CENTRE FOR SOCIO-LEGAL STUDIES
Manor Road, Oxford OX1 3UQ
Tel: +44 (0)1865 284220 Fax: +44 (0)1865 284221
christopher.hodges@csls.ox.ac.uk www.csls.ox.ac.uk

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RESPONSE TO CONSULTATION
Towards a Coherent European Approach to Collective Redress

Professor Dr Christopher Hodges[1]

General Comments

Before answering the individual questions raised in the consultation, some general points should be made. The CMS Research Programme on Civil Justice systems has been researching collective redress and ADR for some years.[2] We jointly coordinate the Global Class Action Network of scholars.[3] The comments below are based on the current findings of our research.

The need for a solution—but for new thinking in identifying it

1. This consultation raises issues of fundamental importance for EU policy: what should European policy be on *public and private redress*, and what should be the inter-connection between those two elements? I fear that these issues require far more detailed and deep consideration than is envisaged in a consultation aimed at just private mechanisms of redress. I call on the EU institutions to undertake a fresh and detailed examination of *all* options for redress. The danger is that the European legal system will unintentionally adopt an alien and damaging policy on private enforcement of public norms when alternative models exist that are more effective and less risky.

2. Mechanisms for delivering redress for consumers and businesses, where the market has been unbalanced and citizens or businesses have suffered loss as a result of infringements of law, need to satisfy criteria of speed, cost, efficiency, effective outcomes, fairness, and due process.

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[1] Head of the CMS Research Programme on Civil Justice Systems, Centre for Socio-Legal Studies, University of Oxford; Erasmus Professor of the Fundamentals of Private Law, Erasmus University.
[2] See http://www.csls.ox.ac.uk/european_civil_justice_systems.php. Major outputs include: C Hodges, '*Collective Redress in Europe: The New Model*' (2010) *Civil Justice Quarterly* 370; C Hodges, 'Collective Actions' in P Cane and H Kritzer, *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010); C Hodges, *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe* (Hart, 2008); C Hodges, S Vogenauer and M Tulibacka (eds), *The Costs and Funding of Civil Litigation: A Comparative Perspective* (Hart Publishing, 2010); C Hodges, 'A Market-Based Competition Enforcement Policy' (2011) *European Business Law Review*, forthcoming; C Hodges, 'European Competition Enforcement Policy: Integrating Restitution and Behaviour Control. An Integrated Enforcement Policy, involving Public and Private Enforcement with ADR' (2011) *World Competition*, forthcoming; D Hensler and C Hodges (eds), *The Globalisation of Class Actions*, Annals of the American Academy of Political and Social Science, Vol 66, March 2009.
[3] See http://globalclassactions.stanford.edu

3. *Courts frequently fail to satisfy those criteria*, both for individual redress *and for collective action procedures* where they exist in European legal systems. Court-based collective procedures either fail to deliver redress, or take far too long and involve excessive cost.

4. New solutions that satisfy the criteria in providing effective, speedy and cost-effective redress do exist in some member States and can be developed further. They require the integration within a coherent system of regulatory, self-regulatory, non-court (ADR) and court techniques.

5. The current European debate focuses on two areas: consumer redress and competition damages. These two areas are distinct and *different solutions* are needed for each of them. This is because (a) the current arrangements for public and private enforcement differ between those two areas (and any other areas), and (b) evidence of the need for and effectiveness of existing systems is different between each sector.

6. For consumer redress, an integrated framework as described in para 4 above, resting primarily on regulators and ADR, will work well in the vast majority of situations—and in several Member States already does so. This approach should be further enhanced, and then evaluated to identify the need for further measures.

7. For competition damages, the solution is to adopt an entirely *new enforcement policy*. If privatized collective court procedures are added to the existing competition enforcement policy, the large financial incentives that will be required to sufficiently incentivise private intermediaries will inevitably produce unacceptable levels of capture and abuse. If, on the other hand, sufficient safeguards are imposed to prevent abuse, the mechanism will not deliver a sufficient level of redress through damages. The reasons are explained fully elsewhere.[4] A new enforcement policy that integrates public and private redress is needed.

8. For both the above areas, and any other area, an essential step before proceeding further is to discuss and evaluate what the enforcement policy (or policies) should be at national and EU level. For example, competition enforcement policy for public enforcement at EU level is based solely on deterrence theory. There is complete confusion over whether deterrence policy or restorative policy should apply for private enforcement of competition damages. In any event the policies are different and incompatible between public and private enforcement in the competition sector. In contrast, no EU policy exists on public enforcement of consumer protection law. Some national authorities pursue responsible or risk-based policies. There is no unanimity or cohesion. But national policy on private enforcement of damages for consumer redress is usually based on restorative justice, and not on deterrence. Where is the coherence in all this?

[4] C Hodges, 'A Market-Based Competition Enforcement Policy' (2011) *European Business Law Review*, forthcoming; C Hodges, 'European Competition Enforcement Policy: Integrating Restitution and Behaviour Control. An Integrated Enforcement Policy, involving Public and Private Enforcement with ADR' (2011) *World Competition*, forthcoming.

The need to recognize the causes of 'abuse'

9. European legislators are concerned that collective procedures should not introduce excessive costs, whether through litigation transactions or unjustified damages or settlements. It is widely thought that if safeguards are introduced into a 'European judicial procedure' that abuse can be avoided. But that is a false assumption. As explained in para 7 above, if a court-based collective procedure is chosen as the primary enforcement mechanism, there is an inherent and inescapable problem – *either the procedure does not work effectively, or it will produce abuse*.

10. The reasons for this can be clearly seen by considering the U.S. system and comparing it with the enforcement architecture of *all* European jurisdictions. U.S.A. made a deliberate choice to adopt a policy that public entities only rarely institute enforcement action: they only operate in the rarest cases.[5] Instead, enforcement is privatized for both private rights *and public norms*. The sole enforcement policy is deterrence theory, which acts on market operators by imposing substantial financial penalties (high damages, sometimes with punitive or triple damages, high procedural transaction costs, and no 'loser pays' rule but often a one-way cost shift in favour of plaintiffs).

11. Accordingly, if private actors and intermediaries are to be incentivised to take enforcement action, they are given very large incentives to take action – because they would not be incentivised to take action without such incentives. The large financial forces that are *inherent* in order to make such a system work inevitably produce various consequences. First, speculative investigations are incentivised, as means of general deterrence—a large volume of litigation. Second, the financial balance between plaintiffs and defendants is such that it can be cheaper for defendants to settle large actions (notably class actions) than to fight on the merits of a case: this is intended as a force for deterrence and saving court costs. Third, class action or other aggregation techniques multiply the costs.

12. What European observers see as 'abuse' in the American system are there *intended* consequences of a policy of private enforcement based on a *post facto* deterrence theory.

Why collective court procedures either do not work—or work too well

13. In contrast, European structures maintain a broad separation between public/administrative enforcement of public law norms and regulatory requirements, and private enforcement of private rights. It would be illogical to add to such a system additional techniques that encourage private enforcement of either public norms or private rights where other techniques already exist (such as regulation and ADR).

14. Features such as a 'loser does not pay' rule, class procedure, contingency fees etc are designed to increase the financial incentives for private actors to bring actions.

[5] For many years, 97% of antitrust enforcement is private.

The adoption of any one of these features will have an effect; together, they will have very powerful effect.

15. The evidence is that all of these features are undergoing reform.[6] If collective actions are added to that mixture, a powerful combination of all the main elements that inherently produce abuse will exist. Success fees are already permitted in the majority of European jurisdictions. Whilst contingency fees are banned in most EU States, they exist and some governments are considering permitting or extending them. 'Third party funding' is a market-led phenomenon that exists in several States and is clearly spreading, partly through market forces and partly as governments restrict legal aid and seek to maintain 'access to justice' (i.e. access to the courts—that policy sometimes ignores ADR opportunities) through privatized funding solutions. The most stable feature is that EU States maintain a 'loser pays' rule,[7] but it has been under sustained attack for some years.[8]

16. A further European feature is the empowerment of private sector bodies, often consumer associations, as means of enforcement of consumer law. Consumer associations can be highly effective watchdogs. But the evidence is that unless they have extensive funding (which applies only for the associations in Germany and Austria, which have State funding and so operate almost as public enforcers), consumer associations will not be effective as enforcement agents. They will not assume the financial risk,[9] have sufficient expertise,[10] or see it as their role to seek mass damages.[11] If private sector bodies are empowered to take collective damages actions, they are likely in future to outsource this to claims funders or lawyers, thereby producing a situation similar to USA. That will result in more damages claims, but with significant conflicts of interest and risks of abuse. It will produce fees or percentages of damages for intermediaries, reduce sums recovered by claimants, and increase the volume of litigation and cost of the courts.

17. The existing European collective court procedures clearly *fail* the critical criteria of speed and low cost. There is an increasing number of examples: the Deutsche Telekom case in Germany under KapMuG will take 10 years, the recent MMR

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[6] C Hodges, S Vogenauer and M Tulibacka (eds), *The Costs and Funding of Civil Litigation: A Comparative Perspective* (Hart Publishing, 2010). A further study on (third party) Litigation Funding will be published in 2011.

[7] It is even included in the European Small Claims Procedure: Regulation (EC) 861/2007, art 16.

[8] Two recent examples are the introduction of contingency fees for class actions in Poland, and the proposal in UK to provide for 'qualified one way costs shifting' in collective redress cases: see *Proposals for Reform of Civil Litigation Funding and Costs in England and Wales. Implementation of Lord Justice Jackson's Recommendations*, Ministry of Justice, Consultation Paper CP 13/10, November 2010.

[9] The UK association Which? has taken one collective competition damages case and said it will not repeat this, given that public regulators have power to act.

[10] The study on implementation of Directive 98/27 on injunctions for the protection of consumers' interests concluded that consumer organisations could only claim to be integrated into the enforcement of consumer law if they are professionalized, but that this situation does not currently exist: M U Docekal, P Kolba, H-W Micklitz and P Rott, *The Implementation of Directive 98/27/EC in the Member States* (Bamberg/Vienna, 2005). Thus, they have remained notably ineffective other than in Germany and Austria.

[11] The involvement of consumer organisations in enforcing regulation does not score highly if measured against standard criteria for regulatory legitimacy: R Baldwin, *Rules and Government* (Oxford: Clarendon Press, 1995).

vaccines case in UK failed after 10 years, the parties in current air freight competition damages cases expect to face litigation of at least 5 years at considerable cost, the Swedish class actions (almost all of which are against the government) are proceeding slowly.

18. In contrast, some 'regulation plus/or ADR' techniques have clearly *satisfied* the criteria of speed and low cost. Examples include the cases brought under the Dutch Class Action Settlement Act, the experience of the Danish Consumer Ombudsman since his new powers in 2009, and various cases negotiated by UK's telecommunications regulator Ofcom.

19. This indicates that a 'regulation plus ADR' approach is the *only* currently identified policy that can satisfactorily deliver solutions for dispersed mass low value losses. Court actions may be necessary in situations where 'regulation plus ADR' is not available, but is a very poor, expensive and slow solution.

20. *It is not possible to have a 'calibrated' response* by providing for a level of control over cost shifting or class action procedures so that there is 'just enough but no more' access to courts. *The size of the financial incentives in mass litigation is such that the mechanism either does not work effectively or it works too much*. Most of the existing collective procedures that exist in EU Member States are little used, because of the problems of funding and the costs rules.[12] But if those features were to be changed, the system would quickly attract many claims (a) that could be dealt within other ways and (b) in which the merits were lowered. Increasing the financial incentives would merely attract intermediaries to capture the procedures.

21. Policymakers have the ability to ban contingency fees by law. They have the ability to regulate third party litigation funding. They have the ability to change enforcement policies and to prioritise alternative options for collective redress than the sole technique of a collective/representative action. They should seriously consider taking all of those actions.

Better Solutions

22. Having said the above, Europe needs mechanisms that provide (a) behaviour control and (b) restitution (i.e. regulation and compensation), but without raising levels of enforcement or costs to excessive levels. So if court-based collective actions have many disadvantages, other options deserve to be considered.

23. If mass claims arise in the court system, judges need procedures to process them efficiently. So, where there is clear evidence of need in particular cases, a collective procedure is required. But unless there is such clear evidence, it is dangerous to adopt a court-based collective procedure as the *primary* method of

[12] An example is the recent Polish Class Action Law, which was deliberately designed to have various safeguard features, such as maintaining the loser pays rule, the ability for a defendant to request an order that the representative claimant post a deposit against the costs, the requirement that all claimants must claim the same amount in damages, the exclusion of non-pecuniary tortious claims, and a limit of 20% on contingency fees.

enforcement. It should be available, where there is evidence of need, as a *final option* after other techniques have reasonably been tried, if they are available.

24. Hence, before introducing features that inherently contain significant risks, it is important to consider (i) what the empirical evidence is for the level of detriment in a particular sector and (ii) what alternatives exist that might be effective and have lower risks. Such options do exist. The following is a brief overview: far more detail is available on (ii), but there is limited evidence on (i).

25. An integrated framework of enforcement can provide significant solutions, and already does so in some Member States. It comprises combining various elements into the right sequence:

    a. Integrating public and private enforcement techniques in a European way (which is the converse of the an American way).
    b. A strong framework of regulatory powers exercised by public authorities, including the ability to encourage or impose court-approved collective damages solutions in appropriate cases.
    c. A first dispute resolution stage of direct contact and negotiation over complaints between consumers, consumer associations, businesses and trade associations.
    d. A second ADR stage, in which various conciliation and arbitration techniques operate involving ombudsmen, compensation schemes, or business codes of conduct.
    e. A final stage of court proceedings that would be accessed only where other techniques were not reasonably available or have been tried and failed within a reasonable time.

26. Item b above has two elements. Public authorities should have the (optional) power to seek orders from the court for collective damage awards. But they should also encourage negotiated solutions with firms through enforcement policies that give discounts on sanctions if firms cooperate or voluntarily make restitution where infringements are established. That policy would encourage business sectors to construct ADR solution that would produce speedy and fair proposals for restitution: a panel of independent experts would verify the facts and the fairness of the terms of a proposal.[13]

The Specific Problem of Competition Enforcement

27. The current EU enforcement policy for competition infringements is based solely on deterrence theory and on imposition of fines by public authorities. The number of enforcement cases is low because they take on average 4.3 years: only 13 decisions and 7 unpublished cases have been processed under the 2006 rules.[14] The leniency rules are unjust in permitting some who have committed serious violations to escape any public sanction. The enforcement policy pays no attention to whether the market that has been unbalanced by the infringement has been

[13] Examples have already occurred.
[14] Dr Cento Veljanovski, 'European Cartel Fines under the 2006 Penalty Guidelines' Case Associates (2011), available at http://ssrn.com/abstract=1723843.

returned to balance or not. Indeed, after most enforcement actions the outcome is that the market will remain unbalanced; those who have obtained illegal advantages will retain some and those who have lost will not be compensated. The system is ineffective and unjust.

28. It appears that damages should be paid more frequently than they have been in the past. The mechanism proposed by DG COMP is to privatize damages, in collective situations by allowing collective damages actions. That will not solve the problem and it will merely create more problems, and continue injustice and high costs for markets and consumers. It is the wrong approach.

29. If one merely 'bolts on' private damages to a system of public fines, those two elements need to be integrated so that infringers do not either escape too much or pay too much, and so that the market is returned to balance. The current proposals simply ignore that requirement. In deterrence terms, there will remain either under- or over-deterrence in most situations, and the authorities responsible for maintaining the market in balance (or anyone else) will not know when either result occurs. Firms who face both high fines and excessive damages and costs would have rational arguments that the system offended the principle of proportionality and justice. Neither consumers nor competitors would be assisted.

30. As outlined above, the only way to incentivise private actors to seek damages claims will be to create such large financial incentives (for example through aggregation) that abuse and lack of control are inevitable.

31. The root cause of DG COMP's problems is its current inability to stand back and reconsider its enforcement policy. It should undertake a *de novo* independent review of:

    a. deterrence as the only enforcement theory,
    b. the current leniency policy;
    c. refusal to contemplate adopting either powers to order restitution or for sanctioning powers to be based around incentivising reductions in return for making restitution.

The questions below are answered in accordance with the policy set out above. It is unnecessary to answer all questions.

Q 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 answer varies from sector to sector. What is needed for each sector are: (i) empirical studies on levels of detriment, and (ii) studies on the scope for delivering redress through regulators, self-regulation and ADR.

Q 2 Should private collective redress be independent of, complementary to, or subsidiary to enforcement by public bodies? Private and public redress need to be part of integrated policy, and not independent elements. **Is there need for coordination between private collective redress and public enforcement?** Yes. It offends principles of justice and proportionality for there to be too great or too less

overall redress, and that demands that the totality of public and private redress needs to be examined in a coordinate fashion. **If yes, how can this coordination be achieved?** By an integrated enforcement policy in each sector. **In your view, are there examples in the Member States or in third countries that you consider particularly instructive for any possible EU initiative?** Yes, several. See paras 1-31 above.

Q 3 Should the EU strengthen the role of national public bodies and/or private representative organisations in the enforcement of EU law? If so, how and in which areas should this be done?
The answer may vary between sectors, and needs further analysis. In general, public enforcement and ADR satisfy the criteria of speed and cost in delivering redress, so should be prioritized over private enforcement. Enforcement by NGOs is only effective where the NGO has sufficient resource, and this only occurs in Germany and Austria. In most other Member States, consumer organizations are totally ill-equipped and inappropriate to deliver collective damages, and at risk of capture by private funders.

Q 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? Any 'action' should also satisfy the criteria of speed, cost etc set out in para 2 above. **Would your answer vary depending on the area in which action is taken?** Yes, see paras 1-31 above.

Q 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?
Sector-specific solutions are needed, depending on the points raised in para 24 above.

Q 6 Would possible EU action require a legally binding approach or a non-binding approach (such as a set of good practices guidance)? What is needed is new enforcement architecture and policies. This may vary from sector to sector. See para 8 above. **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?** Yes.

Q 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?
Yes. See above. The criteria that should apply to all redress mechanisms (regulatory, court, non-court) should be the same, and include: speed, low cost, effective outcomes, proportionality, as well as the principles of independence, transparency, ability to challenge, effectiveness, legality, liberty, representation that are included in Commission Recommendation 98/257/EC on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes and Commission Recommendation 2001/310/EC on the Principles for Out-of-Court Bodies involved in the Consensual Resolution of Consumer Disputes.

Q 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? Yes. Many court actions fail the criteria of speed and low cost. A new approach is needed.

Q 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?
Yes. See paras 1-31 above.

Q 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 and how have/could these problems be overcome?
Yes. The restitution powers of the public regulators such as the Danish Consumer Ombudsman (a regulator) and several UK regulators deliver effective outcomes, quickly and at low cost.
A number of ADR systems in various Member States deliver effective, low cost and swift redress in mass as well as individual situations. These should be learnt from and extended before creating a powerful, uncontrollable and damaging new legal tool.

Q 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?
Yes. See paras 1-31 above. This issue needs to be considered holistically with all public and private options.

Q 12 How can effective redress be obtained, while avoiding lengthy and costly litigation?
See paras 1-31 above.

Q 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?
If the enforcement policy of private redress is based on restorative justice, the principle should remain that any person should be free to choose whether or not to instigate a claim in his or her own name. There should be no distinction between individual and collective redress.

Q 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?
Cooperation arrangements between national regulators and ADR bodies, such as EEC-NET and FIN-NET.

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

Many self-standing and extensive ADR systems already exist in some Member States. These need to be extended. The existence of (a) an EU framework on ADR, (b) a national ADR framework and (c) transparency to the market and to regulatory scrutiny will operate as powerful forces for the creation and operation of effective ADR systems.

Q 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?
Yes in most cases. Claims that are resolved through ADR systems almost always reach solutions for both complainants and businesses more quickly, cheaply and effectively than courts. Experience indicates that if claims proceed though courts when they are suitable for ADR but there is no mandatory requirement, they are either not referred to ADR at all, or they are referred unnecessarily late. This indicates that strongly encouraging referral of suitable cases to ADR, in both the pre-action and action stages, can be sensible. Although a mandatory rule might be thought to require an amendment to ECHR art 6, there are ways of producing the effect without that, for example through an incentive in court costs.

However, not all claims are appropriate for ADR resolution: and courts should decide some claims in any event. Examples would be cases that involve important points of law or public policy, or those that involve many parties or, in some cases, complex evidence. It is important not to undermine the public and democratic forum of a state's courts, or the right of access by both claimants and defendants to that forum.

Q 17 How can the fairness of the outcome of a collective consensual dispute resolution best be guaranteed? Should the courts exercise such fairness control?
Many ADR and some regulators currently agree collective solutions through existing governance mechanisms. There should be a new form of oversight by the courts in appropriate situations, to evaluate fairness and to make the solution generally binding. But this may not be needed in many situations.

Q 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?
Agreements between parties reached through direct negotiation, conciliation or mediation are binding contracts. Decisions issued by properly accredited independent arbitrators, ombudsmen or courts should be binding.

Q 19 Are there any other issues with regard to collective consensual dispute resolution that need to be ensured for effective access to justice?
See paras 1-31 above.

Q 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?
See Appendix note on safeguards.

Q 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[15]? 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?

Loser pays should always apply. It is a well-established principle in all Member States, and around the world. The reason why it does not apply in U.S.A. (which is almost the only jurisdiction where it does not apply) is that the policy there encourages private enforcement of both public and private norms – which is not a policy of any European legal system. See C Hodges, S Vogenauer and M Tulibacka, *The Costs and Funding of Civil Litigation* (Hart Publishing and CH Beck, 2010).

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

Collective powers should be restricted to public authorities or, in those countries where public authorities do not take lead roles, a limited number of private sector bodies who normally perform enforcement roles and satisfy strict criteria. In the rare cases where collective litigation is allowed, the court should approve who is going to coordinate mass groups based on criteria.

Q 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?

The court should have oversight authority for the correct operation of all regulatory and dispute systems. The recognition of representative bodies should be subject to strict criteria: if it is important to prevent abuse, the response would be that bodies should be certified by government authorities. But the answer may differ from sector to sector, if greater flexibility is required and the potential for abuse is less of a risk.

Q 24 Which other safeguards should be incorporated in any possible European initiative on collective redress? See Appendix note on safeguards. The answer to which safeguards may be necessary depends on the situation from sector to sector and country to country, including what regulatory and ADR options are available, and what the risk is of abuse.

Q 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?

Collective redress by public regulators requires no additional funding, and can be achieved extremely cheaply within existing budgets if the authority has an appropriate enforcement policy.

Any private funding arrangement that gives rise to conflicts of interest and abuse should be banned. The spread of contingency fees should be scrutinized very carefully. Third party litigation funding should be regulated by legislation and by the courts.

Q 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?
The use of independent transaction-based funding should be carefully controlled.

Q 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?
The normal loser pays rules should apply. There is no reason to amend normal rules.

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

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

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

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

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

Q 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?
If – but only - there is clear evidence of need, and after a full review of all the options. See paras 1-31 above.

Q 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?
Sector-specific solutions are needed. See paras 1-31 above.

APPENDIX

SAFEGUARDS IN COLLECTIVE ACTIONS

CJS Hodges and R Money-Kyrle

This note is an overview of the safeguards and restrictions that are included within 'class action' laws across the world. A longer note with detailed substantiation will be available in due course.

Around 30 countries have 'class action' laws. They are all different in their functions and details, but all basically seek to enable a number of similar individual claims to be combined within a single procedure and processed by a court at the same time. Most laws follow, or are heavily influenced by, the class action model of USA, in which a single representative plaintiff represents all other claimants, whose claims are assumed to be the same and which are subject to a single decision.

The class action procedure in every country is subject to parameters and restrictions that limit its scope or mode of operation. It is rare to find explicit references to such restrictions being intended to function as anti-abuse mechanisms. But in practice many of the controls have that effect, and some were designed with that purpose in mind. Many of the restrictions also have other purposes. For example, the courts will find it difficult to decide cases within a single procedure if the individual cases are not identical, or sufficiently similar. Or there may be an intention to avoid flooding the courts with mass claims.

What is the abuse that it is intended to avoid?

Discussions over controlling abuse in class actions are fuelled by various features of the U.S. class action system. It is claimed that the U.S. class action system produces excessive volumes of litigation, that cases often have little merit, that if a case is certified by a court as a class action the defendants have little commercial alternative but to settle (known as 'blackmail settlements'). The system is claimed to encourage and fail to prevent frivolous, fraudulent or abusive claims, thereby wasting the resources of defendants and courts, leading to deleterious effect on the economy, and potentially bringing the legal system into disrepute.

It is not the purpose of this paper to examine whether those features do or do not exist: but they are noted as potential features that a European collective procedure would wish to avoid. The basic point is that it is the economic power of the U.S. class action system that gives rise to the concerns about abuse – the sheer amount of money involved, which is the main feature that gives rise to concern. The financial incentives are controlled by not one but several inter-locking features of the legal system and the class action rules: no 'loser pays costs' rule; one-way cost shifting in many statutes; no cost to plaintiffs; inventivised fees for intermediaries (in class actions, fees are awarded by the court and include reward for success); the possibility of punitive or multiples of normal damages, and so on.

For the purposes of this analysis, it will be assumed that the purpose of including safeguards in a collective mechanism is to inhibit or prevent abuse or other

undesirable features (collectively described as 'abuse') from occurring with use of the mechanism. The type of safeguard depends on the type of abuse that it is sought to guard against. That issue, in turn, depends on the underlying purpose of the mechanism itself. In a legal system in which different pathways may be used (courts, ADR, regulators), safeguards may be needed to control each pathway. What may be abuse in one legal system may be a desirable feature in another. The starting point for this analysis, therefore, is to define the purpose of the collective mechanism.

The first question: to decide on the purposes of collective redress, the available options, and the inter-relation between different procedures

In seeking to design a class procedure, the starting point should be to decide on the over-riding purpose and objectives of the mechanism. Only then can one logically proceed to examine the optional mechanisms and their design features. There is a considerable variation in the purposes of the class action procedures around the world. For example, some are intended to provide injunctive relief, whilst others are to deliver damages. Some address environmental issues, others address investor protection, or consumer protection, or competition law. These (and many other) different purposes will affect the design of the procedure, and the relevance of the controls and restrictions that are included.

Another key factor is the extent to which the procedure is intended to work: what is its intended operational capacity? The answer to that issue depends on factors such as the extent of the need for a mechanism (such as the number of instances or cases of unfair trading that need to be addressed), the availability and comparative efficiency of other mechanisms (such as whether cases can be handled by regulatory, arbitration or negotiation techniques), and the surrounding circumstances of the court system and procedure (how many judges and courts are available?).

The fundamental distinction that needs to be drawn in relation to collective actions is whether the procedure is essentially intended to deliver compensation alone, or whether it is intended also to provide a regulatory function through private (or public) enforcement of public norms. There might theoretically be some intermediate models somewhere between those two extremes, but that seems to be unusual within current practice.

By way of example, let us assume that the basic objectives are:

- Maintaining a balanced market, which necessarily itself involves removal of illicit gains, and restoration of unlawful losses;
- Encouraging virtuous behaviour;
- Sanctioning of unvirtuous behaviour.

These objectives do not all need to be delivered by the same mechanism. If the intention is that an individual litigation mechanism should deliver compensation, not behaviour control, then the mechanism need not be so wide-ranging or powerful mechanism as if it is intended to deliver both those functions. In the former case, behaviour control might be achieved either by different means, or by a combination of

several techniques (legal pluralism, with regulation, self-regulation, public and stakeholder impacts, liability, audit, and so on).

If (like U.S.A.) the liability system is intended to deliver both behaviour control and compensation, there are few options – basically just the private class action type. So if it is intended to provide a significant element of enforcement of public norms, the procedure needs to include certain features. The main features will be incentives to investigate and take action, limited barriers to taking action, a wide power to investigate evidence, and external and internal scrutiny of actions.

But if restoration alone is the objective of the private litigation procedure, there are various alternatives to delivering damages than liability claims through the courts: a range of ADR options, like ombudsmen, schemes of compensation, compliant and dispute resolution techniques involving codes of business practice, and so on, using broad arbitration and mediation mechanisms.

Hence, the main questions in relation to deciding what controls should be imposed are:

- Should a different procedure be used that would be preferable for the particular issue?
- Is the collective action, and its individual component claims, meritorious or frivolous, fraudulent or abusive?
- How extensive should the financial incentives and risks be for representative claimants, for members of the class, for claimants' intermediaries (lawyers or other funders), and for defendants?
- How extensive should procedural powers or controls be on access to evidence, or on expert evidence?
- Is a proposed settlement fair to the class, to the defendants, to non-class members and society at large? A particular risk is whether a settlement might be collusive as between claimant lawyers and the defendant.

Although some controls relate to detailed procedural aspects, such as the rules on the extent of access to evidence, in practice many of the controls concern financial aspects.

Controls for damages claims

This paper will summarise the general types of controls that are found in different types of class action procedures around the world. Controls are not always found in a national class action law, but the financial controls are often found in general rules on litigation procedure, or in specific rules on costs and/or funding of litigation. The focus of this list is on actions for *damages* rather than injunctions.

What follows is merely a list of control techniques, without illustration of analysis of the circumstances in which particular techniques might be found or might be combined with other techniques. This is also not an evaluation of how successful any individual technique, or combination of techniques, may be in practice: empirical evidence that would found such an evaluation does not exist.

List of General Collective Action Safeguards

1. Restriction in subject matter of claims

The procedure may be restricted to specific types of claims, such as to consumer claims only. It may also be important to ensure that safeguards are designed and alterable to the specific context, and the procedure is not generic and uncontrollable.

2. Restriction on forum or jurisdiction

There may be rules on which court may accept a case, such as depending on the claimants' or defendants' location or the place of the damage. In Europe, such issues are dealt with generically in the Brussels regulation on jurisdiction and enforcement of judgments.

In some jurisdictions, class litigation can arise simultaneously in different states over the same subject matter. This raises issues of efficiency and the risk of inconsistent decisions, and can complicate matters for the parties who are involved in several jurisdictions at once. The Canadian Bar has established a register of all class actions in the different provinces, to provide at least a level of information to parties and courts.

3. Restriction in who has standing to bring a collective claim

For example, should standing be one or more of a public official, an approved NGO, or any class members, or anyone at large. The rationale in restrict standing includes (a) only empowering trusted and accountable actors, (b) assisting the operation of a 'regulatory assistance' enforcement model in delivering restorative justice very efficiently, quickly and cheaply.

In practice, although various different people may be grated standing, the one who has the greatest financial resource and power is the one who will be most likely to be attractive to claimants and motivated to take action. Hence, in Brazil and Denmark and the United Kingdom, although individual class members and sometimes consumer organizations are empowered with standing, it is in those countries respectively the Attorney General, the Consumer Ombudsman and the Office of Fair Trading who are active in resolving collective issues.

It is a feature of European jurisdictions, and some Latin American jurisdictions, that consumer organizations or other civil society or NGO bodies, are granted standing. However, some governments have imposed constraints on the ability of such private organizations to act. Sometime the controls are contained in the legislation, and sometimes they are matters for the court to decide in individual cases, or for ministers. Such matters may include:

a. Does the association have legal form?

b. Has it been established for a certain time?
c. Do its formal governing documents include the ability and capacity to represent others, and authorize the particular type of class action envisaged?
d. Does it need and have approval from its members, or from the class of claimants?
e. Does it have sufficient representative capacity, i.e. enough members?
f. Does it have sufficient resource to fund and control a class action, and to cover any adverse costs liability?
g. What other bodies might be a better choice?

In UK the minister may only designate a consumer organization to bring competition 'supercomplaints' if it appears to her that the body 'appears to represent the interests of consumers of any description'[15] and it satisfies published criteria, which are:[16]

> 'that they represent the interests of consumers of any description, consumer bodies must also demonstrate that they fulfil the following additional criteria:
> (1) The body is so constituted, managed and controlled as to be expected to act independently, impartially and with complete integrity.
> (2) The body can demonstrate considerable experience and competence in representing the interests of consumers of any description.
> (3) The body has the capability to put together reasoned super- complaints on a range of issues.
> (4) The body is ready and willing to co-operate with the Office of Fair Trading (OFT), and/or with any other authority, body or person having responsibility for responding to super-complaints. In particular, the body agrees to take account of any guidance issued by the OFT on the making of super-complaints.
> (5) The fact that a body has a trading arm will not disqualify it from being designated provided that the trading arm does not control the body; any profits of the trading arm are only used to further the stated objectives of the body; and the body has established procedures to ensure that any potential conflicts of interest are properly dealt with.'

4. Pathway prioritization

This requires or encourages another dispute resolution pathway, such as ADR, to be used before a party can access the court. For those states who are subject to a fundamental right over maintaining access to the courts, such as ECHR art 6, there could not be an absolute requirement on prioritisation. However, incentives may exist to use alternatives, such as that they are quicker and cheaper than the courts (perhaps ironically, that would be an argument for maintaining cost and delay in court procedures). Court rules on costs can also be persuasive. In England and Wales, for example, a party who commences litigation when he should reasonably have first tried an alternative pathway may not be awarded costs if he wins, or even may be ordered to pay the losing defendants' costs. Persuasive effect of costs rules, eg in UK, Poland.

[15] Enterprise Act 2002, s 11(6)(a).
[16] *Guidance for bodies seeking designation as super-complainants* at http://www.bis.gov.uk/files/file50334.pdf, made under the Enterprise Act 2002.

Some class action laws incentivize ADR (especially mediation) during the class procedure, or specifically empower the court to direct that the parties will engage in an ADR procedure.

5. Specialist courts

There is wide recognition that the management of complex litigation requires judges who are experienced and specially trained. There may also be a wish to reduce the opportunities for appeal. An example arises in the Netherlands, where only the Amsterdam Court of Appeal has jurisdiction to deal with class action settlement cases.

6. Certification criteria

Almost every system specifies criteria that the court must apply in considering whether or not to adopt a class procedure. The paradigm list of criteria is the U.S. Federal Rule 23, under which the requirements are:

1. the class is so numerous that joinder of all class members is impracticable (*numerosity*);
2. common questions of law or fact exist (*commonality*);
3. the claims of the proposed class representative is typical of those of the unnamed class members (*typicality*);
4. the class representative will adequately represent the interests of the class (*adequacy of representation*).

In addition:

1. 'The prosecution of separate actions by or against individual members of the class would create a risk of
    A. Inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
    B. Adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impeded their ability to protect their interests; or
2. The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
3. The court finds that the questions of law or fact common to the members of the class dominate over any questions affecting only individual members (*predominance*), and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy (*superiority*). The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.'

Many class action laws include similar controls to the U.S., such as:

- a minimum number of individuals (eg 7 in Australia);
- all claimants must have the same interest;
- all claimants must have the same type of case.

The 2009 Polish law specifies that all claimants must claim the same amount in damages (as Chile provides for collective or diffuse damage cases). One reason for this rule is that proof of individual losses and assessment of quantum of damages can be extremely complex, lengthy and costly. A consequence of the rule is that claimants are forced to consider whether their claims can be simplified, and to negotiate amongst themselves to agree on what the fair level of loss should be. The procedure would not, of course, intentionally be available where detailed individual assessments are required.

7. Merits

Since one of the main objectives of an anti-abuse control will be to prevent claims that have insufficient merit, it may come as a surprise that a requirement for the court to review the merits of a case are not included in the U.S. or almost any other class action rule. The reason for the absence of such a rule in U.S.A. is that litigation is intended to function as a privatized regulatory control on business as well as a vehicle for compensating private rights, so the system positively encourages the commencement and investigation of claims, and especially of class actions. The U.S. certification criteria are, therefore, more directed at whether the procedure will be efficient for the courts.

An initial review of merits by the court may seem to be an obvious control to impose against misuse. It compares as a gateway mechanism with a requirement for initial leave of the court before bringing a judicial review. A possible test is whether the claims have ‘reasonable prospects of success’ or ‘

Some cases, however, may present greater difficulties than others. It may be straightforward to review the merits of simple consumer trading cases, but more difficult in other types of case. Where that is so, an initial evaluation of merits might turn out to be a significant investigation involving considerable cost and delay.

It is also important to consider both generic and individual issues. Some class action procedures are designed to bifurcate cases, by identifying and decide a generic issue (such as liability) first, and in a second phase determining individual questions (such as liability or quantum of damage). Some systems assume that all individual claims will have merit. However, it may be important to evaluate the merits of individual cases at the start, so as to ensure that the whole enterprise in fact involves cases with sufficient merits. Experience in England and USA has shown that what may appear to be serious class actions are not comprised of a sufficient number of viable individual cases.

8. Form of procedure: Opt in or opt out

It is sometimes said that an opt-out procedure will include more people, and hence it is a more efficient enforcement tool: that approach accords with the US policy on private enforcement. However, the position is more complicated than that, since in (some) US opt out certification class actions, consumers have to opt in at the end, after a settlement has been reached, in order to claim their entitlement from the settlement fund (and there is strong empirical evidence that consumers do not do so in many cases, since the sums involved are too small to be worth collecting). Some US class actions have mandatory opt out classes.

The opposing approach is a procedure under which all individual claimants have to opt-in to the collective procedure. That approach is supported on Constitutional grounds that individuals should be free to make their own decisions in choosing whether or not to assert their legal rights.

The Danish approach restricts the right to apply for an opt-out procedure to the regulator (the Consumer Ombudsman).

9. Ability to pay opponents' costs

In those jurisdictions that require losing parties to pay winners' costs, as all European states do, some rules require claimants to show that they have sufficient funds to satisfy this potential liability. Sometimes, the rule only applies where a defendant satisfies the court that there is a risk that the claimants will be unable to do so. The reason for the requirement is to maintain appropriate balance between the parties and confidence in the legal system's rules that those who put others to unjustified expense should repay it.

10. Notice and publicity

Rules usually specify that notice of the action must be given to possible class members, irrespective of whether the procedure is opt-in or opt-out. Sometimes the rules specify what form the publicity or notice should be, and sometimes court is given discretion over such matters. In some cases, notice is required at several, or different, stages of a case.

11. Control of experts

This type of control is more a matter for general civil procedure, but it has proved to be important in U.S. class actions, where decisions like *Daubert* have sought to reign in claimant attorneys' use of experts who have inadequate credentials or expertise, and where there may be suspicion that evidence may be influenced by commercial considerations. This problem does not arise in the procedure of civil law jurisdictions to the same extent.

A **s**imilar issue is whether the court is able to control the width and quantity of documentary evidence (discovery). Some countries prefer an inquisitorial procedure:

in Scotland an independent senior lawyer collects evidence for the court as its as Commissioner.

12. Judicial scrutiny of the fairness of settlements

This is an important governance issue, as the only democratic way of replacing the ineffective 'voice' of individual class members (who have limited or no actual involvement in a case) is by substituting the court (or independent trustees or scrutineers) for them in assessing whether or not to accept a settlement. An individual may be able to opt-out of a settlement, but that is an all-or-nothing decision.

The situation is a major concern since a collusion problem is said to exist in U.S.A., between class counsel and defendants, who both want to agree a settlement for their own differing financial reasons. A single class representative may be unable adequately to exercise control over the class attorneys. Individual class members may have very limited 'voice', so the issue is one of democratic representation. Hence, the primary solution has been for independent scrutiny by the people's representative, the judge not only of the amount that individual claimants would receive under the proposed settlement but also of the remuneration of the claimants' lawyers. That mechanism has caused problems in class actions in U.S. State courts, because judges are elected and some are claimed to be susceptible to influence by local members of the Bar who may contribute to their election. The Class Action Fairness Act of 2005 (CAFA) attempted to address that issue by shifting many class actions to the Federal courts, where the judges are permanent appointees.

The 2006 class action law of Israel has several interesting controls on the scrutiny of settlements:

- A request for approval of any settlement agreement must be accompanied by affidavits signed by counsels for the plaintiffs and defendants in which "due disclosure of all substantive details that concern the proposed settlement" are submitted to the Court.[17]

- Notice of the request for approval of a settlement agreement must be published, and a copy sent to the Attorney General, the Director of the Court Administration Authority, and any other person ordered by the Minister of Justice or the Court.

- A number of actors may, within forty-five days from the publication of the notification regarding the proposed settlement, submit a detailed objection to the Court regarding the terms of the proposed settlement

- A member of the class may opt-out.

- The Court is prohibited to from approving a settlement agreement: "unless it finds that the settlement is proper, fair and reasonable in view of the

[17] s 18(B).

interests of the class members…and the resolution of the dispute by means of a settlement represents the most efficient and fair means of determining the matter in the circumstances of the case."[18]

- The Court is ordinarily barred from approving a settlement agreement before receiving a written opinion from a "settlement examiner". The examiner must be a disinterested person who possesses expertise in the field pertaining to the representative action in question (such as consumer rights, securities, environmental damage etc.). The examiner is entitled to receive from the Court and the parties materials relating to the settlement proposal; may summon the parties in order to hear their position on any matter pertaining to the proposed settlement; and may propose any amendments to the potential settlement.62 In its opinion, the examiner must comment on the advantages and disadvantages of the proposed settlement agreement for all class members, commenting specifically on any matter pointed out to him by the Court. The examiner is required to submit the report within sixty days of receiving a copy of the request for approval of the settlement agreement. The Court must share the examiner's opinion with the parties, and these have thirty days in which to file a written response to the opinion with the Court.

- after receiving the opinion of the examiner and any objections from the parties, the Court must issue a reasoned decision whether to approve or reject the proposed settlement. In its reasoned decision, the Court is directed to relate to the following factors:[19]
  (1) The gap between the remedy proposed by the settlement agreement and that which members of the class would have been entitled to receive had the Court have found in favor of the class;
  (2) Any objections filed in opposition to the proposed settlement agreement and the Courts' decisions regarding these objections;
  (3) The stage of the proceedings at which the decision whether or not to approve the settlement agreement is made;
  (4) The opinion of the examiner;
  (5) The risks and opportunities involved in the continuation of litigation, versus the advantages and disadvantages of the settlement agreement;
  (6) The causes of action and remedies vis-à-vis which the decision to approve the settlement agreement will create a judicial decision affecting the members of the class to which the agreement will apply.

13. Control of class attorney fees

In U.S., class counsel are largely uncontrolled by class members in their strategic decisions during a case, and in negotiating the terms of settlement with defendants, especially over negotiations on fees. Accordingly, the court provides the democratic scrutiny function and approves their fees (which are not contingency fees, but are usually linked to a percentage of recovery).

[18] s 19(A).
[19] s 19(C)(2).

In Israel, the proposed settlement may not contain instructions regarding compensation for the representative plaintiff or counsel fees. Instead, the parties to a proposed settlement agreement may make a recommendation to the Court regarding such awards [20]

14. How a settlement fund should be distributed

Some laws envisage that the outcome of most class damages claims will be a fund out of which individual claimants will be paid, or must claim. It may be necessary to provide details of how such distribution or decisions (on liability or quantum) should be reached. The court may need power to approve arrangements unless they are specified in legislation.

The Australian Federal Class Actions Act provides:

- The court may not make an award of damages unless a reasonably accurate assessment can be made of the total amount that the group would be entitled to under the judgment;[21]
- The court may make an order for constitution and administration of a fund to manage and distribute damages. If a fund is established, directions must be given as to how group members are able to make a claim for payment out from the fund, including time limits etc.[22]

[20] s 18(G)(1) and (2).
[21] s 33Z(3).
[22] s 33ZA