Submission to the European Commission Public Consultation: Towards a Coherent European Approach to Collective Redress

Irish Competition Authority Submission

S-11-006
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The Competition Authority
An tÚdarás Iomaíochta

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1. INTRODUCTION

1.1 The Competition Authority (the 'Authority') welcomes the opportunity to make this submission to the European Commission (the 'Commission') on its initiative on Collective Redress as a possible instrument to strengthen the enforcement of EU law. The Authority commends the extensive work undertaken by the Commission in the area of collective redress, both in this and in previous initiatives.[1] The Authority supports the enormous work undertaken by the Commission in the area of collective redress and the direction that the Commission has taken in this initiative.

1.2 There is a need to introduce a coherent and effective method of allowing collective redress in the European Union. Collective redress will provide an essential mechanism to allow claimants with small and dispersed claims to recover compensation in cases where there has been anti-competitive harm caused to both consumers and other businesses, including SMEs.

1.3 The Authority agrees with the general definition of collective redress provided by the Commission in its collective redress initiative. That general definition states, amongst other things:

> "Collective redress" is a broad concept encompassing any mechanism that may accomplish the cessation or prevention of unlawful business practices which affect a multitude of claimants or the compensation for the harm caused by such practices.

Layout of this Submission

1.4 In this submission, the questions will be grouped and answered in the order set out in the Public Consultation document.

[1] Previous initiatives undertaken by the Commission involving collective redress include the Green and White Papers on Damages actions in antitrust cases (Green Paper on Damages actions for breach of the EC antitrust rules; Com (2005) 672, SEC (2005) 1732; White Paper on Damages actions for breach of the EC antitrust rules, Com 2008 (165) Sec (2008) 404 – 406) and the Green Paper On Consumer Collective Redress COM (2008) 794, each of which is available on the Commission's website.

Collective redress in Ireland

1.5 In Ireland there are currently a number of ways in which the courts can deal with multi-party actions under either the Rules of the Superior Courts or through various statutory provisions. These include representative actions, joinder and consolidation of actions, test cases, public inquiries and compensation tribunals. However, the methods for conducting multi-party litigation in Ireland are limited and almost entirely ineffective for competition cases. In particular it should be noted that representative actions in Ireland do not allow for the recovery of damages by injured parties in competition cases, and indeed, in representative actions generally.[2] The various methods for dealing with multi-party litigation in Ireland just outlined are therefore wholly ineffective for allowing claimants with small and dispersed claims to recover compensation for loss suffered due to anti-competitive harm.

1.6 This is a flaw in the Irish legal process that was examined by the (Irish) Law Reform Commission ('LRC') in 2003[3] and 2005.[4] Unfortunately, though the LRC recommended reform in how multi-party litigation is dealt with, its report has lain dormant and reform has not occurred.

The Legal Requirement for a mechanism of redress

1.7 The European Treaty does not provide remedies for breach of the various rights that are found in or created by the Treaty. Instead, the right to damages in competition cases that citizens derive from Community law have been 'found' by the Court of Justice in a number of important cases on the matter.[5]

1.8 The Court of Justice of the European Union clarified in *Courage v Crehan* that…

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[2] See for example the Law Reform Commission Report, 'Multi-Party Litigation', (LRC 76 – 2005) at pages 9 -10. When listing the limitations of the representative action the LRC Report stated: 'Remedies available: these are limited to injunctive and declaratory relief; damages may not be sought in a representative action.'

[3] Law Reform Commission, 'Consultation Paper on Multi-Party Litigation (Class Actions)' (LRC CP 23-2003).

[4] Law Reform Commission, Report, 'Multi-Party Litigation', (n2).

[5] Prof. Michael Dougan of University of Liverpool, in a paper given to Irish Centre for European Law, 'Standing to Enforce EU Law before the National Courts', (The Long Room Hub, Trinity College, Dublin, Friday 28th January 2011) stated that the Court of Justice '...comes close to *actio popularis*...' in *Courage v Crehan*.

> The full effectiveness of [Article 101 TFEU] and, in particular, the practical effect of the prohibition laid down in [Article 101 (1) TFEU] would be put at risk if it were not open to any individual to claim damages for loss caused to him by a contract or by conduct liable to restrict or distort competition. Indeed, the existence of such a right strengthens the working of the Community competition rules and discourages agreements or practices, which are frequently covert, which are liable to restrict or distort competition.[6]

1.9 This view was restated and reinforced by the Court in *Manfredi v Lloyd Adriatico Assicurazioni SpA* where the Court stated:

> It follows that any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an agreement or practice prohibited under Article 81 EC [Article 101 TFEU].[7]

1.10 The Court in *Manfredi* continued by saying that:

> In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law, provided that such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness)…[8]

1.11 The Commission, in its Staff Working Paper accompanying the White Paper on damages actions in antitrust cases, stated that the *acquis communautaire* of the European Union on the question of damages in competition cases under Community law is as follows…

[6] Case C-453/99, *Courage –v- Crehan*, [2001] ECR I - 6297.

[7] Joined Cases C 295 – 298/04, *Manfredi v Lloyd Adriatico Assicurazioni SpA*, ECR I - 6619.

[8] Ibid.

> Any individual can claim compensation for the harm suffered where there is a causal relationship between that harm and an infringement of Article 81 or 82 EC. This principle also applies to indirect purchasers.[9]

1.12 It is clear from the case law of the Court of Justice that there is a recognised right for individuals to sue in damages for any loss or harm caused by the anti-competitive conduct of undertakings. In fact, the Court of Justice has made clear that there is an onus on Member States to create the conditions in their legal systems that will ensure that the rights of citizens of the European Union are safeguarded so that they can sue in damages if they are the victims of a competition law infringement. The Member States are to safeguard these rights by laying down detailed procedural rules to ensure that private actions can be taken by individuals. This in turn will ensure that the rights of citizens that are safeguarded in European law will be enforceable.

1.13 The Commission, in its White Paper on damages actions for breach of the EC antitrust rules, reiterated the views expressed by the Court of Justice on safeguarding citizens' rights under the Treaty in both *Courage v Crehan* and in *Manfredi* and tied this to the need to consider introducing mechanisms that allow for collective redress:

> With respect to **collective redress**, the Commission considers that there is a clear need for mechanisms allowing aggregation of the individual claims of victims of antitrust infringements. Individual consumers, but also small businesses, especially those who have suffered **scattered and relatively low-value damage**, are often deterred from bringing an individual action for damages by the costs, delays, uncertainties, risks and burdens involved. As a result, many of these victims currently **remain uncompensated**.[10] (Emphasis in Original)

[9] Commission Staff Working Paper accompanying the White Paper on damages actions for breach of the EC antitrust rules, SEC (2008) 404, at paragraph 37.

[10] White Paper on Damages actions for breach of the EC antitrust rules Com 2008 (165) Sec (2008) 404 – 406.

2. QUESTIONS 1 – 6: POTENTIAL ADDED VALUE OF COLLECTIVE REDRESS FOR IMPROVING THE ENFORCEMENT OF EU LAW

Question 1:

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

2.2 Private actions for damages in competition cases, including actions by way of collective redress, first and foremost serve a compensatory rather than an enforcement function. This is certainly the position in relation to 'follow on' actions for damages. In a 'follow-on' case there has already been some form of enforcement action taken by a public agency. Therefore, the only purpose of a 'follow on' action for damages is to compensate those that have suffered loss, rather than to punish offenders for a second time. If the purpose of 'follow on' actions was to punish wrongdoers for a second time, this would offend the principle of *non bis in idem*.[11]

2.3 Collective actions, either for injunctive relief and/or for damages can have a role in enforcing European competition law where they are taken as standalone actions. By definition in these cases, there has been no preceding public enforcement action and therefore the principle of *non bis in idem* has not been infringed. Steps should be considered to assist claimants who have suffered loss in a competition case to take action, including action for injunctive relief as well as for damages. Public authorities have limited funds and cannot take action in every case where there is a suspected breach of competition law. Furthermore, private actors are sometimes better placed to take action as they have first hand access to evidence which might be unavailable

[11] The Court of Justice has recognised in a number of cases that the principle of *non bis in idem* is a fundamental principle of Community law. For example in Case-238/99P *Limburgse Vinyl Maatschappij NV (LVM) and others v. Commission*, the Court found that '...the principle of *non bis in idem*, which is a fundamental principle of Community law also enshrined in Article 4(1) of Protocol No 7 to the ECHR, precludes, in competition matters, an undertaking from being found guilty or proceedings from being brought against it a second time on the grounds of anti-competitive conduct in respect of which it has been penalised or declared not liable by a previous unappealable decision.'

to a competition authority, or very difficult for that authority to obtain. These private actions strengthen the enforcement of competition law by ensuring that action is taken in cases where the public authorities are unable to take cases.

2.4 Collective actions, in either 'follow on' or standalone cases, can add to deterrence, both specific and general. If undertakings fear that there is an increased possibility that they will have to compensate their victims, especially victims that have suffered small and dispersed losses, they may be less likely to break the competition rules in the Treaty.

2.5 In sum, collective redress can only serve an enforcement function where there has not already been public enforcement of the law. However, mechanisms that allow for effective collective redress by victims of anti-competitive conduct can help to deter offenders from re-offending and deter others from offending in the first instance.

Question 2:

2.6 *Should private collective redress be independent of, complementary to, or subsidiary to enforcement by public bodies? Is there need for coordination between private collective redress and public enforcement? If yes, how can this coordination be achieved? In your view, are there examples in the Member States or in third countries that you consider particularly instructive for any possible EU initiative?*

2.7 There is a real need for effective mechanisms that allow claimants with small and scattered losses to recover damages for losses they have suffered due to anti-competitive conduct by undertakings. This need for effective mechanisms that allow for collective redress for claimants exists independent of the enforcement of competition law by public authorities. Claimants who have suffered small and scattered losses have a right to damages, a right that is recognised by the Court of Justice as deriving from the Treaty. That right to damages by such claimants is not vindicated where the legal system of a Member State makes it difficult, if not impossible, to recover damages. The Authority therefore believes that collective redress should be independent of enforcement by public bodies as it serves a separate function to enforcement of the law by public agencies.

2.8 Nevertheless, collective redress can be complementary to public enforcement in competition law. This is achieved where collective redress occurs in standalone cases, thereby adding to the spectrum of enforcement options available to society, especially as public agencies cannot be expected to take action in every case alleging a breach of the law.

2.9 Collective actions will also complement public enforcement in 'follow-on' cases by adding a considerable amount of additional deterrent (both specific and general) to the action already taken by the public agency.

2.10 The Authority does not believe that there is a need for formal coordination between public enforcement agencies and private actors taking action by way of collective redress. The interests of plaintiffs in a collective action are largely divergent from the interests of a public enforcement agency. The plaintiffs in a collective action are first and foremost seeking redress in the form of damages for their private loss. The primary interest of a public enforcement agency is to bring illegal conduct to an end, to punish those that have broken the law, to protect the competitive process for the good of all consumers (and for business) and to set an example (general deterrence) to other would-be offenders of the potential consequences if they break the law. Furthermore, public enforcement agencies also have an interest in developing and clarifying the law, something that is, at best, only a secondary interest for private plaintiffs.

2.11 However, where a collective action has been taken successfully by private plaintiffs, it would seem unwise for public enforcement agencies to expend scarce public resources in pursuing the unsuccessful defendant by way of public enforcement action. In these circumstances, where there has been private enforcement of the law, it would be useful for the public agency to be made aware of the outcome of the private collective action so as to avoid further expending public resources.

Question 3:

2.12 *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?*

2.13 In the context of collective redress, collective actions should be taken either by private claimants (named individuals) on behalf of a class of injured persons and/or by a representative body nominated for the purpose of taking such actions. The Authority does not believe that public authorities such as National Competition Authorities ('NCAs') should take private actions as a representative body for and on behalf of a class of injured persons.

2.14 The Authority opposes such a proposition for the following reasons. First, it would confuse the public enforcement role of the public agency with the private objectives of injured parties whose interests (in securing damages) usually diverge significantly from the interests of the public authority. When taking enforcement action, the NCA will, for example, have to keep in mind the likely need for evidence to support a follow up private collective action. Second, if the public agency is tasked with the responsibility of bringing collective actions on behalf of small claimants, scarce public resources will have to be diverted to, and dedicated for, this added role. Finally, if the public agency is designated to bring collective actions, it will increase the burden of expectation that the public body will take cases that it might not otherwise take in order that the rights of small claimants are vindicated.

2.15 There is a need for effective mechanisms of collective redress in competition damages cases. Such collective actions should be taken either by private claimants on behalf of a class of injured persons, or by nominated representative bodies such as consumer associations. These actions should be available on an 'opt-out' basis.

Question 4:

2.16 *What in your opinion is required for an action at European level on collective redress (injunctive and/or compensatory) to conform with the principles of EU law, e.g. those of subsidiarity, proportionality and*

effectiveness? Would your answer vary depending on the area in which action is taken?

2.17 The Court of Justice has clarified in *Courage v Crehan*[12] that, in competition matters at least, it is a matter for the legal systems of Member States to, amongst other things, '...lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law...' The Court clarified that those procedural rules must abide by the principles of equivalence and of effectiveness:

> ...such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).[13]

2.18 The Court of Justice has therefore set down a minimum standard in competition cases that is required of the legal systems of Member States to ensure that citizens' rights derived under Community law are safeguarded. As there is no possibility at present in Ireland of claimants with small and dispersed losses recovering damages in a competition action under the Treaty, legislation in the form of a Directive would ensure that citizens' rights in Community law are protected.

Question 5:

2.19 *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?*

2.20 There is a need to allow collective actions for damages, that is, for compensatory redress, in competition cases. The Court of Justice has stated that EU citizens enjoy rights derived from the Treaty and that those rights include a right to damages. The Court of Justice has also stated that:

[12] [2001] ECR I-6297 (n6).

[13] *Courage –v- Crehan*, [2001] ECR I-6297, (n6).

> In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law… [14]

2.21 It is clear, therefore, that, in the absence of Community rules, Member States must put in place mechanisms that ensure that the rights that citizens derive from the Treaty can be vindicated. It is also clear that:

> … such rules are not less favourable than those governing similar domestic actions (principle of equivalence) and that they do not render practically impossible or excessively difficult the exercise of rights conferred by Community law (principle of effectiveness).[15]

2.22 As there is no mechanism in Irish law that allows for compensatory collective redress (that is, an award of damages), it is clear that the rights that EU citizens living in Ireland derive under the competition rules of the Treaty, cannot be effectively vindicated where the claims are small and scattered. For this reason, there is a need for the Commission to consider legislating to introduce EU-wide collective redress mechanisms. This would ensure that citizens' rights can be vindicated and would also ensure that there is consistency across the EU in how those rights can be vindicated. The Authority therefore suggests that the Commission should propose that a Council Directive on collective redress be enacted in competition damages cases. A Directive would ensure that collective redress would become a reality across the 27 Member States of the EU, while respecting the legal systems of the various Member States.

Question 6:

2.23 *Would possible EU action require a legally binding approach or a non-binding approach (such as a set of good practices guidance)? How do you see the respective benefits or risks of each approach? Would your answer vary depending on the area in which action is taken?*

[14] *Manfredi v Lloyd Adriatico Assicurazioni SpA* (n7).

[15] Ibid.

2.24 The Authority supports the introduction of an EU Directive on collective redress. This would give some leeway to Member States on the introduction of collective redress into their respective legal systems, while ensuring that collective redress for small claimants in competition (and other) cases becomes a reality.

2.25 Therefore, the Authority would support a Commission proposal that a Council Directive be enacted to ensure that collective redress becomes a reality.

3. QUESTIONS 7 – 10: GENERAL PRINCIPLES TO GUIDE POSSIBLE FUTURE EU INITIATIVES ON COLLECTIVE REDRESS

Question 7

3.1 *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?*

3.2 The Competition Authority agrees that any EU initiative on collective redress should set out common principles to be applied in order to ensure effective and efficient redress for claimants that have suffered loss. These common principles would also allow for a more harmonised approach to collective redress which, in turn, should help claimants across the EU to gain access to compensation when they have suffered damage. These common principles would be a base line from which Member States could build effective mechanisms that encourage and assist the taking of collective actions where there has been harm to many small claimants arising out of a breach of EU competition law. The best way to ensure that this is achieved is to legislate by Directive.

Question 8:

3.3 *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?*

3.4 The Commission could certainly look to the experience gained so far by the Member States when formulating a common set of European principles.

3.5 For instance, there has recently been much debate in the United Kingdom (and in other common law jurisdictions) as well as in various Member States of the EU on the issues surrounding collective redress, and how collective redress might be made more effective. Particular note should be taken of the recent experience in the United Kingdom of the consumer group *Which?*,[16] in taking collective actions in

[16] See for example *Consumers Association v JJB Sports plc Competition Appeals Tribunal* (CAT) case number: 1078/7/9/07. Consumers had bought replica England and Manchester United

competition cases. That experience suggests that a less conservative approach to collective redress is required, to ensure that any form of collective redress that is chosen is both effective and efficient at obtaining redress for claimants.

3.6 The successful action taken by *Which?* in the *JJB Sports replica jerseys* case highlights, among other matters, the need for an 'opt-out' method of collective redress, rather than the ineffective, narrower and much less efficient 'opt-in' model currently available in the United Kingdom and suggested by the Commission in its White Paper on damages actions in antitrust. For instance, Dr. Deborah Prince, the Head of Legal Affairs with *Which?,* made the following point in relation to the current 'opt-in' system available in the United Kingdom:

> One of the biggest issues with the current legislation is that it only allows an opt-in system. Because of the generally low level of uptake, the opt-in system will invariably result in proportionality issues. To make it attractive for designated bodies to bring follow-on actions in all competition redress cases, **the system must be changed so that opt-out systems can be used**. As most representative bodies will be charities, there will always be concerns about proportionality if an opt-in system prevails — both from a cost and time perspective. The only real, practical way to get over this is to introduce an opt-out system.[17] (Emphasis added)

3.7 Rachel Mulheron, in her research[18] for the Civil Justice Council in the United Kingdom, used the example of the OFT's milk price-fixing case[19] as an occasion that would have been ideal for an 'opt-out' class action

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football jerseys from JJB Sports and other manufacturing companies which were found by the Office of Fair Trading (OFT) to have been involved in a price-fixing cartel. JJB Sports was fined £18.6 million by the OFT. The Consumer association *Which?* as a designated body took a 'follow-on' action under section 47B of the Competition Act 1998.

[17] 'Observation by the Head of Legal Affairs, Which?' cited by R Mulheron, 'Reform of Collective Redress in England and Wales – A Perspective of Need', 41 a research paper submitted to the Civil Justice Council for England and Wales, and available at http://www.civiljusticecouncil.gov.uk/files/collective_redress.pdf

[18] R Mulheron, 'Reform of Collective Redress in England and Wales – A Perspective of Need', a research paper submitted the Civil Justice Council for England and Wales, available at http://www.civiljusticecouncil.gov.uk/files/collective_redress.pdf and accessed on the 4th October 2010.

[19] For a report on the case see for example *The Guardian* of the 7th December 2007. There it was reported that the OFT fined Sainsbury's, Asda, Safeway, Dairy Crest, Wiseman and The Cheese Company a total of STG£116m for their parts in a price-fixing conspiracy. It was also reported in that article that the '...price collusion is estimated to have cost consumers £270m in higher prices.'

with the ability to apply damages applied *cy-près*, if such an option had been available. Mulheron argued for an 'opt-out' class action with the possibility of applying excess funds *cy-près*:

> ...in respect of the milk price-fixing case … where the profits made from the cartel clearly outstrip the fines imposed, where the purchasers have no prospect of proving the fact of purchase, where the amount per claim is very small, but where the aggregate profits have no realistic prospect of being stripped without aggregate damages assessment and *cy-près* distribution…

Question 9:

3.8 *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?*

3.9 The Authority had previously either been opposed to collective redress altogether or, if collective redress was to be introduced, considered that it should be by way of 'opt-in' only.[20] However, through its involvement in the Commission's initiative in the Green and White Papers on Damages actions in antitrust cases, the Authority's views on collective redress have evolved to the point where it realises the need for effective collective redress in competition cases. This evolution in thinking has also been helped through the Authority's experience in enforcing competition law, especially in the area of 'hard-core' cartel cases. Despite recent success in combating 'hard-core' infringements of competition law, there have been no follow-on actions for damages by injured consumers. The reasons for this include the inability to bring collective actions for damages in competition cases in Ireland at this time. Finally, the Authority is aware of the legal rights that citizens derive from Community law in the area of competition and the requirement that national law must provide effective mechanisms that

[20] See Submission to the Law Reform Commission ('LRC') on the LRC's Consultation Paper on multi-party litigation (class actions), Submission No. S/03/005, dated 30th October 2003, available at http://www.tca.ie/EN/Promoting-Competition/Submissions/S03005.aspx?page=1&year=2003. See also the Competition Authority's Submission to the European Commission's Green Paper on Damages Actions for Breach of the EC Antitrust Rules, Submission No. S/06/001, dated 20th April 2006 and available at http://www.tca.ie/EN/Promoting-Competition/Submissions/S06001.aspx?page=1&year=2006

enable citizens to vindicate these rights. Without collective redress, it is not currently possible to vindicate these rights in instances that involve small and dispersed losses by consumers in competition cases.

3.10 The Commission's previous antitrust damages initiatives, which resulted in both the Green and White Papers, provided direction on the possibility of introducing effective access to justice (in competition cases), while also taking into account the EU legal tradition and the legal orders of the various Member States. In these initiatives, and over a protracted period of time, the Commission carefully consulted interested parties and stakeholders on how to make private actions for damages in competition cases more effective across the EU. The Commission also carried out various studies and published working papers and reports on its various proposals. Although the proposal on collective redress in the White Paper was, in hindsight, conservative and unlikely to be effective (as it involved a very limited form of 'opt-in' class action), the process that the Commission engaged in, together with the research it conducted and published, provides a firm basis for advancing with this collective redress initiative.

3.11 In order to ensure that both the EU legal tradition and the legal order of the various Member States is respected, as well as ensuring that the rights of citizens in competition cases, recognised by the Court of Justice, are vindicated, the Commission should propose that a Council Directive be enacted in the area of collective redress. Such a Directive would set down the minimum standards required to allow for collective redress in EU law within Member States, while allowing Member States to enact legislation that fits in with their respective legal orders.

Question 10:

3.12 *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?*

3.13 As mentioned above, there is not, at present, any form of collective redress that allows for the recovery of damages in Ireland, in either competition cases or generally. The Authority is aware of the debate

and some recent developments on collective redress in the United Kingdom that could help inform the debate on collective redress in Europe.

4. QUESTIONS 11 – 12: THE NEED FOR EFFECTIVE AND EFFICIENT REDRESS

Question 11:

4.1 *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?*

4.2 Any model of collective redress introduced under this initiative should be a model of general application and therefore available to both consumers and small business alike. This means that the model chosen should be a mixed model that allows either an individual claimant (a consumer or small business) on its own initiative, or a nominated representative consumer body, depending on the particular case, to take a collective action on behalf of the entire class.

4.3 In order to be both effective and efficient, this model of collective redress should involve 'opt-out.' Injured persons must actively take steps to opt-out from the class action within a specific time frame. 'Opt-in' class actions involve an immense amount of front-loading which is costly both in time and resources, while also usually ineffective.

4.4 In certain 'opt-out' class actions, although there may have been substantial injury to a huge class of potential claimants, it will be impossible to reimburse those claimants individually for the losses they have suffered. For example, in the Office of Fair Trading milk case[21] referred to earlier, the illegal additional profits made by the various members of the cartel are estimated to have totalled in the region of Stg£250m. However, it would have been almost impossible for most consumers who were overcharged in that cartel to prove that they had bought milk from that cartel, or to prove the extent of their (individually) small losses. For this reason, the possibility of allowing any remaining damages left over be awarded in a collective action to

[21] See footnote 19.

be applied *cy-pres*[22] would ensure that wrongdoing is not rewarded, while the interests of consumers may also benefit.

4.5 If 'opt-out' collective redress is adopted, small businesses could take action through nominating one of their number to take the case on behalf of the entire class. In the case of collective actions on behalf of consumers, representative bodies, such as consumer associations, should be empowered to take such actions alongside the possibility of individual consumers taking an action on behalf of a class.

4.6 In consumer cases, it would be a matter for the Court to certify the appropriate party to act as class representative, be that an individual or a representative body on behalf of the class. The Court may need to take into consideration such issues as the ability of the claimant (individual or representative body) to fund an action and to pay the costs of the defendants if the action is unsuccessful. Of course, given the potential difficulties that will arise in the area of costs, and in particular if the 'loser pays' rule is retained (as the Authority believes it should so as to discourage frivolous cases) then individual consumers will be very unlikely to take an action as representative on behalf of a class unless the various issues regarding funding such actions are addressed. For this reason, representative bodies should be enabled to take cases on an 'opt-out' basis on behalf of consumers.

4.7 Care needs to be taken that collective redress is not restricted to representative bodies alone. This would put undue pressure on the resources of such bodies. These representative bodies would either be expected to take every case that arises or, alternatively, they might only take a limited number of cases, leaving many injured consumers without redress in those instances where the representative body could not take a case. Furthermore, there is a need to ensure the rights of individuals to take cases, even where they do so as representative on behalf of a wider group.

[22] *Cy-pres* distribution literally involves giving something to the next best or nearest cause. The Commission explained this method of applying damages in footnote 28, page 18 it its Staff Working Paper accompanying the White Paper on damages actions in antitrust cases as follows: 'Distribution according to the "cy-pres" doctrine means that the damages awarded are not distributed directly to those injured to compensate for the harm they suffered (for instance because they cannot be identified) but are rather used to achieve a result which is as near as may be (e.g. damages attributed to a fund protecting consumers' interests in general).' Commission (EC), 'Commission Staff Working Paper accompanying the White Paper on Damages actions for breach of the EC antitrust rules', Brussels 2.4.2008, SEC (2008) 404.

Question 12:

4.8 *How can effective redress be obtained, while avoiding lengthy and costly litigation?*

4.9 Litigation may well be both lengthy and costly no matter which option is adopted. Not providing for collective redress does not appear to be an option, even if the reason for avoiding collective redress is to avoid costly and lengthy litigation. There is a clear need for collective redress to allow claimants that have suffered antitrust injury to recover their losses.

4.10 In order to bring increased certainty and clarity in the area of collective redress and thereby potentially reduce costs and delay in complex competition litigation, consideration might be given to allowing collective actions in follow-on cases where the prior finding of illegality by a court or NCA can be certified and used as a basis for taking the action. Such a provision would have to be drawn broadly and possibly switch the burden of disproving causation to the defendant undertaking against whom there has been a prior finding of anti-competitive conduct. The reason for this is that this type of proposal has encountered problems in the UK, as was seen in the recent *Enron v EWS* case.[23] That case involved a follow-on action under section 47A of the (UK) Competition Act 1998 after a prior finding of anti-competitive conduct by the Office of Rail Regulation against EWS (English, Welsh and Scottish Railway Ltd.). However, despite the provision contained in section 47A of the Competition Act 1998, claimants must still prove causation, and of course loss, in a follow on action, even after a prior finding against an undertaking by an NCA.

[23] *English Welsh & Scottish Railway Ltd* v *Enron Coal Services Ltd (in Liquidation)* [2009] EWCA Civ 647.

5. QUESTIONS 13 – 14: THE IMPORTANCE OF INFORMATION AND OF THE ROLE OF REPRESENTATIVE BODIES

Question 13:

5.1 *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?*

5.2 If the Commission proposes that a Council Directive is enacted which would introduce as a minimum requirement, collective redress by way of 'opt-out' rather than 'opt-in', some of the problems raised in this question will be addressed. If an 'opt-in' collective redress mechanism is introduced, there are major potential problems involved in identifying and notifying potential victims to add to the class. Even where an 'opt-in' model allows claimants to join an existing class after the litigation has commenced, this creates a piecemeal approach to dealing with mass claims. It is also ineffective in ensuring that class members gain compensation for losses caused by anti-competitive conduct.

5.3 In an 'opt-out' model of collective redress, class members need not be specifically identified until the close of the litigation. If it proves impossible to identify some (or even most, if not all) members of the class, the damages award in a successful action should be applied *cy-pres*. Although efforts must be made to inform potential class members, in advance, of the proposal to take collective action (so that they have the opportunity to opt out from the action), this need not be so cumbersome as to hold up the collective litigation.

5.4 Notice of the intention to institute collective proceedings should be by way of public notice that would include a publicity campaign through the media. Potential class members could be made aware of the litigation and their options to actively opt out from the litigation if they so chose.

5.5 Collective actions should only be taken on behalf of class members residing within individual Member States. Enormous difficulties would be encountered if (for example) representative bodies were allowed to take cases before the courts in one Member State on behalf of citizens of a number of Member States. The representative body, or a named individual, should take separate actions in individual Member States. It should remain a matter for Member States, through bi-lateral agreements, to allow collective actions in one Member State to include the interests of citizens within their own jurisdiction.

Question 14:

5.6 *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?*

5.7 As outlined above, collective actions for breach of EU law should only be taken in individual Member States and on behalf of citizens residing in those states. Collective actions should not be taken on a multi-state basis unless there has been bi-lateral agreement between states to allow for this.

5.8 If the Commission proposes that a Council Directive is enacted to introduce collective redress mechanisms throughout the EU so as to help protect the rights that citizens derive from Community law, that legislation will set a minimum standard for the type of collective redress mechanism that would be available in all Member States. This will help to ensure that citizens in all 27 Member States will enjoy access to justice through collective redress, no matter where they live in the Union.

6. QUESTIONS 15 – 19: THE NEED TO TAKE ACCOUNT OF COLLECTIVE CONSENSUAL RESOLUTION AS ALTERNATIVE DISPUTE RESOLUTION

Question 15:

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

6.2 Alternative Dispute Resolution requires the consent of all parties to (first) participate in, and then abide by, any agreement that emerges. This means that undertakings suspected of wrongdoing are expected to participate freely and willingly in ADR and to pay compensation in full at the outcome of the process. For ADR to work, there is a need for a credible alternative threat of public enforcement and/or private action. Only where there is a real and credible threat of effective action by public authorities and/or private plaintiffs, with recourse to the courts to enforce orders and/or penalties and/or compensation orders, will there be any desire by undertakings to participate in ADR.[24]

6.3 ADR also operates on trust. Undertakings that have conducted their business dealings outside the legal process and caused harm to the competitive process, to competitors and to customers (e.g. SMEs and consumers), will then be expected to detail honestly the level and extent of their wrongdoing, so that fair compensation can be arrived at and agreed. In cases involving 'hard-core' secretive wrongdoing such as is found in price-fixing conspiracies, it is extremely unlikely that ADR will provide an effective method of compensating victims unless there has either already been public enforcement action against them and/or there is a real and credible private litigation alternative, which includes an effective form of collective redress.

6.4 For these reasons, ADR should be considered as a method of compensating victims only where an effective system of collective redress is readily available as an alternative.

[24] See for example, the comments of Christopher Hodges, *The Reform of Class and representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe*, (Hart Publishing, Oxford 2008), at page 233 where he argues: 'The effectiveness of a voluntary model will be enhanced where encouraged by effective external pressures, such as serious and/or ongoing loss of reputation, threat of regulatory action, court action risk of damage...'

Question 16:

6.5 *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?*

6.6 It would certainly be a bad idea to make consensual dispute resolution a mandatory step in connection with collective redress. One concern is the possibility that such an additional mandatory step in the process towards compensating parties that have suffered loss, would add unnecessary further delay to what will already be a slow and lengthy process of redress for victims of anti-competitive conduct. Where an effective method of collective redress is present, incentives will emerge for offending undertakings to seek consensual dispute resolution.

Questions 17 & 18:

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

6.8 *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?*

6.9 The Authority is unable to assist with these two questions.

Question 19:

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

6.11 Competition cases can be complex, both factually and legally. These cases often involve the input of experts in competition law and economics. Such complexity can be further exacerbated where the harm has been passed down the chain of distribution thereby causing harm to undertakings and consumers alike at various levels of the distribution chain. If a competition case involving losses to large numbers of businesses and consumers arises, this can be an extremely difficult case to deal with, not least when attempting to calculate how much loss or damage each party at each stage in the chain has

suffered. For ADR to have a role in dealing with such cases, it would require specialists in competition law and economists to handle such cases. If ADR is to be a compulsory first step in a process that might still lead to litigation, then it could prove to be a very expensive and time consuming extra layer to the process.

7. QUESTIONS 20 – 24: STRONG SAFEGUARDS AGAINST ABUSIVE LITIGATION

Question 20:

7.1 *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?*

7.2 At present, there is very little private litigation in competition damages cases in Ireland, and there are no cases involving collective redress by a large body of injured parties, such as consumers, in competition cases, under either domestic or Community law. Although the Commission is right to maintain vigilance against the possibility of abusive litigation, such fears should not be used to stifle the development of collective redress mechanisms that would allow citizens to vindicate their rights before the courts. Furthermore, some, at least, of the alleged abuses in the American class action procedure may have been exaggerated. What is forgotten, when criticising the American class action, is the fact that the American system allows small claimants to gain access both to justice and to compensation. It should be possible to introduce a model of collective redress that respects the legal traditions of the Member States, while avoiding the (alleged) excesses of the American class action model.

7.3 The courts in the Member States have a vital role to play in safeguarding the legitimate interests of all parties in (injunctive and/or compensatory) collective redress actions. This involves the courts participating at all stages of the collective action. At the outset of the action the courts would have a role that would include, for example, certifying counsel to act on behalf of the class, defining the class in the action and certifying the class representative (be that an individual or a representative body). At the other end of proceedings, if the action is to be settled for example, the courts will need to ensure that class members are adequately and appropriately compensated or that counsel for the class and the defendants have not colluded. This is in line with the Authority's view that both injunctive and compensatory collective redress for consumers or SMEs in competition cases should be dealt with by the courts.

Question 21:

7.4 *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?*

7.5 A fee system based on the 'loser pays' principle (sometimes referred to as the 'English system') is unlikely to lead to frivolous and unreasonable litigation (and would act as a safeguard), given that the cost of losing the case will be borne by the plaintiff, even if the plaintiff does not have to pay his lawyers if there is a contingent fee agreement in place. There are a number of problems in Ireland regarding the method of payment to lawyers in litigation, an issue that has been raised by the Authority in its Report on Competition in the Legal Professions[25] and which is the cause of ongoing concern in Ireland. Among those problems is the fact that contingent fee agreements, even the moderate form of conditional fee agreement found in England and Wales,[26] are illegal in Ireland and act as a brake to many potential plaintiffs in initiating proceedings to vindicate their rights.

Question 22:

7.6 *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).*

7.7 In relation to consumer actions, a system of collective redress should retain the possibility that individuals can initiate the action as representative of the class. This recognises the right of citizens to seek

[25] The Competition Authority, 'Competition in Professional Services: Solicitors and Barristers', (Report) December 2006, available at the Competition Authority website at http://www.tca.ie/EN/Promoting-Competition/Market-Studies/Professions/Solicitors--Barristers.aspx

[26] Conditional fee agreements in England and Wales are permitted under Section 58 of the Courts and Legal Services Act 1990, which came fully into force in 1995 and 2000.

redress in the courts. If collective redress in consumer cases is restricted to nominated bodies only, such as consumer associations, then there is an increased risk that citizens' right of redress (and in particular, their right of access to the Courts) will not be fully vindicated. Nominated bodies, like NCAs, will have limitations on the number and type of cases that they will be able to bring. These limitations may lead to meritorious cases not being initiated, and harm to consumers not being redressed.

7.8 That said, nominated representative bodies should, in consumer collective actions in competition cases, be allowed to initiate 'opt-out' class actions on behalf of the injured class of consumers. In those cases where the nominated body decides to initiate proceedings, it should be given precedence in the law (and therefore by the court dealing with the case) over individuals who step forward to act as representative of the putative class. If the nominated representative body decides against taking proceedings, this should be by way of positive step, on Notice to the Court which is published and which will therefore allow individual claimants the time to consider taking the action on behalf of the class.

7.9 In relation to SMEs, the Authority has already outlined certain concerns regarding representative bodies acting on behalf of their (undertaking) members, as there could be at least a perception that such a system is open to abuse. SMEs should therefore be allowed to initiate collective proceedings on behalf of their respective class, in much the same way as an individual named consumer. The representative body for the injured SMEs (e.g. a trade association) should be precluded from taking such cases. It is presumed that SMEs will be at least slightly better placed financially in instituting such cases than individual consumers.

Question 23:

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

7.11 It may be preferable for policy makers to make this decision, and that the representative body therefore be identified by statute.

7.12 However, the Authority has a clear view that collective actions should be taken before the Courts rather than an alternative body. The Authority is also clear that the Judge will have an extremely important role to play in safeguarding the process and the rights both of defendants (from abusive actions) and absent class members in an 'opt-out' class action (from abuse and collusion between class counsel and the defendant). It is well known that conflicts of interest can arise between lawyers acting for a class of plaintiffs in an 'opt-out' model and the class members. Lawyers in these instances may be tempted to settle cases with defendants where the lawyers for the class get paid large fees and the defendants agree to pay little or nothing to the class in compensation. The Judge in such cases will have an important role to play in order to protect the class from such abuse. The system that is introduced will have to be carefully crafted to ensure that such abuse is minimised, if not avoided altogether.

Question 24:

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

7.14 To avoid one of the alleged abuses found in the American class action, it might be useful to specifically prohibit collective actions being initiated by lawyers. A collective action initiated by an individual consumer acting on behalf of an entire class, should be just that: an action initiated by that consumer and not by the lawyer. Both claimant and lawyer should swear to the effect that the action was initiated by the claimant. Lawyers should only be allowed to file for certification that they are initiating a class action <u>after</u> they have been retained by a claimant that has suffered some form of injury. Lawyers should not be allowed to advertise for possible plaintiffs/claimants to step forward to commence an action. The first step must be by the claimant.

7.15 Finally, contingent fee agreements (if introduced as part of the collective redress model) must be carefully controlled and capped, to avoid excessive fees being paid to counsel. Fee agreements in class action settlements should be agreed by the Court as part of the settlement of the action, to ensure that collusion between counsel for

the class and the settling defendant has not occurred, to the advantage of class counsel and the defendant and the disadvantage of the injured class. Counsel should be paid in like kind to the method used to pay injured parties. This should avoid instances where counsel for the class agrees to settle a case with compensation for the class in the form of coupons, as the lawyer would then also be paid in coupons! If coupons are the method used to pay compensation to claimants in the collective action, then the coupons should be transferable so that they can be used not just with the defendant company, but with the defendant's competitors!

8. QUESTIONS 25 – 28: FINDING APPROPRIATE MECHANISMS FOR FINANCING COLLECTIVE REDRESS, NOTABLY FOR CITIZENS AND SME'S

Questions 25 & 26:

8.1 *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?*

8.2 *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?*

8.3 The Authority has previously pointed out, in its Study of the Legal Profession, that there is currently a number of issues in Ireland in relation to legal costs. For instance, contingency fees, where the legal fees charged for litigation depend upon the size of the award won by the client, are illegal in Ireland. Despite this, evidence uncovered by the Competition Authority during its study of the Legal Professions[27] reveals that in practice, legal fees for litigation are highly related to the size of the award to the client and that the official system of taxation of legal costs effectively cements this relationship. The Authority has strongly advocated reform in this area.

8.4 In relation to funding private collective actions for damages, there is no doubt that a balance is required. On the one hand, bringing a complex competition case against well-funded corporate defendants can be an extremely daunting and very risky venture by individual consumers. Even where the individual consumer takes an action on behalf of the entire class in an 'opt-out', someone will have to fund the action and bear the risks of paying the defendant's costs if the action fails. On the other hand, failure to address the funding issue will undermine the initiative on collective redress. Errant undertakings will be left secure with their ill-gotten gains, as plaintiffs will be unable to initiate proceedings due to the funding issue.

[27] See Competition Authority Report, 'Competition in Professional Services: Solicitors and Barristers', available at: http://www.tca.ie/images/uploaded/documents/Solicitors%20and%20barristers%20full%20report.pdf

8.5 Nominated representative bodies, such as consumer agencies, taking collective actions on behalf of consumers should be reasonably well placed to take complex and costly cases on behalf of consumers. The ability of representative bodies to fund such actions could be enhanced if they are expressly awarded excess funds *cy-pres* in successful damages cases. Although it may be argued that this creates an incentive for representative bodies to initiate collective actions as they will have the opportunity to win damages, this is in reality no different to the position that an individual plaintiff would be in if taking an action themselves. Any award of excess damages granted to a representative body *cy-pres*, should be made with a stipulation that the award of damages is to be used to further consumer interests and in particular, to fund future litigation.

8.6 Lawyers acting for individual consumers taking a collective action as the representative of the entire class should be allowed to charge fees on a contingency basis. This is currently illegal in Ireland.[28]

8.7 A further step worth consideration is the possibility of third party litigation funders assisting plaintiffs to take collective actions. As with contingent fee agreements, these types of funding arrangements are also currently illegal in Ireland due to the laws of *maintenance* and *champerty*. However, recent developments in this area in England and Wales have allowed litigants to gain access to justice that they would be otherwise denied due to inability to fund the litigation. The Courts in England and Wales have taken a pragmatic approach to litigation funding, as evidenced in the case of *Arkin v Borchard Lines Ltd and others*.[29] In that case, the Court of Appeal acknowledged the important role that commercial litigation funders can play in allowing plaintiffs to gain access to justice which might otherwise be denied through lack of funds. The court realised the need to balance the right of successful defendants to recover costs where litigation brought against them was funded by third parties, against the need not to discourage funders from helping plaintiffs from gaining access to justice.

[28] The ancient laws on maintenance and champerty are still in force in Ireland, even though they have been largely repealed in other common law jurisdictions, most notably in England and Wales since 1967. These ancient laws, together with various regulations governing the calculation of lawyers' fees in effect prohibit lawyers charging clients on a contingency basis.

[29] *Arkin v Borchard Lines Ltd and others*, Court Of Appeal, (Civil Division) [2005] EWCA Civ 655, [2005] 3 All ER 613.

Questions 27 & 28:

8.8 *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?*

8.9 *Are there any further issues regarding funding of collective redress that should be considered to ensure effective access to justice?*

8.10 It would seem reasonable that, if the 'loser pays' principle is to be retained, it should be applicable against either side in litigation involving collective redress. Therefore, if a representative body succeeds in its action, it should be entitled to recover its reasonable costs from the unsuccessful defendant. Equally, a representative body, or indeed consumer, acting as representative of a class and funded by a third party, should have to pay the reasonable costs of a successful defendant in a collective action. This would help to reduce the risk of abusive or frivolous actions being taken.

8.11 The Courts, when certifying counsel in a class action, must have oversight of the fee arrangements entered into between the class representative and class counsel. Any settlement of a class action must also involve oversight of the fee agreement contained in the class settlement between counsel for the plaintiff class and the defendant, so as to ensure against abuse.

9. QUESTIONS 29 – 31: EFFECTIVE ENFORCEMENT IN THE EU

Questions 29, 30 & 31:

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

9.2 *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?*

9.3 *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?*

9.4 Collective actions under EU law should be taken in individual Member States for and on behalf of citizens residing in those individual Member States. The primary thrust of the Commission initiative is to ensure that the rights of EU citizens, derived from Community law, are enforceable before the Courts of the Member States. By proposing the enactment of a Council Directive that sets a minimum requirement for the Member States in facilitating collective redress under Community law within their own Member State, the Commission will have addressed the problem that currently arises where citizens' rights cannot be vindicated.

9.5 This may lead to a number of parallel collective actions being taken simultaneously. However, this will be necessary in order to respect the legal order and traditions of the various Member States. It will also ensure that any legislation by way of Directive that is introduced to give effect to collective redress will be adopted more effectively into the legal system of each Member State. If Member States wish to allow cross-border collective actions, this might best be achieved through bi-lateral agreement between them.

10. QUESTION 32: POSSIBLE ADDITIONAL PRINCIPLES

Question 32:

10.1 *Are there any other common principles which should be added by the EU?*

10.2 The Authority does not have any suggestions to make under this question.

11. QUESTIONS 33 – 34: SCOPE OF A COHERENT EUROPEAN APPROACH TO COLLECTIVE REDRESS

Questions 33 & 34

11.1 *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?*

11.2 *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?*

11.3 The Authority cannot assist with this query, beyond stating that there is a clear need for the availability of an effective collective redress mechanism in competition - and by extension, consumer - cases.

12. CONCLUSION

12.1 The Competition Authority acknowledges that citizens have a right to sue for damages where they have suffered loss or injury by the illegal anti-competitive conduct of undertakings contrary to Articles 101 and/or 102 TFEU. It is clear from the caselaw of the Court of Justice that, among other things:

> In the absence of Community rules governing the matter, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law...[30]

12.2 The Authority further acknowledges and supports the current initiative of the Commission to consult on a coherent European approach to collective redress. Collective redress is an effective method of allowing claimants, such as consumers, with small dispersed claims, to receive compensation for the harm caused to them by the illegal conduct of undertakings. This initiative, if successful, will help to address the concern of the Court of Justice, expressed in *Manfredi*, that '...detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Community law...' are put in place.

12.3 The Competition Authority therefore recommends that:

- the Commission propose that a Directive be adopted for the introduction of minimum standards of collective redress in competition and consumer cases;
- actions for collective redress can be taken in cases involving harm to consumers either by a named consumer on behalf of the class or by a nominated representative body;
- actions for collective redress in cases involving harm to SMEs be taken by a named SME on behalf of the class and not by the trade association (or representative body);

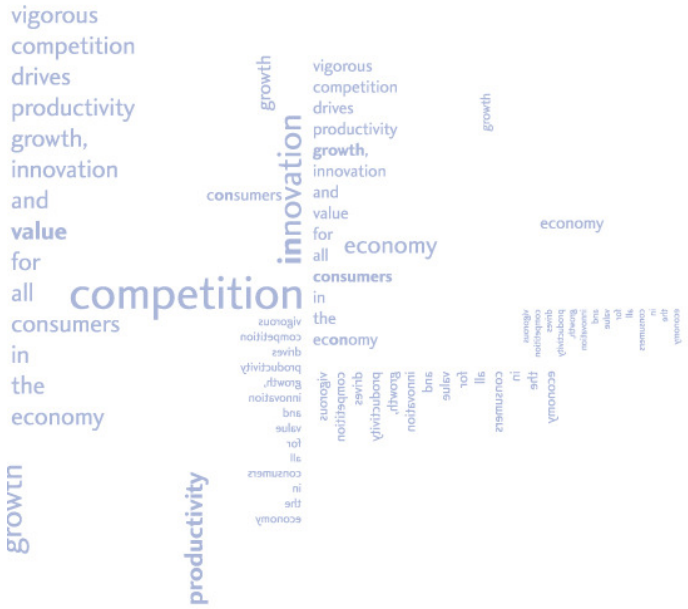
[30] *Manfredi v Lloyd Adriatico Assicurazioni SpA*, (n7).

- collective redress be by way of 'opt-out' action, so as to ensure the most effective and efficient method of gaining redress for injured parties from undertakings that have infringed citizens' rights derived under Community Law;

- actions for collective redress be taken before the courts in the Member States, instead of NCAs or other public authorities,

- courts have the discretion to apply any damages award that remains undistributed in a collective action *cy-pres*; and

- careful consideration be given to issues of funding litigation.



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