International Chamber of Commerce
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Prepared by the ICC Commission on
Competition

Comments in response to the Commission's study of the general principles applying to collective redress

Highlights

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Comments in response to the Commission's study of the general principles applying to collective redress

On February 4, 2011, the EU Commission launched a new study to identify the common legal principles applying to collective redress, and later released a Commission Staff Working Document (the "Document") organizing the results of that study around a series of questions. The Competition Commission of the International Chamber of Commerce (the "ICC Competition Commission") wishes to submit its comments and answers to those questions. The following comments relate exclusively to competition matters.

The questions fall into three main categories:

- Potential added value of collective redress to improve the enforcement of EU law;
- General Principles to guide future EU initiatives on collective redress; and
- Scope of a coherent approach to collective redress.

Rather than respond to each question with a specific answer, an introductory section below contains general comments that summarize the ICC Competition Commission's position, and the second section answers specific questions by referring to the corresponding general position. We believe that this approach will avoid needless repetition and allow the ICC Competition Commission to present a single, coherent argument.

General Comments

1. The ICC Competition Commission supports the consultation process launched by the EU Commission and reaches the conclusion there is no need for EU collective redress

The ICC Competition Commission supports the EU Commission's efforts to explore ways to grant full and effective compensation to victims in accordance with the principles that already exist in the European legal culture. The ICC Competition Commission acknowledges that access to justice for victims of cartels should be fair, but it does not see the need for action on collective redress at the EU level. Also, it should not be underestimated that there are many situations in which injunctions or interim relief satisfy victims better than compensation.

It is up to Member States to guarantee a system of fair and effective compensation. The ICC Competition Commission is concerned that an EU legislative action obliging Member States to introduce judicial collective redress mechanisms would infringe on the principle of subsidiarity and could lead potential litigants to file frivolous claims.

2. The EU Commission must take into account the risk of abuse which is inherent in any collective court action

While the primary goal of favoring effective compensation for damages is laudable, it is extremely important to implement strong safeguards against abusive claims. Without such safeguards, a collective redress mechanism – again, which is not desirable – will increase the number of abusive lawsuits, generating higher operating costs for companies (exposure to judicial blackmail, waste of business time and resources) and, ultimately, higher prices for consumers.

For this reason, the ICC Competition Commission strongly opposes the creation of economic incentives for litigation. Any financial incentives would expose the European system to the excesses of the U.S. class action system, where claimants are induced to bring a case to court even if it lacks

merits. In the ICC Competition Commission's opinion, the focus should be shifted from regulatory intervention to other more effective means, such as alternative dispute resolution (ADR). ADR can provide faster, cheaper and easier resolutions in certain cases while avoiding the risk of excessive litigation.

3. Were the Commission to seriously consider an action on collective redress, while maintaining its strong opposition to such initiative, the ICC Competition Commission supports an opt-in only model

If a system of collective redress were to be seriously considered by the EU Commission despite the numerous downsides of such systems, it should only set up an opt-in model which would allow potential plaintiffs to join the action voluntarily. Indeed, formalizing opt-out procedures in the law would lead to claims much like U.S. class actions, which are by no means desirable in the European context, and contrary to the Constitutions of some Member States.

In this regard, it should be noted that not precisely identifying the group of plaintiffs on behalf of which a qualified entity may bring an action always leaves room for abuse. For example, in the area of competition law, situations could arise where collective redress actions would aim to compensate consumers who might have indirectly been injured by the defendant, by virtue of wholesalers' passing-on inflated prices to final customers. Such indirect purchasers would be extremely difficult to identify and their injury is often minor. This is an example of the likely consequences of an opt-out system, which will be abused by unscrupulous lawyers without resulting in any benefits for consumers.

More generally, allowing for indirect purchaser claims raises the prospect of dual recovery by the direct purchasers and then again by the indirect purchasers. To avoid dual recovery, the court would need to determine how much of the overcharge was passed on by the direct purchaser. That analysis is extremely complicated. Not only would such an analysis consume valuable court resources, but the complexity of the analysis in any given case would increase the uncertainty for direct purchasers, who might invest significant monies in pursuit of their claims, only to be faced with the prospect of losing the bulk of their recovery to the indirect purchasers. This uncertainty would undermine efforts to increase private enforcement of competition laws.

4. Principles rooted in the European legal culture should be reaffirmed as safeguards against abuse

Several principles that are rooted in common European legal culture should be maintained in order to effectively protect European businesses against abusive claims.
First, the "loser pays" principle should to be reaffirmed since it is an effective deterrent against frivolous claims and multiple actions. Any deviation from this strict principle will encourage frivolous plaintiffs to bring actions based on a variety of meritless legal theories while assuming minimal or even no financial risk.

Second, while victims are entitled to full economic compensation, any attempt to introduce punitive damages should be rejected, in accordance with the European legal culture that applies to compensatory claims. In this context it is imperative that payments awarded must actually end with the damaged person - and not with any representative entity, because in this respect there simply is no representation.

Third, the principle of a separation of powers, as understood in most Member States, prevents the executive branch from directing the judiciary with respect to the individual matters being litigated. However, previous EU Commission communication established that the requirement according to which the claimant has to prove an infringement/breach/fault could be relaxed and that judges would be bound by National Competition Authorities' (NCAs) finding of a fault. This would be inconsistent with the laws of most Member States which require a court to establish the existence of an infringement (on the basis of a review of the evidence brought for by the parties) in order to impose financial liability and sanctions. Giving the NCAs the power to usurp judicial authority by imposing a finding of fault on these courts could also be subject to constitutionality challenges.

Fourth, protection of data and the right of privacy are fundamental rights within the European Union. Almost every procedure in the realm of competition law touches upon confidential information or business secrets. Those must be adequately and efficiently protected.

5. Any private collective redress should not prevail over public enforcement

The ICC Competition Commission wishes to emphasize that Europe has a long tradition of public enforcement in the area of competition law, through a network of regulators. In the EU and in Member States national antitrust authorities enforce competition law and have been highly successful in investigating and sanctioning infringements. The ICC Competition Commission is strongly attached to this tradition and does not believe that private collective redress actions should interfere. Even in the U.S. the primary responsibility for enforcement of US antitrust law falls to the FTC and the Antitrust Division. Private enforcement is only complementary of regulatory enforcement.

The ICC Competition Commission notes that the only way private actions can achieve a significant systematic impact on enforcement is through a high and sustained increase in litigation activity. Such increase will economically make sense only if strong financial incentives are introduced, making action in court sufficiently attractive for private actors, and will require procedural features that facilitate litigation and alleviate the position of claimants. Therefore, promoting private enforcement by means of judicial collective redress necessarily develops a favorable ground for abuse.

This increase in litigation will inevitably put more pressure on the already strained resources of national courts and run counter to the efforts made in many jurisdictions to decrease courts' caseload.

The ICC Competition Commission also believes that private redress should not be advanced as a means of deterrence since deterrence is a sociopolitical objective that is best left in the hands of the public authorities who are responsible for enforcing antitrust law. Moreover, irrespective of any collective redress, it is the interest of the victims to wait for the outcome of the public action before bringing claims for compensation. Thus private enforcement should only be allowed in the form of ancillary actions and as a remedy for compensation.

Finally, the ICC Competition Commission is concerned by the impact of the introduction of a collective redress mechanism at the EU level upon Member States' procedural and substantive laws. This impact should not be underestimated, and should be carefully considered by the EU Commission.

6. The designation of representative entities entitled to bring collective claims is problematic

Where collective redress does not already exist, national legislations nevertheless already provide numerous means allowing for a centralization of private claims (co-plaintiff procedures, linked procedures or claims transfer to a trustee). Those existing means have already proved to be efficient in various Member States, indicating that an intervention at the EU level is far from being necessary.

However, should any collective redress procedure be seriously considered by the EU Commission, private claims should be "channelled." Collective claims should not be brought by representatives who are designated based on abstract and theoretical criteria by Member States' governments, without any reference to potential future cases. This system would lead to granting some entities full jurisdiction over cases that may be totally unrelated to their area of expertise. Or even worse, allowing entities designated in Member State A to bring actions in Member State B could create legal and logistical hurdles. Moreover, only publicly funded bodies (e.g. Ombudsmen) should be eligible because otherwise abusive financial incentives, possibly to extort settlements, would necessarily prevail over the intention to compensate victims.

7. The ICC Competition Commission is concerned by the risk of forum-shopping

The ICC Competition Commission is very concerned that any EU-wide collective redress action would provide opportunities for forum-shopping. Forum-shopping opportunities arise when plaintiffs can decide in which jurisdiction and before which court they prefer to bring their case, often on the basis of that court's procedural rules or favorable policies.

If collective redress actions can be brought before the courts of any Member State, this will inevitably lead to the rise of so-called "magnet jurisdictions" which are likely to be those with the most attractive discovery rules and the judges who award the largest amounts of damages. By contrast, alternative dispute resolution mechanisms efficiently hamper the possibility of forum shopping (because ADR can combine several groups of plaintiffs within one single proceeding and apply different rules to each group) and should as such be favored and preferred to judicial actions.

More importantly, the ICC Competition Commission recalls that the EU is supposed to act in a subsidiary capacity, and believes that collective redress is a matter that should be dealt with under national legislations. The ICC Competition Commission would welcome further justification from the Commission regarding the need for EU intervention.

8. Preserving the advantages granted by leniency

Collective actions would also hamper leniency programs. Special arrangements would become necessary for collective actions relating to infringements disclosed by leniency applicants before the EU Commission or NCAs. Indeed, leniency programs would become moot if the immunity or the fine's reduction granted to applicants did not also apply to the damages the applicant may face. In fact, the incentive to self-report in order to benefit from a reduced fine would be outweighed by the concern that private parties would recover such savings in the form of damages awards. Ultimately, this could lead to fewer violations of EU competition rules being discovered.

9. Further evidence is needed to warrant EU action on collective redress

Should the EU Commission pursue its initiative for an EU-wide collective redress mechanism, it must first provide evidence that the issue of cross-border cases is important enough to justify any such initiative on the part of the EU. This evidence will have to be gathered through further EU-wide studies of consumer organizations, business representatives and economists.

The EU could then issue a report on how to deal with mass claims, with a focus on cross-border matters. To that end, the ICC Competition Commission applauds the EU Commission's recent decision to release the report "*Quantifying antitrust damages, Towards non-binding guidance for courts.*"

1. Potential added value of collective redress

***Q1**. What added value would the introduction of new mechanisms of collective redress (injunctive and/or compensatory) have for the enforcement of EU law?*

***Q.2** Should private collective redress be independent of, complementary to, or subsidiary to enforcement by public bodies? Is there need for coordination between private collective redress and public enforcement? If yes, how can this coordination be achieved? In your view, are there examples in the Member States or in third countries that you consider particularly instructive for any possible EU initiative?*

***Q3**. 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?*

***Q4**. 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?*

***Q5**. 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?*

***Q6**. 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?

As indicated in Paragraph 1 of the General Comments, the ICC Competition Commission supports the EU Commission's efforts to explore the ways to fully compensate victims but does not consider it necessary to introduce new mechanisms of collective redress at EU level. Thus the ICC Competition Commission would welcome additional justification for EU intervention.
Regarding the role of public bodies, the ICC Competition Commission maintains that private redress should always be subsidiary to enforcement by public bodies, as indicated in Paragraph 5 of the General Comments.

Among other objections, the ICC Competition Commission is highly concerned by the risk that EU-wide collective redress actions create forum-shopping opportunities and lead to abusive claims. Paragraphs 4 and 7 of the General Comments explicate the necessity, to this regard, to maintain in any case the core European legal principles and to implement strong safeguards.

2. General principles to guide possible future EU initiatives on collective redress

***Q7**. 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?*

***Q8**. 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?*

***Q9**. 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?*

***Q10**. 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?*

As indicated in Paragraph 4 of the General Comments, any EU initiative should comply with the principles rooted in the European legal culture. Referring to Paragraph 2 of the General Comments, the ICC outlines that the main specific feature of any possible EU initiative would be the protection against abuses and against an increase in litigation.

In light of ICC's limited resources, it is not in a position to provide information to the EU Commission on each Member State's domestic laws.

a. The need for effective and efficient redress

***Q11**. 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*

***Q12**. How can effective redress be obtained, while avoiding lengthy and a costly litigation?*

Were the Commission to seriously consider an action on collective redress, the main specific feature of any possible EU initiative would be the protection against abuses and against an increase in litigation, as indicated in Paragraph 2 of the General Comments. Other features would be the use of an opt-in model, as indicated in Paragraph 3, and of the principles detailed in Paragraph 4.

The ICC Competition Commission feels that the length and the cost of the procedure could be effectively reduced through the use of Alternative Dispute Resolution mechanisms, as stated in

Paragraphs 2 and 5 of the General Comments. The ICC Competition Commission strongly encourages the EU Commission to pursue its review of such mechanisms.

b. The importance of information and of the role of representative bodies

> ***Q13**. 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?*
>
> ***Q14**. 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?*

The very issue of the impossibility to adequately inform victims in Member States A that an action is pending in Member State B supports the argument that no EU-wide collective redress mechanisms should be created.

As indicated in Paragraphs 6 and 7 of the General Comments, the ICC does not support the creation of representative entities but instead recommends resorting to existing means provided for by national legislation that allows for a centralization of the claims.

c. The need to take account of collective consensual resolution as alternative dispute resolution

> ***Q15**. Apart from a judicial mechanism, which other incentives would be necessary to promote recourse to ADR in situations of multiple claims?*
>
> ***Q16**. 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*
>
> ***Q17**. How can the fairness of the outcome of a collective consensual dispute resolution best be guaranteed? Should the courts exercise such fairness control?*
>
> ***Q18**. 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?*
>
> ***Q19**. Are there any other issues with regard to collective consensual dispute resolution that need to be ensured for effective access to justice?*

As indicated in Paragraphs 2 and 5 of the General Comments, the ICC Competition Commission recommends that serious consideration be given to different kinds of Alternative Dispute Resolution mechanisms, in particular mediation. Since its establishment, ICC has supported the development of ADR mechanisms for the resolution of commercial disputes. While it will have to be considered whether these mechanisms are equally applicable to collective redress procedures, the value of ADR procedures in particular with regard to time and cost, could be of great interest. In particular, the ICC Competition Commission welcomes any efforts which increase the enforceability of results obtained through ADR proceedings. However, the ICC Competition considers that the outcome of an ADR procedure should only be binding if agreed to by the parties and that courts should not exercise a "fairness" control.

d. Strong safeguards against abusive litigation

> ***Q20.** 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?*
>
> ***Q21**. 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 principle15? 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?

***Q22**. 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).*

***Q23**. 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?*

***Q24**. Which other safeguards should be incorporated in any possible European initiative on collective redress?*

The European legal tradition provides several principles that are explained in paragraph 4 of the General Comments and that would be efficient safeguards against abusive claims. In particular, the "loser pays" principle must be applied to all cases, without any exceptions.

As indicated in Paragraphs 1 and 6 of the General Comments, the ICC Competition Commission is sceptical about the possibility to establish theoretical criteria that should be fulfilled in order to allow entities to bring collective actions.

e. Finding appropriate mechanisms for financing collective redress, notably for citizens and SMEs

***Q25**. 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?*

***Q26**. 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?*

***Q27**. 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?*

***Q28**. Are there any further issues regarding funding of collective redress that should be considered to ensure effective access to justice?*

The ICC Competition Commission does not wish to elaborate on a complete system of funding as that is clearly beyond the scope of Competition law, and such a question should be left to Member States. It strongly opposes the creation of economic incentives to litigation and therefore doesn't wish to recommend the introduction of general contingency fees. On the other hand, organizing a Europe-wide special funding system would be tremendously complex.

As indicated in Paragraph 4, the "loser pays" principle is necessary in any collective redress system. It should therefore also apply to representative entities.

f. Effective enforcement in the EU

***Q29**. 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?*

***Q30**. 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?*

***Q31**. 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?

The ICC Competition Commission believes that the questions made by the Commission are too general and reserves its right to answer them at a later stage.

However, the ICC Competition Commission maintains that the risk of forum-shopping would remain without harmonization of procedural regulations, but such harmonization, in turn, is not permissible because of the principle of subsidiarity.

g. Possible additional principles

***Q32**. Are there any other common principles which should be added by the EU?*

As indicated in Paragraph 4, the prohibition on punitive damages and the proof of a fault are major principles that should be reaffirmed by the EU Commission.

3. Scope of a coherent European approach to collective redress

***Q33**. 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?*

***Q34**. 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?*

As stated in Paragraph 1, the ICC sees no need for action on collective redress at EU level, neither as general initiative nor through sector-specific measures.

The International Chamber of Commerce (ICC)

ICC is the world business organization, a representative body that speaks with authority on behalf of enterprises from all sectors in every part of the world.

The fundamental mission of ICC is to promote trade and investment across frontiers and help business corporations meet the challenges and opportunities of globalization. Its conviction that trade is a powerful force for peace and prosperity dates from the organization's origins early in the last century. The small group of far-sighted business leaders who founded ICC called themselves "the merchants of peace".

ICC has three main activities: rules-setting, dispute resolution and policy. Because its member companies and associations are themselves engaged in international business, ICC has unrivalled authority in making rules that govern the conduct of business across borders. Although these rules are voluntary, they are observed in countless thousands of transactions every day and have become part of the fabric of international trade.

ICC also provides essential services, foremost among them the ICC International Court of Arbitration, the world's leading arbitral institution. Another service is the World Chambers Federation, ICC's worldwide network of chambers of commerce, fostering interaction and exchange of chamber best practice.

Business leaders and experts drawn from the ICC membership establish the business stance on broad issues of trade and investment policy as well as on vital technical and sectoral subjects. These include financial services, information technologies, telecommunications, marketing ethics, the environment, transportation, competition law and intellectual property, among others.

ICC enjoys a close working relationship with the United Nations and other intergovernmental organizations, including the World Trade Organization, the G20 and the G8.

ICC was founded in 1919. Today it groups hundreds of thousands of member companies and associations from over 120 countries. National committees work with their members to address the concerns of business in their countries and convey to their governments the business views formulated by ICC.
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