COMMENTS OF THE ABA SECTIONS OF ANTITRUST LAW AND INTERNATIONAL LAW TO THE EUROPEAN COMMISSION STAFF'S WORKING DOCUMENT: TOWARDS A COHERENT EUROPEAN APPROACH TO COLLECTIVE REDRESS

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The Sections of Antitrust Law and International Law (the "Sections") of the American Bar Association are pleased to submit these comments to questions posed by the European Commission Staff in its Working Document entitled: "Towards a Coherent European Approach to Collective Redress." The Sections applaud the Commission Staff's careful examination of whether and how the implementation of a collective redress mechanism could supplement the enforcement of EU law. The Commission has identified many issues worthy of serious consideration before any collective redress mechanism is implemented, either EU-wide or by any individual Member State. The Sections appreciate the opportunity to participate in this process.

The Commission's Working Paper poses numerous detailed questions, including some questions that call for specialized knowledge and experience regarding the workings of EU law and the laws of Member States. Other commentators have greater expertise and experience in these areas of law and are better situated to comment on these particular issues. By contrast, the Sections have significant experience with class action litigation (the term used to describe collective redress in the United States), as class actions are provided for under certain circumstances in federal courts and in some state courts in the United States. The Sections therefore provide comments drawing on experiences and perspectives gained from class action

practice in the United States and in particular class action practice in the area of antitrust and unfair competition law.

Antitrust class action litigation is a controversial topic in the United States, with views often sharply diverging. Because the Sections include within their membership many practitioners on both sides of this divide, these comments do not take a position on whether, on balance, the EU states should or should not create rules permitting collective redress in the competition sphere Rather, the purpose of these comments is to explain how many of the key issues raised in the consultation document regarding this form of antitrust enforcement are addressed in the U.S. context.

I. COLLECTIVE REDRESS AS AN INSTRUMENT TO STRENGTHEN ENFORCEMENT

The Sections commend the Commission for its strong stance in favor of effective enforcement of EU law and its concern for ensuring effective enforcement on behalf of individuals and Small and Medium-Sized Enterprises (SMEs). Enforcement of U.S. federal antitrust law and state unfair competition laws has for many years taken place within a dual system of both public and private enforcement. Given the limited resources available to public enforcement authorities, private antitrust enforcement in the United States has helped to promote compliance with and provide compensation to victims of antitrust violations.[1]

It has been widely debated whether individual private enforcement is adequate to achieve these goals or whether it is also necessary to have collective private enforcement through the

[1] Private antitrust litigation is prolific in the United Sates, and has been studied extensively because of concerns about its ultimate impact. It has been suggested that the incentives of private antitrust litigants are misaligned relative to the public interest in antitrust enforcement, and that certain features of the litigation system – especially discovery rules and practices, pleading rules, multi-district proceedings, multiple damages and fee-shifting provisions, and other elements independent of class action procedures as such -- may distort the litigation system in ways that are contrary to the ultimate public interest in effective antitrust enforcement. The Sections respectfully suggest that the Commission may wish to study the distinct issues associated with these other elements in addition to those raised by the proposals for collective redress.

class action mechanism. Experienced practitioners can point to cases for which the defendant perceived the underlying class claims were of dubious merit yet the magnitude of potential class-wide damages resulted in coercive settlements because the defendant was either financially unable or otherwise unwilling to risk the uncertainties associated with litigating the case to final judgment. Such actions have led some to question the merits of the class action device as a whole and have led some to brand class actions as examples of "abusive" litigation.

On the other hand, the antitrust class action mechanism has also facilitated the prosecution of meritorious legal claims in circumstances where there otherwise might not have been any enforcement of the antitrust laws. In these instances, either due to the limited resources available to public enforcement agencies or because individual private plaintiffs did not have an adequate financial stake in the matter to bring a private claim, only private class action enforcement of competition laws provided the means for deterrence and redress.

Most class actions fall somewhere between these two extremes. Examples include follow-on class action filings in the wake of government criminal enforcement actions. The burdens and benefits of class action in these circumstances also have been the subject of considerable debate, and the United States continues to focus on how best to implement the class action mechanism by curbing its dangers and facilitating its availability in instances where it may be truly warranted.[2]

Defendants as well as plaintiffs recognize benefits as well as burdens from the class action mechanism. Most notably, private class actions can assist defendants who wish to resolve significant potential antitrust litigation liability in a single proceeding. The *res judicata* effect

[2] *See* Class Action Fairness Act of 2005, Pub.L. No. 109-2, 119 Stat. 4 (2005) (codified in various sections of 28 U.S.C.). The Sections note that because of the interrelationship of the procedural dynamics involved in U.S. class actions any acceptance of only portions of the procedural system without others could result in serious substantive or due process concerns.

accorded judgments and broad releases in settlements of private class action litigation allows defendants to achieve a measure of finality and certainty that contrasts with seeking separate resolutions of a multitude of individual private cases filed in varying jurisdictions by different parties.

Thus, most debate regarding antitrust class action redress in the United States tends to focus on whether certain procedural safeguards and requirements are met, whether the parties receiving compensation are the proper parties, and whether the amount of the compensation is appropriate from the perspectives of deterrence, compensation, and preserving competition. The contours of the specific safeguards/conditions that need to be implemented and the timing of determining whether such conditions can be satisfied by the representative party or parties initiating the action are critical questions. How such questions are answered may determine whether private antitrust collective redress actions effectively promote important public enforcement goals or result in inappropriate over-deterrence and abusive litigation.

One particular issue raised by the EC Staff Working Document is whether private collective redress should be independent of, complimentary to, or subsidiary to enforcement by public bodies.[3] In the United States, private class action litigation may be initiated without waiting for the filing or ultimate resolution of any public enforcement proceedings. In that regard, private class actions are independent of public enforcement actions. Nonetheless, there are features of the U.S. system that result in some interplay between public and private enforcement actions that the Commission may wish to consider.

First, the United States has adopted a formal coordination mechanism that allows an independent judicial panel, the Judicial Panel on Multidistrict Litigation ("JPML"), to transfer,

[3] *See* EC Commission Staff Working Document, Question 2 at p. 6.

upon application by affected parties, related private class action and individual proceedings pending in different federal courts throughout the United States to a single judge.[4] Where there already exist pending governmental proceedings, either by litigation or by criminal grand jury investigation in a particular district, the JPML may consider the venue where such governmental proceedings are pending as a factor in determining where private actions may be transferred for coordinated pretrial proceedings. In many cases, private class action or individual antitrust litigation has been coordinated before a judge who already is presiding over a related government enforcement action. Discovery in the civil proceedings is coordinated to minimize the burden and the potential for duplicative discovery taken from defendants, and the interests relevant to the governmental proceedings often are considered as well. The multi-district litigation device generally succeeds in centralizing related class actions before a single judge who has the power to coordinate and manage pretrial proceedings in an efficient manner.

Second, coordination between public and private antitrust actions is significantly enhanced in federal antitrust cases because public and private parties are seeking to enforce the same laws that have the same substantive provisions, regardless of whether the plaintiff is a public or private entity. In this regard, the identity of the applicable substantive legal standards promotes efficient coordination of public and private proceedings.

Third, a final judgment or decree entered in any antitrust enforcement proceeding brought by the United States (including a guilty plea entered in a criminal case) is prima facie evidence of a violation of federal antitrust law that may be introduced by private plaintiffs in follow-on litigation, including class action litigation.[5] Although this rule does not mandate that

[4] The judicial panel on multidistrict litigation consists of seven federal circuit and district court judges designated from time to time by the Chief Justice of the United States. *See* 28 U.S.C. § 1407.

[5] *See* 15 U.S.C. § 16(a).

government enforcement actions take precedence over private actions, it can lead private plaintiffs to agree to stay or lag their actions behind pending government proceedings.

Last, there have been instances where federal antitrust enforcement authorities, particularly ongoing criminal antitrust proceedings, have intervened in parallel civil proceedings and requested that courts stay the ongoing civil proceedings -- either fully or in specific and limited respects -- so that they do not interfere with the governmental investigations. Courts generally are receptive to such government requests, frequently subject to some assurance regarding the likely duration of the government investigation and attendant delay.

II. THE IMPORTANCE OF INFORMATION AND THE ROLE OF REPRESENTATIVE BODIES

The EC Staff Working Document raises the issue of how, when and by whom should victims of EU law infringements be informed about the possibilities to bring a collective action or to join an existing lawsuit, and what would be the most efficient means to inform such potential victims, particularly when victims are domiciled in several Member States. In the United States, notice to potential victims is addressed specifically in the context of private class action litigation. Notice in government civil proceedings also may be provided but not until the conclusion of the case (either through settlement or litigated judgment) when public comment on the proposed relief in the case is solicited. In civil cases, after a defendant agrees to a guilty plea or the entry of a judgment of guilt, the government often issues a press release to advise the public.

The overwhelming majority of private antitrust class actions in the United States focus on monetary damages as the primary relief sought. These cases are brought as "opt out" class actions, meaning that putative class members must formally opt out of the class if they do not want their legal rights adjudicated in the proceedings. If an absent class member does not opt-

out of the class, that class member will be bound by the outcome of the class action and will not be able to bring an independent claim later. In other words, the result of the class action will have *res judicata* effect on that class member.

Because an opt-out class action conclusively determines the legal rights of all class members who do not opt out, it is critical to provide notice to class members about the existence of the action, the fact that their legal rights are at stake, and that they have the right to opt out of the action. Notice in U.S. class actions is provided only after a court has determined that the action is appropriate to proceed as a class action.[6] Historically, this took place during the early phases of the litigation. However, due to recent changes in the Federal Rules of Civil Procedure, as well as judicial decision emphasizing the need for greater scrutiny regarding the appropriateness of certifying a class, the timing for deciding class certification sometimes has been pushed back so that notice is now often provided well after substantive merits discovery is underway.

The timing of notice is important for several reasons. First, notice provides class members with a greater ability actively to participate in the litigation if they so choose. Second, notice allows class members who wish to opt out and initiate their own individual action the opportunity to do so and participate meaningfully in any coordinated proceedings, thereby enhancing litigation efficiency and reducing the likelihood of duplicative subsequent proceedings. Third, notice timing may have implications for the application of any relevant statute of limitations.[7] Balanced against an interest in providing early notice is the equally

[6] As such, this notice process is driven by due process concerns – not as a means to encourage or otherwise promote persons to initiate additional class actions or join existing class actions.

[7] In the United States, the running of any applicable statute of limitations against any absent class members is tolled pending a determination of whether the class should be certified. If a class is certified and an absent class member opts out, the statute of limitations resumes running against that party.

important principle of ensuring that the court has a sufficient factual record upon which to make an informed decision regarding whether a class should be certified at all. .

Plaintiffs' counsel proposes and generally arranges and pays for notice in U.S. class actions.[8] The substance of the notice typically provides a neutral factual description of the claims alleged (as well as information about where additional detailed information about the case can be obtained), the parties to the case and the identity of class counsel, and how a party may opt out. Defendants are permitted the opportunity to comment on and/or object to the proposed content in the notice. The court then reviews and must approve the notice.

How notice is provided has generated some controversy in U.S. litigation. In cases where the identities of potential victims are easily ascertainable and their number is manageable, providing individual notice by mail is usually an effective and desirable means of ensuring that class members receive adequate notice. In some cases, however, such notice is not practicable, either because the identities of class members are not readily discoverable or their number is sufficiently large to make notice by postal mail economically prohibitive. Thus, "publication notice" is widely used, usually in the form of advertisements taken out in widely read newspapers, magazines or trade journals, though there is no requirement that class members actually receive such notices. The adequacy of such notice and its effectiveness to afford class members with due process have been the subject of some debate in the United States. The wide-spread availability of electronic media – both electronic mail and Internet advertising – may

[8] In some class actions, a settlement is reached before class certification is litigated. In these cases, plaintiffs may make provisions for part of the settlement fund to be used to pay for the class notice that must be provided regarding the settlement.

present opportunities for more effectively targeting class members and thereby providing effective notice.[9]

III. SAFEGUARDS AGAINST ABUSIVE LITIGATION

The EC Staff Working Document seeks comment and suggestions for adopting safeguards to minimize instances where collective redress actions constitute "abusive litigation." The Sections, of course, agree that abusive class action litigation does not further legitimate interests. Abuse can result from litigation that is not well-founded; that is excessively costly to litigants, the judicial system and the economy in general; that does not promote deterrence; or that does not result in appropriate compensation for victims of anticompetitive conduct.

As a threshold matter, a party that initiates a class action in the United States must establish that various criteria have been met before a court will "certify" a class. Claimants typically must establish that: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class. In addition, where a claimant seeks to represent an opt-out class seeking monetary damages on behalf of the entire class, the moving party must establish that questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.[10] These requirements are designed to ensure that the action presents the type of case where collective action is most needed and potentially beneficial, while ensuring that the

[9] Notice of settlements and requests for comments in government civil proceedings are typically provided by publication in the United States Federal Register.

[10] *See* Federal Rules of Civil Procedure 23(a) & 23(b)(3).

representative claimant and his/her counsel possess interests that are properly aligned with and able to serve the interests of the putative class.[11]

The EC Staff have identified several factors that they believe incentivize parties "to bring a case to court even if, on the merits, it is not necessarily well-founded." Comm'n Staff Working Document at ¶ 21, p. 9. Such incentives are, according to the EC staff, the result of several factors including: (1) the availability of punitive damages, (2) the absence of limitations on standing, (3) the possibility of contingency fees for attorneys, and (4) the wide-ranging discovery procedure for procuring evidence. *Id.* The EC Staff specifically question whether a number of procedural mechanisms, including "loser pays" and limiting standing to only certain entities, should be employed in collective redress actions to help safeguard against abusive litigation.

As the Commission is aware, the U.S. system does not operate on the principle of "loser pays." Indeed, under federal U.S. antitrust law, a prevailing plaintiff may recover reasonable attorneys' fees incurred in prosecuting the action above and beyond actual (and treble) damages. However, if a plaintiff loses, the court does not assess any legal fees against him. Accordingly, the U.S. legal system does not have experience with the "loser pays" principle in the context of private antitrust class actions.

Defining the appropriate scope of legal standing presents another vehicle for either broadening or limiting the prevalence of collective redress actions. Under federal antitrust law in the United States, only "direct purchasers" (those who purchased directly from a defendant) may

[11] In many instances in the United States, a type of collective redress is actually brought outside of the class mechanism by large numbers of companies that have opted-out of the class and pursued individual relief either by joining together as plaintiffs in a single action or through the JPML process coordinated pretrial proceedings on individual actions. Individually these actions are pursuing the same substantive offense and seek the same substantive remedy. For example, in the U.S. Vitamins litigation, some have opined that approximately 50% of the affected companies opted-out of the class to pursue their claims outside of the class mechanism.

bring suit to collect money damages. "Indirect purchasers" (those who purchased the product at issue from a distributor or other middleman, and not from the defendant) may not sue for money damages under federal law, though, if appropriate, they may sue for injunctive relief. Indirect purchasers may sue for money damages under certain state laws. The issue of whether indirect purchasers should be permitted to sue for monetary damages has been the subject of robust debate for many years in the United States.[12]

Finally, the EC Working Document raises the issue of the role to be given to judges in collective redress proceedings, and whether a competent government body should be authorized to recognize certain representative entities as entitled to bring a collective redress claims.[13] In the United States, the court is given sole authority to determine whether a class action should be certified, including determining whether a named class representative is adequate to represent the putative class. The U.S. experience involves serious and substantial scrutiny of named representatives and provides courts, rather than an extra-judicial process, with the authority to make these decisions on a case-by-case basis.

IV. FINDING APPROPRIATE MECHANISMS FOR FINANCING COLLECTIVE REDRESS, NOTABLY FOR CITIZENS AND SMEs

Plaintiffs' counsel, using contingency fee arrangements with named class representatives, have been the sole mode of financing antitrust class actions in the United States. As part of these contingency fee arrangements, plaintiffs' counsel advance all costs and expenses associated with the litigation, including the costs associated with providing notice to absent class members that a class has been certified and/or that a proposed settlement has been reached. To spread the risks

[12] For a discussion of various issues presented by parallel direct and indirect purchaser antitrust litigation, *see* Antitrust Modernization Commission Report and Recommendations at 265.

[13] *See* EC Commission Staff Working Document, Question 23 at p. 11.

associated with financing class actions, plaintiffs' counsel often associate themselves or work in conjunction with large numbers of other law firms to prosecute cases.

The EC Working Document raises the question whether representative entities bringing collective redress actions should be able to recover the costs of proceedings, including their administrative costs, from the losing party.[14] In cases that proceed to a final judgment after trial under U.S. antitrust law, attorneys' fees are awarded to plaintiffs who prevail above and beyond their compensatory damages. However, the overwhelming majority of antitrust class actions in the United States are resolved without a trial, either because the case settles before trial or because the defendants prevail at the motion to dismiss or summary judgment motion stages or at the class certification stage.

In the United States, plaintiffs' counsel must apply to the court for the payment of attorneys' fees and costs from settlement monies recovered on behalf of the class.[15] Regardless of the contingency fee arrangement agreed upon by the named plaintiff representatives at the outset of the case, the court must determine that the attorneys' fees and costs to be awarded are reasonable after consideration of a number of factors, including the complexity and difficulty of the action, the time and expense expended in the prosecution of the case, the result achieved and the benefits conferred upon the class by the action. Plaintiffs' counsel must make filings with the court detailing the time spent on the case and actual expenses incurred. After these filings, plaintiffs' counsel in some class actions are awarded attorneys' fees that significantly exceed the value of their actual fees and expenses.

[14] *See* EC Commission Staff Working Document, Question 27 at p. 11.

[15] *See* Federal Rule of Civil Procedure 26(h).

Courts in the United States also have the discretion to award bonuses or other incentive payments to named class representatives above their actual damages as compensation for their service as class representatives and to incentivize others to serve this role. The magnitude of such awards historically has not been significant and it is therefore not clear whether they provide a meaningful additional incentive for the prosecution of antitrust class actions.

Given the prevalence of private antitrust class actions in the United States, particularly in cases that follow government enforcement actions, there does not appear to be any need for public or other third party funding mechanisms to ensure that class actions are filed in meritorious cases. Court-imposed limitations on attorney fee awards (or in the worst cases sanctions)[16] are the main mechanisms that the U.S. courts have to discourage the filing of weak or frivolous claims.

V. CONCLUSION

The Sections applaud the efforts of the European Commission staff to tackle the issues raised in trying to develop a coherent European approach to collective redress and hope that these perspectives from the U.S. experience further those efforts.

[16] Federal Rule of Civil Procedure 11 provides that courts may impose against counsel or parties that assert frivolous claims.