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# RESPONSE TO PUBLIC CONSULTATION ON COLLECTIVE REDRESS

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We welcome the opportunity to provide the following comments in response to the European Commission's Public Consultation on Collective Redress. We have served as lead plaintiffs' counsel in some of the largest, most high-profile US antitrust class actions, including *In re Visa Check/MasterMoney Antitrust Litigation* where we recovered the largest antitrust settlement in US history. We have likewise successfully served as defense counsel in an equal number of prominent class actions. As US antitrust practitioners with experience in both bringing and defending class actions, we believe we have a unique and balanced view on the benefits and shortcomings of the US class action system. With this in mind, we have set forth below in response to select questions in the Commission's Consultation Document our opinions on how best to effectuate in the EU a successful collective redress system for competition claims.

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

The introduction of a collective redress system for competition claims would greatly supplement the enforcement of EU competition law by (i) allowing the burden of enforcement to be shared between the Commission and NCAs on the one hand and private plaintiffs on the other; (ii) encouraging plaintiffs that could not otherwise afford the cost and risk of bringing their own competition claims to bring their claims collectively with, or on behalf of, other similarly situated parties; and (iii) providing additional deterrence to would-be wrongdoers through the increased exposure inherent in a collective redress system.

We believe that a collective redress system is particularly well suited for competition claims because unlike a typical business transgression, a violation of competition law has ramifications that extend well beyond the party bringing a private action for damages. It can, and usually does, adversely impact entire industries with wide-scale consumer consequences. For these reasons, competition laws should be treated with special solicitude and their active enforcement highly encouraged. In the US, Congress recognized early on that the government would not have the resources to adequately enforce the antitrust laws alone. It enlisted the support of the public to serve as "private attorneys general" to assist in the enforcement. Congress did so through the bounty of treble damages, attorneys' fees and costs awarded to successful plaintiffs.

Private antitrust plaintiffs heeded the call to service and have, as Congress hoped, become an indispensable part of US antitrust enforcement. The number of private antitrust actions for any given year dwarfs the number of government actions, in some years by as much as a factor of 20. There are numerous benefits to the private attorney general model. Perhaps the strongest is that it provides a much needed supplement to the significant resource constraints of the government. The government only has so many attorneys and so much money it can devote to antitrust enforcement. These constraints often delay government action, or more importantly, cause the government to choose very carefully the cases it brings. There is a definite resistance to difficult cases. The government usually chooses to pour its limited resources only into those cases it views as clear winners.

Private actions also provide antitrust victims with a vehicle for obtaining compensation for their harm, and serve as an additional level of deterrence by exposing violators to significantly increased monetary risk. In the US, the class action device has proved essential to maintaining

the private attorney general model and all of these associated benefits. Without it, there would likely be very few private antitrust actions brought by consumers. They are just too risky, too expensive, and typically offer too little reward for any individual consumer to bring alone. There is no question that adopting a system of collective redress for competition claims will significantly increase the level of enforcement in the EU and provide a greater deterrence for those considering violating the competition laws.

**Question 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?*

The most important role a private collective redress system can play is as a supplement to government enforcement. This means that it addresses anticompetitive conduct that the government does not have the resources or inclination to challenge. It also means that the private actions seek compensation for those directly injured by the conduct but for whom the government is not seeking redress. What it does not mean is that private actions in any way usurp or interfere with government enforcement, or tax the courts through duplicative and superfluous proceedings. Therefore, any parallel private and public proceedings must be coordinated in a way to effectuate maximum enforcement with public enforcement taking precedence over private enforcement.

So, if the government is investigating alleged misconduct, or has actually filed suit, any private actions challenging the same conduct should be controlled in a way so as not to undermine the government proceedings. This could involve staying the private actions or limiting their reach until the government proceedings are complete. In the US, courts have been particularly sensitive to government concerns that parallel private actions not upset ongoing government proceedings and have acted accordingly in controlling such actions until the government proceedings are complete.

It is also critical that any private collective redress system not interfere with the viability of any kind of amnesty system set up to encourage actual or potential wrongdoers to voluntarily come forward. These programs are growing more and more popular and effective in assisting governments to detect and enforce anticompetitive conduct, particularly illegal cartel activity. But the threat of being ensnared in a private action serves as a real deterrent to those thinking about participating in these programs. Amnesty from government prosecution may not be worth the ensuing exposure from private litigation. The US has dealt with this potential conflict with the Antitrust Criminal Penalty Enhancement and Reform Act which limits liability in private actions to single damages (from treble damages) for those cooperating in government amnesty programs. It offers similar reprieve for those who publicly report -- under the National Cooperative Research and Product Act -- joint efforts with competitors relating to standard setting or research and development activity.

Of course, the *quid pro quo* of relegating private actions to the back seat in the enforcement arena is that private parties should be able to reap the fruit of any successful government proceeding. Under both US and EU law, private parties are to some extent able to rely on successful government prosecutions. In the US, they also are able to obtain access to the defendants' files on which the government relied in its proceeding. Again, and for good reason, there may be occasions to limit this access so as not to chill voluntary submissions under leniency programs. The key is to strike a proper balance of supplementing government enforcement without undermining its effectiveness.

**Question 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?*

In any legal system, the key benefit of private enforcement is to enable those directly injured by the challenged conduct -- either individuals or businesses -- to seek redress for their injury directly from the responsible parties. Giving representative organizations an active or exclusive role in the litigation runs the risk of interfering with this kind of direct challenge and creating an unnecessary layer of bureaucracy and separation between injured and offending parties. This would seem to defeat one of the goals pursued by the EU to simplify and make more efficient the enforcement of EU competition law.

There are additional problems associated with a representative organization model of collective enforcement stemming from the fact that the interests of the representative organization may not always align with those of the injured parties the organization is supposed to represent. An organization's institutional interests, resources or public relations considerations may prevent it from aggressively pursuing compensation on behalf of the victims of violations of EU law. They may prevent the organization from taking on a particular case in the first place for reasons that have nothing to do with the merits of the legal challenge.

Enlisting representative organizations to serve as a driving or dominant force in a collective redress system is also inherently problematic and likely unrealistic. That is because with a union of 27 Member States, there will be countless representative organizations representing various and diverse constituencies, interests, objectives and cultures. We expect that there would be great difficulty in finding for any given case a representative organization that can span these divides and represent a single group of individuals and businesses that are similarly situated in terms of the challenged conduct.

Representative organizations such as consumer groups or trade associations can and should play an important role in supporting, advising and encouraging individuals and businesses in pursuing their rights under the law. These organizations can also serve as additional class representatives to ensure they have a seat at the table to ensure their members' interests are well accounted for. We always try to include such an organization as a class representative in the class actions we bring, and there are special rules for doing so under US antitrust law. However, having these organizations serve as the only or dominant plaintiff is inadvisable and unworkable. Private enforcement is best effectuated

where the directly injured parties are the driving force and direct beneficiaries of the collective action.

**Question 11.** *In your view, what would be the defining features of an efficient and effective system of collective redress?*

We believe an effective and efficient system of collective redress must include at least some, if not most, of the following features.

**Opt-Out System**

For all practical purposes, a collective redress system for competition actions will unlikely succeed unless it is based on an opt-out system where all potential claimants are automatically presumed to be part of the action. An opt-in system is simply unrealistic because it would impose on the plaintiffs' counsel -- before filing suit and without any assistance from the defendants -- the unworkable burden of locating and signing up all of the parties that potentially have been injured by the defendant's conduct. This runs counter to the reality that those best positioned to identify potentially injured parties are the defendants themselves since the victims of their anticompetitive conduct are in most cases their own customers.

Adding to this perverse dynamic would be the fact that the plaintiffs' counsel would be required to engage in this exercise and shoulder this burden, which can be extremely costly, when it is not even known whether or not the action will proceed. In addition, potential claimants would be presented with an undeveloped case before all the evidence has been uncovered, and before the extent of the loss they may have incurred, often unbeknownst to them, has been determined. In this way, requiring potential claimants (assuming they can be found) to affirmatively decide before a case is filed whether they want to participate would almost certainly result in very low participation rates. This would seem to cut against the principal objective of a collective redress systems -- dealing in a single proceeding with the common claims of all similarly situated parties against the same defendants for the same alleged misconduct.

Moving the timing of the opt-in decision to the end of the case after discovery is completed, merits issues are decided or a settlement is reached would cure some of these issues. But it would not meaningfully fix the central problems inherent in an opt-in system -- reduced incentive by plaintiffs' counsel to bring the action; uncertainty in the size and scope of the class; greatly reduced plaintiff participation rates; and greatly reduced deterrent effect on potential wrongdoers. In short, the central benefits of a collective redress system largely would be undermined if it did not proceed as an opt-out system.

**Limitations on Loser-Pays System**

There is no doubt that the loser-pays rule is an extremely powerful disincentive to bring a collective action. While discouraging frivolous actions is certainly a worthy objective,

the problem is that it is just as likely to discourage meritorious claims. This is particularly true with competition claims which, at least in the US, are significantly longer and more expensive than other commercial claims. Collective actions further add to the complexity, length and cost of bringing a competition claim. A loser-pays system will therefore seriously interfere with the viability of a collective redress system for competition claims. Very few will be willing to take the risk even for strong claims.

One way to avoid this outcome but at the same time retain the useful "screening" function the loser-pays rule serves would be to limit its application to frivolous claims (*i.e.,* those instances where the Court determines that a party or its counsel are acting with the intent to harass the adverse party or drive up litigation costs, making arguments without any basis in law or fact, making statements that are unsupported by reasonable belief or factual investigation, or asserting claims that are inherently unreasonable or implausible. In the US, Rule 11 of the Federal Rules of Civil Procedure provides for a somewhat analogous vehicle through which a party can be sanctioned for frivolous filings. While the threat of such a sanction is often made, the reality is that courts impose it only in the rarest of circumstances. Perhaps a more liberal granting of such a sanction could be a compromise procedural tool to replace the strict application of the loser-pays rule. Applying the loser-pays rule in this way would achieve the goal of deterring frivolous lawsuits without discouraging bona fide private efforts to enforce EU law.

**Contingency Fees**

The ability of plaintiffs' counsel to obtain a percentage of any recovery, or to receive some positive multiplier of their actual fees if successful, is critical to the viability of any collective redress system. That is because for most collective actions, the plaintiffs will be in no position to cover the costs and fees of the suit. It will be up to the lawyers to carry the financial burden and risk. But without the possibility of a significant recovery, there will be very little incentive for plaintiffs' counsel to take on the significant risk and expense of these cases.

The significance of shifting the cost and risk of collective actions to plaintiffs' counsel tends to be underestimated. Indeed the criticism leveled at contingency fees seems to assume that they are a low-risk path to a big payday, and that only defendants incur significant costs and risks in collective actions. This fails to recognize the considerable costs associated with these types of actions, particularly those involving competition claims. A prime example of how significant these costs can be is our *In re Visa Check/MasterMoney Antitrust Litigation* case.

Over the six-year life of that action, the plaintiffs spent roughly $19 million in costs and 250,000 hours of attorney time in a case that involved the review of five million pages of documents, 15 expert depositions, 400 fact depositions, 54 expert reports, and additional document discovery from roughly 200 non-parties. The parties ultimately settled that case for more than $3 billion in compensatory relief and injunctive relief valued by the court at more than $20 billion. Without the ability to obtain a contingency fee for such a successful outcome, it is highly unlikely that we, or any other law firm, would have been

willing to take on the costs and risks of litigating that class action.

The most common criticism of contingency fees is that it misaligns the incentives of the lawyers and the client. Plaintiffs' lawyers supposedly rush to settle for amounts sufficient to secure a significant fee award but that are insufficient to provide any meaningful relief for the client. We believe that the exact opposite is true; that tying the ultimate fee award to the amount ultimately recovered best aligns the incentives of the lawyers and clients. What better way to encourage the lawyers to work for the best possible recovery than to reward them with a percentage of that recovery.

In any event, under the US system, which could be similarly applied in the EU, any final settlement must be approved by the court under a system by which the parties must demonstrate that the settlement is fair and reasonable to all class members. As part of this process, the court must also approve as fair and reasonable the portion of the settlement that is awarded to counsel as fees. During this process, there is ample opportunity for any interested party to file objections to the proposed settlement and fee award. In most cases, numerous objections are filed and ruled upon by the court. In fact, there is a cottage industry that has developed in the US of "professional objectors" whose sole practice is objecting to class action settlements. So, any real concern about contingency fees leading to improper settlements can be readily accounted for through the adoption of such a court approved settlement procedure.

**Discovery**

The U.S. experience has shown that the extremely liberal discovery rules -- which basically require the production of all documents that might possibly be relevant to the action -- have been a principal factor in the skyrocketing costs of litigation. This has only gotten worse as electronic communications have become the norm. It is not uncommon for a typical antitrust case to involve several million pages of discovery and millions of dollars of costs for collection, production and review. Unfortunately, discovery is a critical component of competition cases, particularly cartel cases, where the evidence of misconduct is uniquely in the hands of the wrongdoers.

The US system needs to do a better job to rein in the discovery abuse and excesses that have plagued litigation here. On the other hand, the limited discovery available in most Member States is a significant deterrent to private enforcement. It presents yet another obstacle for plaintiffs to overcome in their pursuit of a successful competition claim, an obstacle exacerbated in the collective redress context where the costs and risks are magnified because of the size of the action. A successful system in the EU will have to provide for more discovery, though not in US proportions, to allow private enforcement to really take hold.

**Treble Damages**

The mandatory award of treble damages provides another powerful incentive for private parties to incur the risk and cost of bringing competition actions in the US. It is not as

critical to fostering a viable collective redress system as some of the other factors, but it is an important component of the US private attorney general model. Outside the US, there is strong resistance to treble damages because of the concern that it over-punishes wrongdoers. However, this concern ignores that the majority of cases settle for less than single damages. It also ignores that large chunks of antitrust damages are not even subject to recovery because of statute of limitations issues, indirect purchaser issues, and the overall difficulty of proving and calculating damages.

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

As discussed above, the biggest contributing factor to the lengthiness and costliness of US litigation is the discovery free-for-all that permeates most cases, particularly antitrust class actions. To whatever extent the EU moves closer to an American-styled antitrust class action system, it should be careful to tightly control the discovery process. This does not mean limiting the ability of plaintiffs to obtain the defendants' internal files and communications, or to depose their key executives. Without access to that kind of discovery, it will be extremely difficult for plaintiffs to prove their case, particularly when it involves a conspiracy. But there should be limits to the discovery and it should be closely monitored by the court.

The US system theoretically provides for this kind of tight control. For example, the Federal Rules of Civil Procedure presumptively limit the number of depositions that can be taken in a case. And in every federal case, a magistrate judge is assigned to specifically handle discovery disputes and monitor how the process proceeds. However, the courts generally leave it to the parties to work it out, leaving them ample room to demand from each other more documents and depositions than they actually need. The general tenor of the courts is to err on the side of more, not less, discovery. The exponential increase in the amount of electronic data produced by businesses and individuals has exacerbated this problem. The cost of collecting documents has gone down because it is significantly cheaper to collect and copy electronic data (compared to hard copy data). But the cost of reviewing these materials, which often run into the millions of pages even for medium-sized cases, has skyrocketed because of the sheer volume of electronic data that must be sifted through.

So in instituting a collective redress system, there should be a tight rein on discovery. There must be sufficient flexibility to provide plaintiffs with access to crucial evidence that is uniquely in the defendants' possession. At the same time, judges should have the power (and willingness to exercise it) to prevent the parties from abusing the discovery process. Limits should be placed on the timeframe from which documents need to be produced, the subject matter they cover, and the custodians whose files must be searched. There should also be limits on the number of witnesses subject to deposition or examination. The bottom line is that discovery should not be used as a vehicle by either side for driving up costs, delaying the proceedings, harassment, or engaging in so-called "fishing expeditions."

**Question 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?*

As discussed above, a successful collective redress system must involve an opt-out system of inclusion. This essentially entails (i) the filing of the action by one or more representatives of a broader class of similarly situated plaintiffs; (ii) a determination by the court that the class representatives and their counsel will adequately represent the interests of the class and that the evidence needed to prove liability and calculate damages will be the same for all class members; and (iii) the provision of notice to all class members informing them of the allegations in the case, any proposed settlement between the parties, and the opportunity to opt out and pursue their own action. This type of procedure presumes all class members agree to be bound by the collective action unless they affirmatively remove themselves. It differs sharply from an opt-in procedure which requires any plaintiff wanting to participate in the collective action to affirmatively join the litigation.

On the timing and method of notifying potential victims about the collective action, the US process works very well. Notice and the opportunity for opting out occurs only after the case is filed, significant document and deposition discovery have been made, and the court has determined that a collective action is appropriate. Plaintiffs have the burden (financial and otherwise) to provide the notice, but defendants must assist them in locating all potential victims since defendants typically have that information readily available. Notice is usually sent by direct mail or email to each potential class member, and by publication (through magazines, newspapers, trade journals, etc.) to capture those for which a current address cannot be found. The court oversees the process to ensure it is reasonable and fair and likely to adequately notify all potential plaintiffs in the pending action. The notice period can last up to six months or more to allow plenty of time to reach all affected parties and give them ample time to exercise their opt-out rights.

The opt-out system for antitrust class actions in the US has worked well in facilitating all of the benefits associated with a collective redress system. It maximizes the participation in the action of all potential class members. It provides a strong incentive to plaintiffs' counsel to incur the costs and risk of bringing these actions. It provides the most effective and efficient mechanism for litigating in one proceeding the claims of all similarly situated victims of the same anticompetitive conduct. And it provides the strongest deterrent against violating the competition laws.

**Question 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?*

There appears to be a deep-rooted concern outside the US (fostered by many inside the US) that

a collective redress system will open the floodgates of frivolous litigation brought by greedy and misguided plaintiffs' lawyers. This concern is not entirely unfounded. There have been numerous instances of frivolous class actions filed in the US. However, in the context of antitrust class actions, the impact of unscrupulous plaintiffs' lawyers has been very much overstated. Class action abuse in the US is largely driven by non-antitrust cases. Securities actions and business tort cases have traditionally been the more common ground for this kind of mischief. Antitrust cases are simply too risky and too pricey to engender the gush of frivolous filings found in these other practice areas. Nor are they the kind of cases that typically lack a meaningful objective as succeeding on virtually any antitrust case requires a showing of market-wide consumer harm in the form of higher prices, reduced output or diminished choice or quality.

In any event, a number of safeguards exist in the U.S. which have been successful in limiting abusive antitrust litigation and otherwise protecting the interests of the parties involved. First and foremost, defendants have three opportunities to get rid of a meritless case: (a) a motion to dismiss; (b) an opposition to class certification; and (c) a motion for summary judgment. These are three distinct hurdles antitrust class plaintiffs must cross before defendants even begin to be exposed to the risk of treble damages. In the antitrust context, it is extremely difficult for a frivolous case to get by these hurdles. With the Supreme Court's whittling away of *per se* antitrust liability (*Leegin*[1]), its introduction of a heightened pleading requirement for antitrust conspiracy cases (*Twombly*[2]), and its revitalized aversion to condemning conduct within regulated industries (*Credit Suisse*[3]), these hurdles are getting considerably higher. This is particularly true in light of the increased rigour with which more and more courts are evaluating the propriety of class certification (*Hydrogen Peroxide*[4]).

Serving as a further bulwark against abusive litigation is the battery of legislation designed to make it more difficult and risky to game the class action system. The Class Action Fairness Act, for example, has made it significantly more difficult to bring class actions in state court, the traditional hotbed of class action mayhem and illicit attorney recoveries. The Foreign Trade Antitrust Improvements Act -- particularly as recently applied by the Circuit Courts following the Supreme Court's *Empagran* decision[5] -- similarly hampers class action malfeasance by barring from US courts most kinds of foreign purchaser actions. Finally, there is the Rule 11 sanction against parties and their counsel for bringing frivolous cases. As noted, while woefully underutilized, Rule 11 offers what could be an extremely potent safeguard against the misguided class lawyer.

Finally, the courts are required to assess and approve any settlement to ensure that they are fair and reasonable to all class members. While the courts used to be a bit slack in carrying out this function -- often approving settlements which made the lawyers a lot of money but provided class members with nothing but a worthless coupon -- they have taken this responsibility much more seriously over the past decade. They are more closely overseeing the attorney fee awards

[1] *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007)
[2] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)
[3] *Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. 264 (2007)
[4] *In re Hydrogen Peroxide Antitrust Litigation*, 552 F.3d 305 (3rd Cir. 2008)
[5] *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004)

and generally insisting on some form of meaningful relief for all class members. And, as is evident in a federal court's recent rejection of the class action settlement between Google and various authors and trade groups over Google's plans for a broad-based digital library[6], they won't hesitate to strike down a settlement that is not up to snuff.

**Question 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?*

As discussed above, the loser-pays system is overbroad in its effect, serving to deter both frivolous and meritorious cases alike. A much better system to discourage frivolous filings is to more liberally apply Rule 11 type sanctions to those cases determined by the court to be without merit and an abuse of the legal system.

**Question 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).*

As previously discussed, a successful collective redress system will be best effectuated if the collective action is originated and driven by those directly harmed by the challenged conduct. There is certainly a place in the process for trade associations, consumer groups and other representative organizations that have members actually or potentially harmed by the misconduct. But these groups should not usurp the ability of direct victims to serve as named plaintiffs representing the interests of all similarly situated victims.

What constitutes a "direct" victim is subject to some debate. Under US law, there are typically two categories of victims that can seek relief under the antitrust laws -- direct purchasers of the defendants, and direct competitors of the defendants. Outside of these two plaintiff classes, it is very difficult to secure antitrust standing. The law is quite rigid on this point. For collective actions, direct purchasers are suitable to serve as class representatives because all of the purchaser victims are typically impacted by the challenged conduct in the exact same way -- overcharges. Competitors, by contrast, are not typically impacted in the same way. There are usually a whole host of differing factors unrelated to the challenged conduct, including their own business failings, which can impact their market performance. Accordingly, it would be rare, if ever appropriate, for competitors to bring collective actions.

It likewise would be problematic in most cases for so-called indirect purchasers to bring collective actions. Under US law, indirect purchasers do not have standing to bring antitrust claims (though there are some exceptions to this rule and numerous states permit

[6] *The Authors Guild, Inc., et al. v. Google Inc.*, Case No. 05 CV 8136 (S.D.N.Y., March 22, 2011)

indirect purchaser actions under their state antitrust laws). The rationale for the indirect purchaser bar is that once you move beyond the direct purchaser relationship, the damages flowing down the line become attenuated and difficult to assess. The party suffering the most direct injury, and in the best position to enforce the antitrust laws, is the one with the direct relationship with the defendant.

Permitting indirect purchasers to bring collective actions would be, in most cases, rife with issues unique to each indirect purchaser depending on how the product they had purchased was priced and otherwise handled upstream. Even more problematic would be the differing applications of the so-called pass-on defense. This is the argument a defendant can make that a purchaser was not harmed because it simply passed on to its own customers any overcharge it may have suffered from the defendant's misconduct. Under US law, defendants are precluded from asserting this defense. Such a bar goes hand-in-hand with the indirect purchaser bar. If indirect purchaser claims were permitted, the opportunity to assert the pass-on defense would also have to be permitted. It would be very difficult to bring a collective action under these circumstances.

**Question 23.** *What role should be given to the judge in collective redress proceedings?*

As discussed above, the court should be closely involved in every step of the collective redress proceeding. This should include at the very least, determining whether the case is appropriate to proceed as a collective action and whether the named plaintiffs and their counsel will adequately serve the interests of the broader class, overseeing discovery, and ensuring that any settlement is fair and reasonable to all interested parties. Active judicial oversight is especially critical in this context because of the broad impact a class proceeding can have. It is up to the court to protect the interests of absent class members who are not specifically represented by counsel. It is likewise up to the courts to ensure that the collective action not be abused to wrest unfair settlements for cases of questionable merit.

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

To recap, the following safeguards, most of which are inherent in the US system, should be part of any possible EU initiative to best effectuate a fair and efficient collective redress system: (i) minimum pleading standards that require some level of factual support for a potentially viable claim; (ii) strict requirements for permitting a case to proceed as a collective action; (iii) strict judicial oversight over discovery; (iv) an opportunity for summary judgment for either side after discovery is complete; (v) judicial oversight and approval of any settlement between the parties; (vi) the imposition of sanctions, including the payment of attorney's fees, for abusive or frivolous filings.

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

**and**

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

For most consumers and SMEs, paying lawyers' hourly fees and covering litigation costs is not an economically viable option for collective competition actions. If a collective redress system does not provide for some form of funding that goes beyond the plaintiffs themselves, it is unlikely that many such actions, if any, will be brought. Permitting plaintiff's counsel to fund the litigation by covering the costs upfront and permitting the award of contingency fees is an effective way to overcome the significant financial obstacles inherent in bringing these kinds of actions. That is how it is typically done in the US. It may, and likely does, contribute to greater abuse of the class action system. However, without it, there unlikely would be any system at all for competition claims. Furthermore, as already discussed, the risk of abuse from competition class actions is overstated, and is (or can be) checked by the significant cost and risk associated with these claims, the numerous opportunities for defendants to dispose of baseless actions, and close judicial oversight of the proceedings, including the imposition of strong sanctions.

Aside from lawyer-based funding, there appears to be a growing use of third-party funders that underwrite the costs of the litigation in exchange for some multiplier of their investment. This option should remain available to remove from plaintiffs the financial burden and risk of bringing these kinds of cases. However, we believe lawyer-based funding is the better option to balance the dichotomy of encouraging open access to the courts and discouraging abusive filings. It more directly aligns the incentives of the lawyers and clients. It places a more powerful check on frivolous filings by imposing on the lawyers the financial risk of failure. And it leaves the lawyers untainted by "outside" influence in serving the best interests of the plaintiffs and broader class.

The ability of a victim to assign its claims to another party (with greater financial resources) is a third option for funding these kinds of cases. Again, this is an option that is and should remain available, but is less preferable to lawyer-based funding. The biggest downside we see in this option is that it does not necessarily best serve the interests of the harmed party since the assignment takes place outside of any judicial oversight. Therefore, an unwitting or unsophisticated victim may receive in exchange for the assignment only a token of the remedy to which it would otherwise be entitled if it had been a party to the collective action. As discussed, the most effective and efficient collective redress system involves an action brought and controlled by those directly harmed by the wrongdoers.

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From our experience in both bringing and defending antitrust class actions in the US, we believe there is significant value in having a collective redress system for competition claims. It serves as an invaluable supplement to government enforcement which is often constrained because of resource limitations or political considerations. The US experience shows what a powerful supplement a private enforcement ("private attorney general") model can be. The US system is not perfect. There are flaws in its design which have to led to abuses (though less so in the antitrust context). But there are numerous checks and balances that can be employed to minimize potential abuse. For these reasons, we strongly encourage the EU to adopt rules and procedure that would facilitate a more widely available collective redress system, particularly for competition claims.

Respectfully submitted,

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