Public Consultation

Towards a Coherent European Approach to Collective Redress

Submitted by CMS

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Public Consultation: Towards a Coherent European Approach to Collective Redress

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

1.1. We consider that introducing new mechanisms of collective redress at the EU level would most likely not endow enforcement of EU law with any overall added value. Theoretically, there might be some added value possible; however, practically, this will not materialise due to the many unsolved problems of collective redress (such as financing and creating the wrong incentives).

1.2. From a competition law standpoint, we believe that sufficient injunctive relief for victims of competition law infringement can already be forcefully achieved through the existing means of public enforcement. Competition authorities have sufficient means at their disposal allowing them to stop such infringements with immediate effect. However, from a compensatory relief perspective, collective redress may be of some added value in cases where there is a previous business relationship between the member of a cartel and the consumers in a downstream market. This would in particular be true in cases in which there was a cartel in an upstream market and one or more of its members are vertically integrated in such a manner that they hold subsidiaries in the downstream market. Here, the direct relationship between consumers and infringer in the downstream market would allow damages claims in an easier setting in which it would not be possible for the infringer to assert that the damage was not passed-on to the consumers so that consumers can actively bring forward the pass-on argument.

1.3. In the area of consumer protection, collective redress may not offer a solution with added value where the amount of the individual damage of each consumer is so insignificant that it is not only not worth filing a claim to recover such amount, but also not feasible to allocate the right portion of the damages to each of the consumers affected because their identities and their individual burden cannot be easily verified, amongst other reasons. As a potential alternative to the collective redress approach, such problems could perhaps be addressed more effectively within the realm of public enforcement by dedicating a certain percentage of the fine as a contribution to the tax authority triggering an automatic tax reduction benefitting the community as a whole or mediating between the firms and the consumers to offer the latter a reduction in prices.

1.4. Moreover, there are already some legal instruments available tackling the issue of small individual claims without reverting to collective redress mechanisms.

The European Small Claims Procedure[1] already gives consumers the opportunity to claim damages in a simpler setting than usual for trans-border claims lower than EUR 2,000. This shows that collective redress is not the only option available to more effectively protect small individual claims.

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?*

2.1. Firstly, we strongly believe that a clear distinction between fines and damages should be drawn. Fines are generally imposed after a procedure initiated by a competition authority has taken place. The purpose of issuing fines is not only to punish an undertaking that has infringed competition law but also to discourage future violations of competition law. Damages, on the other hand, have as their core objective the compensation of a loss suffered by the victim of a civil wrong (and not deterrence). Hence, fines and damages constitute two very different matters with two very different objectives and, consequently, they should not be mixed and have distinctive roles to play. Deterrence by public enforcement fines is more (cost-) efficient than any attempt to achieve it through private enforcement.

2.2. Secondly, we deem that public enforcement naturally precedes private enforcement since the results of such public enforcement action are a vital starting point for subsequent private enforcement. In practice, it is not conceivable to start a private antitrust action without a previous investigation having been carried out by a public authority. At the EU level, the tools that the Commission has at its disposal to pursue investigations of antitrust infringements, especially cartels, such as leniency programmes and dawn raids, among others, are fundamental for the prosecution of contraventions of competition law and there are no comparable tools that would allow equally effective private enforcement in such sector. To introduce such tools, in particular extensive pre-trial discovery, would create a great risk of abusive litigation.

2.3. Furthermore, it has to be taken into account that for a collective redress mechanism to be established as an additional means of enforcing competition law, the burden on defendants would have to be substantially eased elsewhere to

[1] Regulation EC No. 861/2007.

avoid excessive punishment. This means that in our view it would be absolutely necessary to simultaneously lower the level of fines imposed by competition authorities for antitrust infringements. In general, even under the current framework the amounts of fines for violations to antitrust laws are much too high with the courts not sufficiently weighing the effects of the wrong committed by the undertaking with the burden they face. In some cases, courts impose drastic fines without clearly stating in their decisions what the negative effects of the sanctioned conduct were on competition.

2.4. Added to that, in our view, the total damages paid by antitrust infringers are already now – without collective redress mechanisms in place – to a large extent higher than their individual gains derived from the breach. This effect can be attributed to the surcharge of interest, expenses and disbursements that go along with the damages claim. This leads to situations in which interest claims can represent half of the total amount of damages awarded.

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

3.1. No. The role, functions and resources of national public bodies and/or national private representative organizations should be determined only by Member States. Any Community intervention in these matters would in our view constitute an infringement to the principle of subsidiarity. Furthermore, Member States have a much better understanding of the role and functioning of the national public bodies and/or private representative organizations.

3.2. This line of thought has been accepted for example in the Unfair Commercial Practices Directive[2] where in Arts. 11 and 13 it has been left to the discretion of the Member States to decide through which mechanism(s) the harmonized standard of the Directive will be enforced.

[2] Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005.

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?*

4.1. Before any Community action is taken with regard to collective redress a valid legal basis needs to exist in Community law. We hold the strong opinion that no such legal basis is available and that such legal basis should not be introduced into the European Treaties.

4.2. In the past, the Commission has repeatedly voiced its intention to enact legislation in relation to private claims e.g. in antitrust cases. However, in none of those occasions has the Commission been able to identify the concrete legal basis on which such Community legislation could be based. Without such legal basis, we do not see how a European action on collective redress could be legally adopted.

4.3. Moreover, collective redress mechanisms naturally require the interaction of substantive and procedural rules. Due to the diversity of the legal systems and redress mechanisms adopted by each Member State in this regard, it is almost impossible to embrace a system that takes into account the particularities of each national legal system without disrupting the existing balance developed in the Member States' civil law systems.

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?*

5.1. In its consultation paper the Commission identified sectors in which rules on collective injunctive relief already have been implemented, such as consumer protection and environmental claims. Regarding consumer protection, the existing EU rules provide for the possibility to file collective injunctions and claims to stop acts that harm consumers. We believe that it would not be effective to extend such rules to competition law infringements in light of the high factual hurdles to gather evidence in antitrust cases, especially cartels. As mentioned above, we believe that the Commission and national competition authorities play a fundamental role in obtaining injunctive relief against antitrust infringers that private parties will struggle to attain.

5.2. In relation to collective compensatory redress mechanisms, we consider that the implementation of such rules is clearly a matter of national law and that the

only possibility for the Commission to approach the issue would be through non-binding guidelines. As explained above, the introduction of legislation in this area would not be possible as the Community lacks a valid legal basis. Further, any such introduction of legislation would create uncertainties and complexities by disrupting the balance existing within the national legal systems of the Member States in relation to civil procedure.

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?*

6.1. If European action is taken, we consider that the only viable way would be through a non-binding approach. First, we reiterate our concerns on the non-existence of a legal basis that could sustain legislation in this area. Furthermore, any legally binding approach would interfere with the existing balance within the national legal systems of the Member States in relation to civil procedure. In consequence, under the diversity of the national legal systems existing within the European Union, a uniform approach on collective redress would trigger different effects in each of the Member States, creating uncertainty and contradictory outcomes.

6.2. On the other hand, a non-binding approach would enlighten Member States about the common goals and principles that could serve as a benchmark for any potential national collective redress mechanism without at the same time interfering with national legislation. The Member States through a non-binding approach would be free to decide when and how to implement such common principles.

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 set out above, we do not believe that an EU initiative would have a legal basis. However, should such initiative be taken, we agree that any possible EU initiative on collective redress should comply with a set of common principles established at EU level. We believe these to be the following principles:

7.1. The most important principle, at least with regard to compensatory collective redress, should be clarity as to which goal is to be attained and as to which extent one goal shall prevail over another. This is in particular important for the goals of deterrence/enforcement on the one hand and compensation on the other hand. This decision on which of these goals shall prevail is also crucial for most other topics in connection with (compensatory) collective redress.

7.2. Another very important principle should be the proportionality of enforcement goals and enforcement costs. Compensation should never be a goal at all costs (no goal is worth pursuing whatever it takes).

7.3. Another very important principle is the avoidance of abusive litigation (the US class action scenario). Any EU initiative on collective redress should also provide for rules and procedures to avoid an abuse of collective redress instruments.

7.4. The right to a court hearing is a very important principle under various national constitutional laws (e.g. Germany). Any instrument of collective redress should be in line with such constitutional law guarantees in the Member States.

7.5. Any EU initiative on collective redress should also strike an adequate balance between public and private enforcement and should take into account the complimentary characters and the advantages and shortcomings of both sets of enforcement.

7.6. Obviously, the rules on bearing of court fees and litigation costs are of great importance for any instrument of collective redress. Those rules are the pivot for setting the right incentives for the commencement of collective redress procedures and for the prevention of abuses. That said, such rules should be left to the national laws of the Member States to avoid any interference with the existing national civil procedural rules.

7.7. Finally, any EU initiative should leave room for collective redress procedures based on the voluntary ad hoc association of claimants. No limitations to certain groups of claimants should be introduced.

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?*

8.1. Yes, the experience gained from collective redress systems operated in the Member States can contribute to formulating a European set of principles. We however wonder whether one should not wait and gain more practical experience from the (very often fairly new) collective redress systems operated by the Member States before considering a detailed EU proposal. The principles described above (Q 7) could serve as a checklist for the analysis of collective redress systems operated by the Member States. A premature EU action would deprive the stakeholders of this further practical experience.

8.2. In any event, we believe it to be evident that a strong and active role of the courts is vital. This is confirmed by the experience gained from the Member States' practice and by comparative analyses with US law.

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?*

With regard to effective access to justice we believe the following issues to be of great importance:

9.1. The right to a court hearing prejudices the choice of collective redress instruments. For example, an opt-out model would be in conflict with Member States' constitutional law guarantees of the right to a court hearing.

9.2. Guaranteeing the efficiency and adequacy of information of potential claimants is another key factor for effective access to justice (ct. also answer to Q 13 and 14).

9.3. Finding an adequate way of financing collective redress instruments that fits in with the legal systems and traditions of the Member States is a big and difficult challenge. The issue of financing influences the incentive to commence collective redress procedures. Great care should be taken that it does not set wrong incentives.

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 particular valuable. Are there on the other hand national practices that have posed problems on how have/could these problems be overcome?*

    10.1. A strong and active role of the courts ("managerial judging") is one of the most important specific good practices in the area of collective redress and is one of the main safeguards against abusive litigation. The US experience (the class action scenario), which is based on a law of civil procedure that traditionally relies rather on the initiative of the litigation parties than the intervention of the court, in our opinion strongly suggests that any possible EU initiative should provide for a strong and active role of the judge. However, such uniform approach might face problems in jurisdictions without an active judiciary, such as England.

    10.2. Generally, the collective redress systems operated by the Member States clearly show the general problems of collective redress:

    - (more generally speaking) overcoming rational apathy vs. over-incentivisation. Economists use the term of rational apathy to describe a situation in which individual damages are small and widespread. This is typically the case in cartel cases. In such situation victims lack an incentive to take the risk of claiming damages and going to court.
    - the role of the representative person/entity;
    - the financing of collective redress instruments.

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?*

    11.1. An effective collective redress mechanism must carefully balance the overall aim of effective enforcement of competition law with the vital respect for the rights of the defendant.

    11.2. More specifically, if the Community, despite our grave concerns, should decide to implement a collective redress system at the European level, such system should under no circumstances follow an opt-out approach. We consider that opt-out systems are in clear contradiction with constitutional and human rights principles. In this regard, the main problem lies in what is the most distinctive characteristic of such system, namely the impossibility to identify all the

individual claimants taking part in the damages claim. Collective organizations and private litigation companies may unfairly profit and may initiate collective actions enrolling individuals into litigation without those individuals even knowing of the existence of the case. Also, under an opt-out system it would be impossible to fairly scrutinize the merits of each individual claim since the claimants and their particular circumstances are unknown. Therefore, we believe that opt-out systems affect fundamental procedural rights of the defendant, creating uncertainties, in particular as to the final amount of damages that they would have to pay in case of an unfavorable decision.

11.3. However, we also consider that an opt-in approach would face significant hurdles because it would not be easy to implement effective systems to inform consumers of the initiation of collective redress cases for them to take the necessary steps to include themselves within the group and benefit from the final decision. In opt-in systems the problem of rational apathy remains unsolved.

11.4. Regarding SMEs, we believe that they already have sufficient mechanisms of defence as in general they are well positioned to benefit from good professional legal advice, other than individual consumers who may not always have the same level of access.

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

12.1. Effective redress may be obtained through the establishment of simple procedures. We believe that the adoption of a collective redress mechanism at the European level would lead to the existence of parallel systems of collective redress therefore complicating the current setting established by national laws and in consequence inevitably lead to more costly and lengthy procedures.

12.2. The quality and speed of national jurisdictions is the most important issue. It is not worth worrying about the procedural rules if its takes much too long (up to a decade or more) to have a claim resolved. The EU should not increase the already overwhelmed judicial system in many European countries.

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?*

13.1. Information by internet

We believe that an EU-wide internet platform is the most cost-efficient way of informing the public and thus potential claimants about the possibilities to bring or join a collective (injunctive and/or compensatory) claim. It is superior to any other form of information, e.g. by newspaper or any bilateral means of correspondence. The platform could be sponsored and hosted by the EU Commission. Also, the EU Commission could introduce the platform, e.g. in a press release. Since it would be an inexpensive tool, it would also not constitute a big burden on the EU budget. EU funding of the platform would help secure the independence of the platform and avoid double efforts and costs in the Member States.

13.2. Time of information

There are various options. Information can be provided before the commencement of proceedings, after the commencement of proceedings, before a court award or after a court award. The principles described in our answer to Q 7 provide guidance as to when potential claimants should be informed. The right to a court hearing clearly is observed best if the information is provided before the commencement of proceedings. Since opt-out instruments may not be an option (cf. above Q 7), information only before or after the court award would seriously impair the right of effective access to justice. We suggest that in any event that there should be two relevant instances for providing information. The first should be before the commencement of proceedings to enable as many potential claimants as possible to join the initiative right from the beginning. The second instance should be right after the commencement of proceedings to attract further potential claimants and to save the costs for multiple parallel proceedings.

13.4. By whom shall the information be provided?

Once again, there are various options. The information can be provided by the court itself, the lead legal counsel of the collective redress initiative or the representative entity. The information to be provided before the commencement of proceedings (cf. above 13.2.) should be provided by the person in charge of the collective redress initiative, i.e. either a representative entity or a lawyer. The information to be provided after commencement of proceedings should be provided by the court which will hear the case and

decide on the claim. In both cases the information should be provided over the EU-wide internet platform suggested above (cf. above 13.1.). Lawyers will have the incentive to inform consumers. Therefore, no public effort is necessary.

13.5. Cross-border situations

The EU-wide internet platform suggested above would also be the most efficient means to guarantee that the information is received by a maximum of potential claimants wherever they are domiciled. Information on the EU-wide internet platform should be provided in the main languages of the EU, i.e. English, French and German.

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

14.1. Q 14 touches on one main problem of collective redress instruments. This problem follows directly from the situation of rational apathy. The question is how to set the right incentives for the representative (person/entity) to get active and how to protect representative's initiative. From an economic point of view, there is no property right in the representation, so there is a lack of incentives to start collective redress instruments. However, these thoughts would only be relevant for opt-out instruments (for our position on these, cf. Q 9). In non-opt-out-scenarios this will not be a problem. There may be more than one group of claimants represented each by a different representative. The question rather is how to facilitate cooperation to save enforcement costs. We again suggest the use of the EU-wide platform to facilitate cooperation between the representatives (persons/entities). An EU registry for representative entities/associations may further facilitate cooperation at a very early stage, i.e. even before decision making on the initiative. Those tools, the internet platform and the registry, may also solve problems that arise from cross-border situations. For example, a registered representative entity from one Member State considering commencement of a collective redress procedure could then check on the internet platform what other registered entities there are in other Member States which could be contacted about a possible co-operation.

14.2. Further, it should be kept in mind that cross-border situations are rather unlikely to occur in relation to consumer claims. Usually, consumers will have a relationship with the national representative of the respective firm (e.g. a

subsidiary or a distributor). Thus, there is no need of more European regulation in this respect.

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

15.1. The advantages of ADR lie within the ADR system itself (speed, lower cost etc) and it is hard to see what other incentives governments could give to potential litigants to promote recourse to ADR. On the other hand, it should be considered whether the courts should impose sanctions (in the form of costs or other penalties) on litigants who fail to use ADR, where an ADR mechanism was available to them and should reasonably have been attempted before going to court.

15.2. However, potential litigants can only use ADR if they are aware of it and its advantages. Further work should therefore be done to ensure that Member States publicize and promote the ADR mechanisms that exist in each particular state. The courts and other institutions where potential litigants may go when they have a grievance initially, for example, citizen advice services, trade bodies or consumer protection bodies should be charged with such publicity / promotion. In addition, it should be considered whether lawyers should be required to discuss with their clients the possibility of using ADR. For example, in England and Wales, it is a requirement under the Solicitors' Code of Conduct (the regulatory code governing all solicitors in the jurisdiction) that a lawyer must discuss with a client at the outset of a case all the options available to the client, including whether mediation or some other form of ADR mechanism may be more appropriate than litigation, arbitration or other formal process. Also, if the case does go to court, the lawyer must confirm in writing, at a very early stage in the proceedings, that he has explained to his client the need to try and settle the case and the options available.

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?*

16.1. No, the parties should not be required to enter into a collective dispute resolution mechanism in all cases. The success of most ADR mechanisms for the most part, depends upon the process, actually being consensual. Forcing unwilling parties to use such a process is unlikely to produce a satisfactory result, meaning that the time spent and costs incurred in going through the process will be have been wasted. Further, experience shows that existing legal

rules imposing such a mandatory mediation proceeding have been of no avail (labour law in some jurisdictions provides for such an obligation) and have regularly become only another bureaucratic hurdle to be surmounted before filing a claim before the Court.

16.2. Similarly, in cases where parties need to establish their legal rights or obligations by way of a court process, mandatory ADR would again waste time and cause the parties to incur necessary expense.

16.3. However, as stated in the response to Q 15, it should be possible for the court to penalise those parties that unreasonably fail to undertake ADR in appropriate cases.

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

17.1. As ADR is (and should remain) a voluntary process, the parties will decide which mechanism to use and, assuming they have sufficient information to make an informed choice, they will therefore have satisfied themselves that the chosen process is as fair as possible.

17.2. Member States can assist by ensuring that the institutions / individuals that provide the ADR mechanism the parties have chosen operate fairly, efficiently and professionally, perhaps by way of certification schemes.

17.3. The courts should be the ultimate arbiters of fairness, particularly in relation to any ADR mechanisms that are operated by public authorities. Court supervision could however possibly be restricted to important matters such as ordre public and violations of fundamental procedural rights

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?*

18.1. Yes, it should be possible (although not mandatory), depending on which system of ADR the parties choose. Provided the parties are provided with adequate information on the process to make an informed choice, it is up to the parties to decide which mechanism to use and whether to make the outcome is binding. Some outcomes will by their nature be binding, for example,

arbitration proceedings, or the parties may agree to enter into a settlement agreement following mediation, which is a contract like any other, and should be capable of being enforced like any other contract (as now provided for in Directive 2008/52/EC.)

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

19.1. The most important issue, as stated above, is the further work that needs to be done to ensure that Member States publicize and promote the ADR mechanisms that exist in each particular state. Potential litigants can only use ADR if they are aware of it and its advantages. Publicity should be given to the ADR systems and legal and other advisers should be required to advise potential claimants about ADR mechanisms and the benefits of using them before commencing 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?*

20.1. It is essential that any reform established collective actions only as the recourse of last resort if all other attempts to obtain redress have failed. Accordingly, safeguards should be in place to ensure that adequate attempts have been made to seek a consensual solution to claims for collective redress. One possible option is to establish a permission phase which claimant's or representatives should obtain before the claim can proceed. Such a stage should not necessarily involve a detailed merits review but assess whether the parties have reasonable attempted to resolve the claims without recourse to litigation and assess whether the claims pass a threshold merits test (including, by way of example, an assessment of the group of claimants and whether the claimants should proceed by way of a collective action, whether the claimaints have an arguable case and whether there is a public interest in the claims proceeding on a collective basis).

20.2. The advantage with such a permission stage is that those claims that pass this test can proceed perhaps with fewer safeguards than might otherwise be required if all collective redress actions were allowed to proceed.

20.3. In any event, the following safeguards would be essential:

- cost shifting (in both directions) to deter unmeritorious claims and encourage defendants to settle strong cases early;
- disclosure of contingency fee agreements and third party funding, with uplifts only recoverable from the claimants and not as an additional cost from defendants and operating in a quasi or fully regulated environment;
- rigorous case management by the court, ideally with assigned specialist judges supported by case management powers including cost capping orders, disclosure by application to the court only and discretion to adjust the cost shifting taking into account the conduct of the parties and their lawyers.

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?*

21.1. Yes. There should be no exceptions, save for the general discretion of the court (see para 20.3 above).

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).*

22.1. Experiments to allow representative bodies to bring representative actions have not proved successful (see for example the experience of "*Which?*" in the UK in relation to its replica football kits action and its subsequent views on the merits of such proceedings). However, for the efficient administration of justice, if collective actions are to be permitted on an EU wide basis, a model should be established to allow a special purpose trust (or similar entity) to bring proceedings on behalf of all claimants (who have chosen to opt in to proceedings)), with the trustees (from among the claimants) being given power to make decisions affecting all claimants and have power to bind all claimants to settlements (possibly with the approval of the court as an additional safeguard).

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 recognized as representative entities by a competent government body or should this issue be left to a case-by-case assessment by the courts?*

23.1. See our comments in paragraph 20 above. It is essential that the judge has strong case management powers and is trained and encouraged to use them. It is also important that appellate courts support the case management decisions of the judge.

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

24.1. As noted in our answer to Q 20 above, it is essential that collective actions are seen as the last possible recourse and the efforts of the Commission should be directed to achieving that aim. Thus, the Commissions action should ideally be limited to establishing clear and effective options for seeking redress in alternative ways. This may need to operate by way of menu of options including:

- direct negotiation between the parties;
- voluntary settlement schemes promoted through industry associations or established as part of a settlement with, or mitigation of fines imposed by, the relevant regulatory authority (as to which see paragraph 24.4 below);
- conciliation or mediation, ideally with assistance from a trade association, ombudsman or independent party;
- the option of referral to a binding decision by an independent third party through expert determination or arbitration (by an arbitrator, dispute resolution board, or ombudsman), as an alternative to starting a judicial procedure.

The second to the fourth option above can contribute sector-specific expertise, encouraging appropriate and proportionate redress, within a process ideally designed to deliver speed and efficiency.

24.2 Many dispute resolution mechanisms encourage disputes to be channeled in a specific *sequence* of steps (sometimes also with more sophisticated variations of the options outlined above).

24.3 Each Member State should have *a unified national structure* for dispute resolution pathways, so as to provide (a) consistency of operating standards, (b) necessary sectoral variations within a single model, (c) clarity, familiarity, and ease of identification and access for users, especially consumers. An example is the Netherlands Geschillencommissie model, which covers many sectors within a single overall structure, and operates efficiently and effectively. This approach would build on the currently diverse national systems, but enable them to align within a unified pan-EU framework.

24.4 A harmonized regulatory requirement for a number of regulated sectors could include a voluntarily acceptance to a specific ADR mechanism that has been delegated to an expert panel such as the Dutch Geschillencommissie. Failure to comply would be deemed as an infringement of the regulatory requirements. Access to justice is safeguarded by the fact that the consumer/customer's decision to start the ADR procedure is optional.

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

25.1. Providing adequate funding for collective redress mechanisms without setting wrong incentives (over-incentivisation) is one of the main problems in this area. It is hard to conceive an adequate balance. There is no clear learning on how to solve this issue. Public funds might be a solution but funding by the state of litigation that would not take place if there was no public funding (or might take place in any event) raises the legitimate question why the general public should facilitate the compensation of the few. If deterrence was the goal of collective redress (which we believe it should not), the use of taxpayers' money would be justified but that would not justify the use of such funds in pursuing collective actions.. If deterrence is the objective public enforcement by authorities is superior and preferable to private enforcement.

25.2. If public funding were chosen (which we do not recommend), additional safeguards would be required to mitigate the risk of abusive litigation, including judicial supervision, a right to recover. This should include but not be limited to greater supervision to avoid the potential abuse of public funding,

the right to the public purse to be reimbursed in full from the cost shifting principle and from and damages secured.

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?*

26.1. Yes, subject to adequate precautions to avoid abuse, whilst ensuring fairness to the claimants. However, the fact that such non-public funds have not come into existence by themselves is a clear market answer. Obviously, collective redress is not an attractive investment.

26.2. The same applies for legal cost insurance. There is a market for legal cost insurance for a wide range of legal disputes (eg. liability for car accidents), but no such market has developed for collective redress legal cost insurance.

26.3. Changing this requires creating an incentive to invest in collective redress cases. However, it is hard to conceive of a solution where such market is stimulated without increasing the risk of abusive litigation. The alternative to creating such an incentive is providing for public funding (cf. answer to Q25 for our view on public funding).

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?*

27.1. Representative entities should be entitled to recover reasonable legal costs for the proceedings under the ordinary rules on the bearing of costs ("British rule", "loser pays-rule") as any other claimant. The question of giving extra incentives by either allowing them either to recover part of their administrative costs or entitling them to a share in the amount awarded ("quota litis") is a very difficult one. One the one hand, representative entities most likely will not get active at all if there is no financial benefit / incentive. This is evident from the Member States' practice (cf. the non-existence of any cases regarding the disgorgement of profits by associations under section 34a of the German Act against restraints of competition). On the other hand, granting the representative entity a share in the amounts awarded might open the gate for abusive litigation (the "US contingency fee scenario").

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

    28.1. No. As stated above, providing adequate funding for collective redress instruments is one of the main issues in that area. Internal funding by the claimant (individuals or representative entity) requires overcoming the phenomenon of rational apathy by setting incentives without provoking abuses. As stated above, external funding will only work if collective redress is made an attractive investment (for insurance companies, litigation funds, etc.). The market obviously does not regard it to be one. How to stimulate this market is an issue for which we do not see an adequate and ready answer.

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 of these problems have and what counter-strategies were ultimately found?*

    29.1. No, to our knowledge there are no such specific problems. With regard to the question of jurisdiction, there is a trend in competition law litigation that claimants try to choose forums which they believe favourable for them. English and German law is perceived to be rather claimant-friendly. However, this is an issue of the substantive law and not one of the common rules on jurisdiction, recognition and enforcement of judgements under Regulation (EC) 44/2001.

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

    30.1. If collective redress measures were to be introduced, special rules would be required to achieve a balance between the convenience of a single venue for collective redress actions and forum shopping with claimants seeking to bring proceedings in the place considered to be the most "claimant friendly". By way of example, an appropriate forum test could be established to ensure that proceedings were pursued in the venue most appropriate taking into consideration the domicile of the defendants, the availability (and language(s)) of documents, location of witnesses and the location of the majority of claimants. Additional rules could be developed to allow for the joinder of collective redress actions involving different parties into a single proceedings or the severance of actions if the issues between certain claimants and defendants be heard in a more appropriate forum. Until such issues are

resolved, however, it would be premature to attempt to establish any EU wide collective action.

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

31.1. No, we do not think that any other special rules relating to cross-border situations in the field of collective redress are required beyond out comments to Q 30 above. ADR mechanisms are quite capable of dealing with cross-border situations since they rely on the initiative of the parties themselves. We do not see any peculiarities of infringements of EU legislation by online providers for goods and services that would warrant special rules on cross-border situation in the area of collective redress.

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

32.1. The principle of voluntary and individual dispute resolution must not be forgotten: private claims for compensation are necessarily individual claims. The EU should be careful not to "socialise" litigation which, however, would be an almost unavoidable consequence of collective redress (see the financing problems). To balance the disadvantages of individual claims for compensation in cases with a great number of damaged persons (as identified by the Commission) the regulatory actions should be extended and harmonised throughout the EU by including the restitution of damage into the catalogue of regulatory measures. Where appropriate authorities should focus on compensation rather than punitive measures or combine both in a balanced way. This system may reduce the obvious problems of collective redress, namely the danger of abusive claims, inefficiency and high cost. It might also ensure that the infringer will not be excessively "punished" by both huge fines and payments for damages.

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?

33.1. If there were to be any EU initiative at all (cf. above Q4), it would seem prudent to restrict the Commission's work to the two areas identified above, so that the general issues and any potential problems can be identified, discussed

and potential solutions found, before expanding into other areas that would undoubtedly have their own specificities.

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?

34.1. Apart from any initiative on ADR, which could be applied more generally, collective redress initiatives should not be of general scope. Each sector / policy area is different and whilst lessons learned and experience gained from the Commission's work in the competition and consumer protection areas will be of assistance when looking at collective redress in other fields, any such initiatives should be considered in detail in relation to specific policy fields to ascertain whether there is a need for such initiatives in those areas and how such initiatives would work.