member State can neither take jurisdiction over an action brought in another Member State's courts nor compel the courts in other Member States to decline to hear a cause of action. As a practical matter, this system will inexorably lead to parallel or "copycat" proceedings, *i.e.*, lawsuits based on virtually identical allegations being adjudicated in multiple jurisdictions simultaneously.

The White Paper's framework thus opens the door to parties seeking to obtain tactical advantages by leveraging the differences between Member States' legal regimes. Although Member States will be enforcing the same substantive law under the White Paper's proposals, there is no doubt that Member States' implementation of the White Paper's recommendations

---

[2] *See* Civil Justice Council, *Improved Access to Justice – Funding Options and Proportionate Costs*, at 39 (June 2007), http://www.civiljusticecouncil.gov.uk/files/future_funding_litigation_paper_v117_final.pdf; Freshfields Bruckhas Deringer, *Recent Developments in Class Actions and Third Party Funding of Litigation: A Rapidly Evolving Landscape*, at 1-2 (February 2008), http://www.freshfields.com/publications/pdfs/2008/feb20/21722.pdf; *see also* Dietmar Baetge, NATIONAL REPORT FOR THE GLOBAL CLASS ACTIONS CONFERENCE AT THE CENTRE FOR SOCIO-LEGAL STUDIES, *Germany: Class Actions, Group Litigation & Other Forms of Collective Litigation* 2 n.5 (December 2007), http://www.law.stanford.edu/display/images/dynamic/events_media/Germany_National_Report.pdf (noting that Germany's *per se* ban on contingency fees was recently declared unconstitutional); Elisabetta Silvestri, NATIONAL REPORT FOR THE GLOBAL CLASS ACTIONS CONFERENCE AT THE CENTRE FOR SOCIO-LEGAL STUDIES, *The Globalization of Class Actions: Italian Report* 4 (December 2007), http://www.law.stanford.edu/display/images/dynamic/events_media/Italian_National_Report.pdf (describing recent changes allowing lawyers "a certain latitude in taking cases on a conditional fee basis").

[3] *See, e.g.,* Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem*, 92 Harv. L. Rev. 664, 670 (1979) ("The class action onslaught caught everyone, including the draftsmen, by surprise.").

will diverge in accordance with each jurisdiction's legal and political environment. Some of these divergences will favor plaintiffs and others will favor defendants, but plaintiffs, given that they are empowered to initiate litigation, will be more able to exploit differences between jurisdictions than defendants. The White Paper's framework therefore will inevitably lead to forum-shopping by plaintiffs and could give rise to "magnet jurisdictions," *i.e.*, jurisdictions that are so favorable to plaintiffs that they attract litigation like a magnet. The White Paper, however, does not provide any safeguards against these problems; to the contrary, several of the White Paper's proposals – such as the proposal to allow an organization certified to bring representative actions in one Member State to initiate representative actions in any other Member State – will likely exacerbate their severity.

Additionally, the White Paper proposes no mechanism for coordinating cases in the multi-jurisdictional context and neither the White Paper nor the Staff Working Paper provide any meaningful guidance on how courts should operate when parallel proceedings arise. Thus, under the White Paper framework, a plaintiffs' attorney – or a consortium of plaintiffs' firms – could file collective actions predicated on the same alleged misconduct in the courts of every Member State and force a defendant to litigate the same case on multiple fronts simultaneously. This was a common tactic pursued by American plaintiffs' firms in the late 1990s and there is nothing in the White Paper that would prevent plaintiffs' firms from replicating that strategy in the EU.

These concerns, as well as proposed modifications to the White Paper to address these concerns, are set out in detail below.

III. INSUFFICIENT SAFEGUARDS AGAINST LITIGATION ABUSE

Although the White Paper's proposed framework does contain a number of safeguards against litigation abuse, ILR is concerned that such safeguards will be inadequate in light of the extent to which the White Paper's recommendations affect the costs and benefits of bringing frivolous lawsuits. The White Paper significantly increases the potential benefits a party can obtain through initiating large-scale collective actions, while not effecting any similar increase in the costs of bringing claims lacking in merit. This change in its own right would likely result in an increase in frivolous lawsuits; however, the greater concern is that the legal landscape might shift in a way which would reduce the costs of initiating a baseless lawsuit even further, potentially causing an avalanche of frivolous litigation. The White Paper does not guard against that possibility, even though there have been indications in recent years that some Member States are modifying or eroding legal procedures – such as prohibitions on contingency fees and third-party funding arrangements – which have traditionally discouraged frivolous litigation in Europe. ILR therefore suggests modifying the White Paper's proposal to reduce the incentives to bring suit and to fix in place various safeguards against litigation abuse, so as to preserve the White Paper's goal of implementing a balanced approach to private antitrust litigation.

A. Excess Incentives To Bring Suit

As an initial matter, ILR believes that the White Paper creates strong incentives to bring suit by significantly increasing a party's potential recovery in private antitrust litigation. Although the White Paper only recommends that victims of antitrust infringements receive "full compensation" for any harm suffered and does not recommend non-compensatory damages, the White Paper's definition of "full compensation" is fairly broad, encompassing actual loss, lost profits, and prejudgment interest calculated from the date of the infringement.[4] Under this definition, the potential compensatory award in supposed price-fixing cases could – given U.S. limitations on the availability of pre-judgment interest in antitrust actions and the fact that prejudgment interest is calculated from the date the suit is filed, not the date the infringement allegedly began[5] – nearly equal the treble damages award for comparable conduct under U.S. antirust law. In addition, because the White Paper does not make an affirmative recommendation on non-compensatory damages and instead leaves the issue to Member State discretion,[6] it is conceivable that a Member State could adopt a damages regime which provides potential damages awards greater even than those available in U.S. courts.

Furthermore, the White Paper's proposed standard for establishing damages is less stringent than the standard employed in U.S. courts. In the United States, a party would not be able to recover damages if it could not specify, with some degree of precision, the amount of harm suffered; by contrast, the White Paper explicitly provides that a party should be able to recover in those circumstances and invites this Commission to include rules for estimating loss in its forthcoming non-binding guidance on how to calculate antitrust damages.[7]

Accordingly, under the White Paper's proposed framework, a plaintiff potentially could be able to recover a damages award greater than what is available in the United States on lesser showing. The U.S. experience illustrates that the prospect of such massive recovery is a powerful incentive to bring suit – so powerful in fact that, even with substantial counter-incentives, frivolous lawsuits may be inevitable. As noted above, traditional safeguards against litigation abuse, such as the "loser pays" rule, are likely to be only partially successful under these circumstances. The settlement pressure that plaintiffs can bring to bear on defendants in light of such potential recoveries, particularly when combined with collective action mechanisms, ensures that many lawsuits may be settled long before "loser pays" could have any effect – even when the allegations upon which suits are predicated are wholly lacking in merit. Furthermore, as a legal system's capacity for massive recoveries or settlements increases, it makes possible a business model in which repeat players in the legal system – such as third-party funders or consortiums of plaintiffs' attorneys – can spread costs over multiple lawsuits, *i.e.*, offsetting the costs of many failed lawsuits with an outsized pay-off from a single successful one. If that occurs, then rules like "loser pays" are transformed from bulwarks against litigation abuse to risk factors which simply need to be adjusted for in formulating funding arrangements.

To reduce the risk that the White Paper's damages proposals will give rise to litigation abuse, ILR recommends that those proposals be modified in three ways. First, the standard of proof should be tightened to minimize the extent to which a party may recover estimated damages instead of actual damages. ILR recognizes that estimated damages are permissible as a

[4] Staff Working Paper at ¶ 187.

[5] 15 U.S.C. § 15(a).

[6] Staff Working Paper at ¶ 190.

[7] White Paper at § 2.5; *see also* Staff Working Paper at ¶ 200.

matter of Community law, but to prevent abuse, ILR suggests that the Commission promulgate guidelines that (a) clearly explain what evidence is necessary to properly calculate estimated damages and (b) disallow estimated damages based upon speculative or insufficient information. Second, the Commission should recommend that Member States strictly prohibit (or maintain existing prohibitions on) exemplary or punitive damages. Third, the Commission should propose the adoption of the American approach to prejudgment interest and provide that prejudgment interest is calculated from the date the action was filed.

B. Vulnerability To Changing Legal Landscape

As discussed above, several aspects of the framework contemplated by the White Paper enhance plaintiffs' incentives to bring suit. Of even greater concern, however, than these incentives is the proposed framework's vulnerability to future, unforeseen changes in the legal systems of the various Member States. Even assuming that the White Paper's proposals presently strike the proper balance between encouraging meritorious claims and discouraging frivolous ones, there is no guarantee that they will continue to do so. Future developments in the law, either with respect to how the White Paper's Proposals themselves are implemented or with respect to other relevant areas of the law, could shift that cost-benefit balance, potentially making it far more advantageous to bring frivolous litigation than it is at present. Once this balance is shifted, litigation abuse is likely to follow quickly.

Once again, the American experience is instructive. Many of the procedural devices which plaintiffs' attorneys have exploited in U.S. courts did not cause litigation abuse when they were initially created. For example, when the modern class action mechanism was created in 1966, it did not immediately trigger a torrent of litigation abuse.[8] As some courts began to interpret the class action rule more expansively and as new substantive legal rights were created in numerous areas, however, enhanced opportunities for litigation abuse arose that had not been present at the moment of the class action's creation.[9] For example, changes in both substantive law and pleading standards in the 1970s encouraged expanded private antitrust litigation, while a multitude of consumer-oriented legislation created an environment in which it was easier to assert large-scale consumer class actions.[10]

---

[8] *See*, *e.g.*, Miller, *supra* note 3, at 669 ("The Advisory Committee's objectives in rewriting the [federal class action rule] were rather clear. It had few, if any, revolutionary notions about its work product. Although it was expected that the revision would operate to assist small claimants, the draftsmen conceived the procedure's primary function to be providing a mechanism for securing private remedies, rather than deterring public wrongs or enforcing broad social policies.").

[9] *Id*.

[10] *See id.* at 672 ("A variety of forces, most notably appellate court decisions recognizing new substantive rights or easing litigation burdens for plaintiffs pursuing existing rights, have encouraged private actions and increased awareness of their possibilities in the antitrust context. For example, lower court judges have become extremely reluctant to terminate private actions prior to trial by finding that there is no liability as a matter of law . . . . The result is that plaintiffs' attorneys, eyeing the prospects of surviving pretrial motions and reaching the jury with at least a chance for a substantial verdict, have become more inclined to institute actions pursuing less substantial violations and more avant garde theories of liability."); *see also id.* at 674-75 ("[R]ule 23 has been utilized by the proponents of these rights, but the impetus behind the post-1966 litigation expansion is a set of larger social forces. These actions simply reflect increased pressure on the federal courts to recognize new substantive rights and, to a degree, their acquiescence. Congress, by establishing a number of new statutory rights in response to other demands

Plaintiffs' attorneys responded to these developments by bringing lawsuits on behalf of all sorts of supposed classes, most of which were made up of individuals whose claims were not factually or legally similar in the least. Judges began to certify gigantic classes involving mass torts and other claims, none of which were contemplated by the Rule's drafters, and often complex, ongoing conduct affecting large swaths of the American populace. Within a couple of decades, American courts were faced with rampant class action abuse.

As a practical matter, there are two ways in which future legal developments could alter the balanced framework that the White Paper seeks to achieve. First, Member States may implement the White Paper's proposals in a manner that has a significant impact on the costs or benefits of bringing baseless litigation. In the area of discovery, for example, the White Paper appears to strike a fair balance in its recommendations, authorizing national courts to compel parties to disclose categories of relevant evidence and to impose discovery sanctions while requiring plaintiffs to plausibly plead their claims and demonstrate the necessity for the evidence requested.[11] However, this recommendation closely resembles U.S. discovery rules, specifically Rule 26 of the Federal Rules of Civil Procedure. Over time, at plaintiffs' prompting, U.S. courts have interpreted Rule 26 in a manner that allows plaintiffs to use it as a cudgel against defendants. Thus, in U.S. courts, plaintiffs can propound massive amounts of burdensome, "fishing expedition" discovery upon defendants with little justification.[12] Individual Member States could easily interpret the White Paper's recommendations in a similar fashion, opening the door to similar abuse.

Second, laws that are relevant to the operation of the White Paper's proposed framework, but which are not part of the proposed framework, could shift in ways that significantly affect how the White Paper's proposed framework operates. In particular, two of the most important procedural safeguards in European law historically have been the "loser pays" rule and prohibitions on contingency and other third-funding arrangements. As discussed above, however, the White Paper does not take an affirmative position on either of those issues and instead reserves both of them to the Member States.[13] It is clearly possible that either or both of these safeguards will relaxed in coming years; in fact, there are indications that some Member States already are moving in that direction.[14] And if significant erosion of such measures does

---

for social justice, has also played a significant part in contributing to this aspect of the class action workload. For example, rule 23 cases have been brought under such post-1966 statutes as the Truth in Lending Act, the Fair Credit Reporting Act, and the Magnuson-Moss Warranty/Federal Trade Commission Improvement Act. At least initially these statutes were enacted without any class action implications in mind or any appreciation of the burden that they would impose on the federal courts.").

[11] White Paper at § 2.2.

[12] *See* Donncadh Woods, Alisa Sinclair, and David Ashton, *Private Enforcement of Community Competition Law: Modernisation and the Road Ahead*, 2 Competition Policy Newsletter 31, 34 (Summer 2004); Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. Rev. 691, 739-740 (1998).

[13] White Paper at § 2.8.

[14] *See, e.g.*, Civil Justice Council, *Improved Access to Justice – Funding Options and Proportionate Costs*, at 53, 71 (June 2007), http://www.civiljusticecouncil.gov.uk/files/future_funding_litigation_paper_v117_final.pdf (recommending third party funding "be recognized as an acceptable option for mainstream litigation" and noting

occur, then the potential costs of initiating frivolous litigation are likely to decline precipitously even as the potential benefits of initiating frivolous litigation remain constant. In these circumstances, litigation abuse is almost certain to follow.

In short, the White Paper's proposals need to protect against both present and future litigation abuse. To that end, ILR suggests minimizing the amount of discretion commended to the Member States in the White Paper's proposed framework – the greater the discretion, the more likely it is that the White Paper's proposals will operate in manner different from the manner this Commission intends. Reducing discretion can be achieved both by providing more guidance to the Member States on how to implement the White Paper's recommendations (*e.g.*, non-binding guidelines) and by this Commission taking a position on key relevant issues which it presently leaves to the Member States. In particular, ILR recommends that the Commission not simply reserve the issues of "loser pays" and litigation funding arrangements to the Member States, but that the Commission instead incorporate affirmative measures recommending the preservation of the current status quo into the White Paper's proposals. Those two issues, along with the discovery rule, are the issues that are most likely to affect the cost-benefit balance and create the opportunity for litigation abuse.

IV. ADMINISTRATION AT THE MEMBER STATE LEVEL

A. Exploitation Of Differences In Member State Regimes

The White Paper abdicates any authority to administer private damages actions, devolving this responsibility to the Member States. This delegation of authority opens the door to forum-shopping and gamesmanship by plaintiffs. Although each Member State would nominally be implementing the same Commission-designed regime and applying the same substantive law, in practice there are likely to be significant differences among Member States in terms of how their courts operate under the White Paper's proposed framework. Differences may arise because of substantive variation among Member State legal regimes in areas accorded to Member State discretion, *e.g.*, damages, statutes of limitation, or fee arrangements, or they may arise because of informal differences, *e.g.*, local legal traditions or composition of the judiciary. Regardless of the reason, the effect of these variations will be that, within a short time of implementing the White Paper, certain regimes will become viewed as more favorable to plaintiffs while others will be seen as favorable to defendants. And because plaintiffs possess the power to initiate litigation, those regimes which are seen as pro-plaintiff will likely become centers of private antitrust litigation within the EU.

ILR again believes the American experience can be instructive in addressing this issue. Forum-shopping along these lines has long been a problem in the United States because of the concept of federalism, which ensures autonomy for each State's legal system and comity between the systems. In recent years, this problem has become more acute, with the development of "magnet jurisdictions" – courts where the pro-plaintiff bias is so pronounced that defendants essentially have no alternative but to settle any action initiated in these jurisdictions.

---

that fee-shifting, *i.e.*, "loser pays," should be eliminated if alternative funding mechanisms are insufficient); Baetge, *supra* note 2, at 11 (describing how Germany is experimenting with the private, commercial enforcement of antitrust provisions in the *CDC Cases*).

Indeed, at present, the American plaintiffs' bar is effectively engaged in a traveling "road show" in which they locate a favorable jurisdiction; flood that jurisdiction's courts with litigation until the "magnet court" is shut down through a combination of appellate rulings and legislative reform; and then move on in search of the next "magnet court." Over the past decade, the mantle of preeminent "magnet jurisdiction" has moved from Alabama to Mississippi to Southern Illinois to West Virginia, while many other jurisdictions – such as Jefferson County, Texas, and Orleans Parish, Louisiana – have also developed reputations as plaintiff-friendly courts.[15]

The U.S. experience demonstrates that, as long as variations exist among jurisdictions, the plaintiffs' bar will exploit them. Accordingly, assuming the Commission wishes to avoid the problems of the United States, ILR suggests modifying the White Paper's proposed framework in three ways. First, the amount of discretion given to Member States to interpret and implement the White Paper's recommendations should be minimized. Under the White Paper's proposed framework, key issues such as fee arrangements, class certification procedures, and the maintenance of the "loser pays" rule are left to the Member States to determine.[16] It is inevitable that different Member States will resolve these issues in different ways; in fact, differences are readily apparent in how Member States currently address such questions.[17] And these differences in turn will mean that plaintiffs often will have the ability to bring private antitrust damages claims in different substantive legal environments. Although ILR recognizes that the Commission's authority is limited and that there may be reasons for why some discretion needs to be granted to the Member States, ensuring that the White Paper's proposed framework is as facially uniform as possible should reduce significantly the extent to which the White Paper's regime will vary across jurisdictions.

Second, ILR recommends that the Commission incorporate a rigorous venue standard into the White Paper's proposed framework. Forum-shopping thrives when venue rules are lax, because a relaxed approach to venue permits a party to bring claims in a magnet jurisdiction that are only tangentially connected with the forum. In fact, relaxed venue standards have been a hallmark of magnet courts in the United States – for example, the docket of Madison County, Illinois was clogged for many years with personal injury claims based on asbestos exposure from across the country.[18] Venue reform has therefore been seen as a critical component to addressing

[15] *Legal Reform, Of Sorts*, ECONOMIST, Feb. 19, 2005, at 82.

[16] White Paper at § 2.8.

[17] *See generally* Denis Waelbroeck, Donald Slater, and Gil Even-Shoshan, *Study on the Conditions of Claims for Damages in Case of Infringement of EC Competition Rules*, at 1 (Ashurst, Aug. 31, 2004) ("Ashurst Report"), http://ec.europa.eu/comm/competition/antitrust/actionsdamages/comparative_report_clean_en.pdf; *cf.* Chris Hodges, NATIONAL REPORT FOR THE GLOBAL CLASS ACTIONS CONFERENCE AT THE CENTRE FOR SOCIO-LEGAL STUDIES, *Global Class Actions Project Country Report: England and Wales*, 28 n.109 (December 2007), http://www.law.stanford.edu/display/images/dynamic/events_media/England_Legislation.pdf (describing how third-party commercial funders may become more common) *with* Freshfields Bruckhas Deringer, *Class Actions and Third Party Funding of Litigation: An Analysis Across Europe*, at 34 (June 2007), http://www.freshfields.com/publications/pdfs/2007/jun18/18825.pdf (noting that neither Italy nor Spain have developed third party funding).

[18] *See* U.S. CHAMBER OF COMMERCE & INSTITUTE FOR LEGAL REFORM, *The Rogue Courts of Madison County* 1 (June 5, 2003), http://www.instituteforlegalreform.com/issues/docload.cfm?docId=464; *Legal Reform, Of Sorts*, ECONOMIST, Feb. 19, 2005, at 82.

the magnet court problem. The White Paper, however, does not currently address venue, apparently leaving that issue to the Member States. While many Member States do have robust venue standards, there is always the possibility that certain Member States, or certain courts within Member States, will adopt a less rigorous approach. ILR therefore suggests incorporating into the White Paper's proposals and recommendations to Member States a venue standard that clearly limits venue to parties whose claims have a substantial connection with the forum state.

Third, and in the same vein, ILR suggests modifying the White Paper's proposed framework to minimize the extent to which Member State institutions can make EU-wide decisions. Several of the White Paper's recommendations give Member States the authority to make determinations that are binding on the entire EU community.[19] More specifically, the Staff Working Paper recommends that entities which are certified to bring a representative action in one Member State automatically should have standing to bring a representative action in all other Member States.[20] Similarly, the Staff Working Paper provides that the law of the forum jurisdiction should govern in the context of a multi-jurisdictional collective action as long as the market of the forum state is "directly and substantially" affected by the alleged anticompetitive conduct on which the collective action proceeding is based.[21]

These recommendations have the potential to extend the impact of a magnet jurisdiction beyond the jurisdiction's borders. Neither the White Paper nor the Staff Working Paper lays out any standards for what entities are eligible for general or *ad hoc* certification, other than to state that general certification should be done pursuant to "specific criteria set in law" and *ad hoc* certification should only be extended to "entities whose primary task is to protect the defined interests of their members."[22] Thus, it is possible that certain Member States will develop such lax standards for certification that practically any entity will be able to obtain standing, which in turn opens the door to "sham" consumer associations initiating litigation all across the EU. Similarly, if a certain Member State implements a pro-plaintiff legal regime, the Staff Working Paper's choice-of-law rule would allow that regime's law to be applied to claims throughout the EU, at the plaintiff's option, in any case where the alleged anticompetitive activity "directly and substantially" affected the forum state market.[23]

The prospect of litigation abuse is significantly lessened if a magnet jurisdiction cannot easily affect claims or litigation in other states. ILR therefore suggests modifying the White Paper's recommendations to ensure that (1) a Member State may only certify entities to bring representative actions in that Member State, and (2) a Member State cannot apply its law to claims arising in another jurisdiction, but rather must apply the law of the jurisdiction in which the claim arose.

---

[19] White Paper at § 2.3 (Binding effect of [national competitive authorities] decisions).

[20] Staff Working Paper at ¶ 55.

[21] *Id.* at ¶¶ 8-9.

[22] *Id.* at ¶ 53.

[23] *Id.* at ¶¶ 8-9.

B. Absence Of Case Coordination Mechanism

Another major concern raised by the White Paper's delegation of administrative authority to the Member States is the White Paper's failure to address meaningfully the issue of case coordination. Under the White Paper's recommendations, it is inevitable that parties will face parallel or competing actions predicated on the same alleged misconduct. Yet neither the White Paper nor the Staff Working Paper even mentions the possibility of competing collective actions arising out of the same alleged misconduct being litigated simultaneously in different Member States. The Staff Working Paper does acknowledge that parallel or consecutive proceedings involving purchasers from different levels in the distribution chain (*i.e.,* separate suits by direct and indirect purchasers of the same product) could create coordination and apportionment problems, but even with respect to that scenario, the Staff Working Paper fails to offer a solution and instead merely encourages national courts to use whatever powers they have to prevent over- or under-compensation.[24]

Under the White Paper's proposals, any party accused of engaging in EU-wide anticompetitive conduct therefore could (and likely would) face separate actions in multiple Member States, and there would be no mechanism for coordinating or consolidating those proceedings. In fact, given that each Member State has its own rules governing when cases can be coordinated or consolidated, a party could easily face multiple actions within a particular Member State. And the problems inherent in the absence of a coordination mechanism are exacerbated by the White Paper's proposal to grant standing to sue to any party harmed by anticompetitive conduct.[25] That proposal substantially broadens the universe of potential plaintiffs, thereby increasing the odds that there will be multiple groups of plaintiffs bringing suit whenever allegations of anticompetitive conduct arise.

The difficulties caused by the White Paper's lack of a coordination mechanism can be illustrated through a simple example. Assume that distributors of sand are alleged to have engaged in a horizontal price-fixing conspiracy on a EU-wide basis. Under the White Paper's proposal, those distributors might very well face an "opt-in" class action in the U.K. comprised of concrete manufacturers who directly purchase sand from such distributors; a separate "opt-in" direct purchaser class action in Belgium involving glass makers; another "opt-in" class action involving different glass makers in Germany; an "opt-in" indirect purchaser class action of window manufacturers in Poland; a representative action brought by a French consumer association representing people who purchased products with glass; and a representative action brought by an Italian trade group of real estate developers. It is quite possible that those distributors would face a different proceeding in all 27 member states, each one brought by a different set of plaintiffs whose claims are predicated on the same alleged anticompetitive conduct. But there is nothing in the White Paper that provides for coordination or consolidation of such proceedings; instead, the distributor defendants would have no choice but to engage in duplicative litigation in court after court.

[24] Staff Working Paper at ¶ 223.

[25] White Paper at § 2.1.

In this respect, the White Paper's proposed framework mirrors the system that prevailed in the United States before passage of the Class Action Fairness Act ("CAFA") in 2005.[26] Prior to that time, defendants were frequently forced to litigate simultaneously multiple cases in different states arising out of the same alleged misconduct. Because each state has its own independent legal system, there was no mechanism for consolidating cases across jurisdictions and even coordination of such proceedings did not occur absent voluntary cooperation by the judges involved. Parties in these parallel proceedings often experienced jarringly inconsistent results – for example, class certification might be granted in one jurisdiction and denied in another, even though the putative classes in question were virtually identical in all relevant respects.

CAFA largely resolved this problem by creating federal jurisdiction over most class actions, thereby allowing parties to bring related actions into the federal system and to take advantage of that system's consolidation and coordination procedures.[27] While ILR recognizes that the absence of a federal legal system makes this solution less feasible in the context of the EU, it urges the Commission to incorporate formal rules on cross-border coordination and cooperation for courts adjudicating private damages actions under Article 81 or 82 in any further iteration of the White Paper's proposals. For example, the Commission could adopt rules mandating (or at least providing incentives for) consolidated discovery whenever multiple courts in different jurisdictions are adjudicating cases predicated on the same alleged misconduct. Similarly, the Commission could require courts from different Member States to cooperate in the apportionment of damages and the administration of settlements. Although less optimal than the U.S. approach, such an approach would minimize many of problems and inefficiencies identified above.

V. CONCLUSION

The recommendations in the White Paper create a powerful new mechanism for private litigation. This new framework has the potential to do a great deal of good, creating opportunities for the fair and efficient redress and enforcement of individual rights on a collective basis. However, as the American legal experience over the past four decades has demonstrated, great caution is warranted when establishing new mechanisms for collective redress, for these mechanisms can easily lead to litigation abuse absent due care. The comments above are provided with the goal of ensuring that the Commission will keep the lessons of the United States in mind as it further develops the White Paper framework and with the sincere hope that the Commission will avoid the pitfalls of the American experience.

14 July 2008

---

[26] Class Action Fairness Act of 2005, Pub. L. No. 109-2, 118 Stat. 4 (codified in 28 U.S.C. §§ 1332(d), 1453, and 1711-1715).

[27] *Id.* at § 1332(d).