

OMNI BRIDGEWAY



**RESPONSE TO THE EUROPEAN COMMISSION**

**Commission Staff Working Document**

**Public Consultation**

**“Towards a Coherent European Approach to Collective Redress”**



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## Introduction

### Omni Bridgeway and collective redress

Omni Bridgeway provides project management and third party funding of group claims, claims against political risk states and quasi-government entities, as well as ancillary services such as strategy development for those claims. It has offices throughout Europe and Asia. Established and headquartered in The Hague, the Netherlands since 1986, Omni Bridgeway has recovered more than €1.6 billion of claims. The group claims department was established in 2009 to leverage Omni Bridgeway's over 20 years of experience in claims against sovereigns and corporates from emerging market jurisdictions and political risk markets.

Omni Bridgeway is currently funding two collective redress cartel actions in the EU in respect of damages arising respectively from the Elevators and Escalators Cartel<sup>1</sup> and the Airfreight Cartel<sup>2</sup>.

In most cases, Omni Bridgeway works on a complete 'no cure no pay' basis with remuneration calculated as a percentage of the client's recovery.

Omni Bridgeway's multidisciplinary case teams comprise lawyers, bankers, traders, analysts and intelligence officers. Our objective on cases is risk management, and minimization of time and cost while optimizing recovery. Omni Bridgeway's reputation for quality in claim management services and the ability to obtain recoveries from the world's most politically risky defendants, coupled with a simple fee model generating complete alignment of interest, means that clients can outsource claims and maintain their focus on core business activities.

Omni Bridgeway's global client base is largely comprised of export credit agencies (quasi-government organisations), banks, insurers and multinationals.

This background qualifies Omni Bridgeway to give the Commission the following feedback on the procedural and substantial obstacles encountered in group claims across EU jurisdictions today, for example:

- lack of awareness of the harms suffered and the rights to remedies or both;
- having to abandon cases where the facts occurred significantly in the past (an unavoidable problem in cartel cases where the Commission decision is regularly made years after the cessation of the cartel, and where the cartel itself may have lasted a long period) and because of insufficiently precise data in circumstances where a justifiable estimate can be made or the defendant itself has the evidence but is not required to disclose it; and
- variations within the applicable national laws (such as limitation periods and damages principles) which substantially complicate dealing collectively with cross-border claims.

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<sup>1</sup> Case COMP/E-1/38.823.

<sup>2</sup> Case COMP/39258.



These obstacles, along with the others mentioned in this submission, directly jeopardise access to justice and the principle of effectiveness of European remedies. They also mean that potential wrongdoers can pay little regard to laws, particularly where the consequences of a breach, while significant, will be spread across a large group of constituents who cannot afford to take action individually. However, those losses may be meaningful to those individuals, but the costs, inherent risks and unfamiliarity with claim processes means that pursuing them are too great. Effective collective redress is unarguably a key remedy to this major gap in European justice.

The burdens of governmental resources mean that giving public organisations exclusive responsibility for collective redress will deny justice to the vast majority of deserving claims. It is incontrovertible that government agencies and consumer bodies do not have the capacity to act in most of the circumstances where mass losses, and the concomitant right to group claims, legitimately arise. Many consumer bodies and agencies expressly say so. Thus, any policy based around public organisations playing the key roles in collective redress will, whilst sensible philosophically, effectively condemn collective redress to failure. To make this point it seems that no more should be necessary than to refer to the fact that consumer bodies are among the most vocal proponents of private enforcement and the role of private, commercial, actors in collective redress. Once consumer bodies admit that collective redress will only be a reality if commercial operators are permitted a role, it should become an accepted fact that any policy which does not provide for commercial operators will fall short of being able to provide redress for damages suffered (but not more).

Accordingly, Omni Bridgeway welcomes the Commission's efforts to improve the framework within which claimants can seek redress collectively, and appreciates this opportunity to contribute to the formulation of solutions.

## **1. Potential added value of Collective Redress for improving the enforcement of EU law**

### **Response to Question 1:**

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

The wide variety of enforcement procedures, court practices and legal presumptions found within the EU form a confusing terrain for claimants to navigate through.

As the then Competition Commissioner Neelie Kroes has stated: “[the] more European citizens and undertakings stand up for their right to damages, the more the potential perpetrators of illegal actions will think twice”. Until private enforcement is fully effective and widespread, large undertakings throughout the EU will continue to be motivated to do cost-benefit analyses to determine whether it is worth their while to collude with others to flout competition laws. At the moment, it still pays to commit infringements. Law-abiding consumers and businesses will be safer only when this situation is reversed – such that the infringement does not pay.

This improvement can be effected through both procedural and cultural changes. It is to be hoped that any improvements to the procedures of EU-wide compensatory collective



redress mechanisms to be introduced by the Commission following this consultation will help, over time, to change potential claimants' widespread hesitation and / or distrust of seeking redress for competition law infringements – particularly by way of a group action. Such hesitation and / or distrust may emanate from a combination of procedural and cultural factors such as:

- the novelty of such actions;
- unfamiliarity with the procedures;
- uninformed claimant concerns;
- suspicion that participation will encourage 'ambulance chasing' or a 'claims culture';
- uncertainty whether participation will lead to counter-claims, other adverse legal developments; and / or
- fear of adversely affecting future commercial relationships with the defendant.

Opportunities for redress by all types of claimants across the EU will further increase with the removal of some discrepancies, the harmonization of certain procedures, and wasteful multiple actions. In addition to providing an in-built disincentive for companies to commit breaches of competition and other laws, new mechanisms will also further increase the perceived legitimacy of directly effective EU law.

A simple, single EU-wide process for resolving claims, satisfying one or both of the following criteria:

- mass impact, i.e.: causing losses to a large number of people, for example seven or more; and/or
- a cross-border damages element, for example the possibility of different applicable laws and / or different jurisdictions, and / or different laws as to choice of law,

before a centralised, pan-European forum would remove the discrepancies, and substantive and procedural variations from member state to member state which operate as a real bar and disincentive to claims.

In addition, creating the possibility for claims – and the bringing of claims – will operate as a powerful deterrent for companies who may otherwise engage in breaches, for example of competition and other laws, and further increase the effectiveness of EU law.

## **Response to Question 2:**

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

Private collective redress must be both subsidiary and complementary to public enforcement. Private enforcement in practice is sometimes subsidiary and subsequent to public enforcement. A Commission finding of price-fixing, for example, may be the precursor to facilitating private enforcement, and it must be remembered that the massive fines meted out by the Commission do nothing at all to address the harm already suffered by affected Europeans.



In light of this symbiosis, the responsibility for promoting and contributing to justice necessitates that the Commission and government agencies, such as national competition authorities (*NCA*s), be more genuinely supportive of the processes for redress. Increased openness from the Commission and *NCA*s to requests for information from claimants and their representatives will reduce one of the greatest burdens claimants face when deciding to pursue and / or then mounting their claim. Of course, except in cases where disclosure would result in manifest harm, there should be a presumption that information produced through public enforcement activities should be available in the public domain. However, in our experience, the basic stance of the Commission or *NCA*s is to oppose requests for information on files.

Examples of this are, firstly, the Bundeskartellamt's conduct in the *Pfleiderer* case<sup>3</sup> and, secondly, in the *Elevators* case with which Omni Bridgeway is involved. In that case, the Dutch *NCA*, the Nederlandse Mededingingsautoriteit (the *NMa*) rejected a request for documents to assist victims of a cartel to bring a case which had already been commenced in Dutch courts. Amongst the reasons given were: (i) potential negative influence on relations between the *NMa* and the Commission; and, rather surprisingly, that (ii) providing documents could lead to a disproportionate harm for the cartelists by exposure to private damages actions. In particular, that latter reason is directly contrary to the Commission's well publicized encouragement of private actions. Omni Bridgeway acknowledges the important role of the condemnation and exposure to cartelists, but observes a disconnect between the Commission's stated ambition to see victims compensated (rather than simply earning revenue from the imposition of fines) and the actions of some of its officials and *NCA*s more generally. A third example is the surprising decision by the Commission to intervene in US proceedings to oppose discovery to victims of documents held by a cartelist<sup>4</sup>.

Thus it seems without doubt that as regards documents and the evidence critical for victims to bring claims, that elements within the Commission are much more active in impeding claims than permitting them. This does of course raise questions about whether the Commission is entirely honest in its well-publicised and repeated endorsement of private actions when, confronted by actual cases, it appears less than neutral.

To put it into sharp relief, the Commission recovers billions of euros annually in fines for corporate wrongdoing: none of that money goes towards the losses of the victims of that wrongdoing, yet the Commission in effect hinders the pursuit of compensation for those victims.

Even if it was assumed that claimants' access to information on a leniency file of the Commission's Directorate General for Competition is undesirable because it would jeopardise the leniency process, it does not follow that the settlement files should be similarly embargoed. As regards leniency, it is noted that the entire discovery of cartels might rest upon informants, and it is therefore arguable that if information cartelists

<sup>3</sup> *Pfleiderer AG v Bundeskartellamt* (C-360/09).

<sup>4</sup> *Vitamins Antitrust Litigation*, Re, Rep. of Special Master (99-197) (TFH), 2002 U.S. Dist. LEXIS 26490 January 23, 2002 D.D.C..



provide is liable to release then in some instances undertakings might be more reluctant to come forward (and therefore the entire cartel enforcement is jeopardised), at least as long as cartel conduct is not criminalized. However, the settlement process is different. The Commission makes it well known that whilst settlement is a process that shortcuts the infringement investigation and decision, discounts for settlement are quite limited (certainly when compared to discounts for leniency). It clearly follows that allowing claimants access to settlement information will not compromise the Commission's discovery of cartels, in essence because settlement does not involve exposing an otherwise secret cartel. Once again, it seems hypocritical for the Commission on one hand to encourage businesses affected by cartels to claim redress, but to then refuse access to the very documents often critical to pursuing such redress.

Indeed, one may question why taking steps towards giving victims redress is not a factor in the settlement process itself. Critics may regard the status quo as somewhat perverse in so far as it permits a corporate wrongdoer to achieve a discount in a penalty on the grounds of cooperation in reaching an early settlement at the very same time as the wrongdoer is refusing to provide any compensation to the party it has harmed by the condemned conduct. This incongruity of the system exists also in the way that the Commission has the power to increase sanctions for recidivism, but not for refusal to pay back illegal gotten gains (or, put differently, to offer at the very least a discount on fines when the wrongdoer has made fair repayment).

**Response to Question 4:**

**What in your opinion is required for an action at European level on collective redress (injunctive and / or compensatory) to conform with the principles of EU law, e.g. those of subsidiarity, proportionality and effectiveness? Would your answer vary depending on the area in which action is taken?**

As raised in response to Question 1, a single judicial forum (tribunal or court) could handle group claims coming from across the EU – at the very least cross-border ones – and apply a uniform code in respect of matters such as actionable wrongs / liability, damages, time limitations and procedure.

This might not be as difficult as it may seem at first instance, once it is recognized that the source of unlawful conduct giving rise to mass claims is already in EU law<sup>5</sup> in respect of cartel damage claims, and it is only the damages remedies which remain subject to state law. Thus, providing remedies under EU law is a logical next step.

The tribunal should have specific, but limited, powers to order defendants and third parties (including government agencies) to provide claimants with documents necessary to establish the claim. However, such a process easily can, and should, be confined in scope. On that basis there will be no risk of having discovery schemes like the UK and US, which are to be discouraged in continental Europe. Yet the prima facie position should be that specifically identified documents or categories of documents should be disclosed where they are relevant to formulate the claimants' cases. Comparable procedures already exist in European jurisdictions in a number of specific contexts.

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<sup>5</sup> Articles 101 and 102 of the Treaty of the Functioning of the European Union.



However, clarification and codification of their availability for collective redress is necessary to ensure that they can be effectively – but not abusively – used.

**Response to Question 5:**

**Would it be sufficient to extend the scope of the existing EU rules on collective injunctive relief to other areas; or would it be appropriate to introduce mechanisms of collective compensatory redress at EU level?**

The importance of compensation has been clearly established in the EU’s jurisprudence<sup>6</sup>. Furthermore, payment of damages to valid claimants will make a company think twice about repeating its unlawful conduct – be it contrary to competition, corporate or tort laws, for example.

**2. General principles to guide possible future EU initiatives on Collective Redress**

**Response to Question 10:**

**Are you aware of specific good practices in the area of collective redress in one or more Member States that could serve as inspiration from which the EU/other Member States could learn? Please explain why you consider these practices as particularly valuable. Are there on the other hand national practices that have posed problems and how have/could these problems be overcome?**

One traditional impediment to resolving claims is a defendant’s fear that settling one claim (or one group of claims) establishes a precedent which will encourage other claims related to the same events, and thereby set the defendant on a protracted and unpredictable course of claims disputation. However, the Dutch Law on Collective Settlement of Mass Damages – the *Wet Collectieve Afwikkeling Massaschade (WCAM)* provides a powerful solution for problem in the settlement of collective redress claims.

The WCAM does this by allowing opposing parties to jointly approach the court and obtain a binding settlement order which binds to the settlement all persons effected by the same wrongdoing (even persons not involved in the settlement process). This binding order is necessary because it allows a defendant to obtain the “global peace” which would otherwise be a significant obstacle to resolution. Yet, one important limitation is the perceived uncertainty as to whether the settlement order would be recognized by Member States other than The Netherlands, for example whether recognition pursuant to Article 6(1) of Brussels I Regulation<sup>7</sup> would be jeopardised by the public policy exception.

Key fairness elements of the WCAM scheme include very comprehensive requirements of notice to the affected – but absent – claimants, plus opportunities for an absent but affected party to either appear and object or to opt out. Ultimately, this makes it fair that an absent party be bound. However, the novelty of this model means that protagonists are able to question the recognition, and therefore the utility of WCAM could be increased if

<sup>6</sup> Cases such as *C-46/93 Brasserie du Pêcheur*, *C-6-9/90 Francovich*, *C-128/92 Banks* (in particular the Opinion of AG van Gerven), *C-453/99 Courage*, and *C-295/04 to C-298/04 Manfredi*.

<sup>7</sup> Council Reg (EC) 44/2001.



legislation were enacted to confirm that EU Member States would recognize a WCAM settlement order where notification to the party in question has been properly served.

### 3. Need for effective and efficient redress

#### **Response to Question 11:**

**In your view, what would be the defining features of an efficient and effective system of collective redress? Are there specific features that need to be present if the collective redress mechanism would be open for SMEs?**

Any system should be equally applicable to consumers, SMEs and multinationals.

#### Limitation periods

A major hurdle for claimants is lack of information regarding the claim because unlike, for example, contractual disputes, the precise claim facts might not be within the knowledge of the claimant, who may only have a broad understanding sufficient to alert it to the likelihood that it has suffered from unlawful behaviour but not complete certainty, nor the information necessary to prove the wrongdoing. It accordingly takes time (if it is at all possible) for:

- the harm to be detected, investigated and adjudicated;
- information about the existence of the harm to be disseminated;
- claimants to learn that they have rights to seek redress;
- claim information and evidence to be gathered;
- claimants to form or be formed into a group; and
- lawyers to be instructed to issue a proceeding.

Given these hurdles, some of the more aggressive limitation periods found within the EU, such as in Spain<sup>8</sup>, preclude claimants from having a fair chance to seek redress. Even well-resourced claimants in a country with a more reasonable limitation period, such as three years in Germany<sup>9</sup> or Sweden, are known to struggle to file a claim before the expiration of that period.

Harmonizing limitation periods across Europe, with the implementation of perhaps a seven year limit – specific to collective redress actions – starting at the time of awareness or the publication of a Commission Decision on the matter – whichever is later, would address these problems. Legislation should establish that awareness is prima facie the point where it can be shown that the claimant became aware of the key information (claim facts, defendants identities and information necessary to calculate losses) reasonably considered necessary to succeed in the case.

Such a limit would provide claimants with a fair chance to file claims, would provide defendants with the certainty of closure that they require and fairness in terms of being able to access evidence to defend claims before its destruction (because seven years

<sup>8</sup> One year after the affected party becomes aware of the harm done: Articles 1968 and 1902, Spanish Civil Code.

<sup>9</sup> One year after the affected party becomes aware of the harm done: § 195, German Civil Code.



reflects the normal period required for the retention of business records for tax and related purposes) and would be proportionate.

## Rebuttable presumption of an overcharge of 15% for cartel damages cases

One of the biggest hurdles faced by victims of price-fixing is quantifying the overcharge. Traditionally, defendants armed with better quality data and financial resources take advantage of technical and academic weaknesses in the economic analysis by claimants, including frequently insisting that the price-fixing did not lead to an overcharge. Whilst it stands contrary to logic and empirical evidence to allege that cartels do not increase prices, the level of proof required for court proceedings can sometimes lead to unfair outcomes in cases involving price fixing.

Ultimately, the problem is that whereas in 93% of cartels there will be an overcharge<sup>10</sup>, the extent thereof is less clear and the typical operation of litigation means that the claimants have a burden which can be met with varying acceptance and rejection by European judges.

The uncertainty and potential lack of justice discourages valid claims. However, based on the overwhelming evidence that cartels cause overcharges, there is a fair alternative: a presumed overcharge which either party is at liberty to rebut.

Economic research into overcharges imposed by cartelists on customers has consistently found that such overcharges are approximately 20%. These findings have been corroborated by repeated surveys over several decades across different sectors and different continents. For example:

- in 2002 the OECD estimated that the average overcharge was 15-20%<sup>11</sup>;
- a 2006 study found that median overcharge was 25%<sup>12</sup>; and
- the 2009 Oxera report for the European Commission found that the median overcharge was 18% for cross border cartels<sup>13</sup>.

Indeed, Hungary has taken the progressive step of enacting a provision by which courts judging antitrust cases will presume an overcharge of 10%<sup>14</sup>.

A rebuttable presumption would remove a disproportionate and unjust obstacle to valid cartel damage claimants because of: (i) the reduced evidential burden of mounting the case; and (ii) the minimum threshold of compensation.

## Non-solicitation restrictions in certain jurisdictions

Today's globalised world sees cross-border wrongs being suffered by cross-border consumers, whether individuals or businesses. In light of this and the need to decentralise enforcement, existing barriers to the dissemination of the existence of such

<sup>10</sup> "Quantifying antitrust damages: Towards non-binding guidance for courts", a study prepared for the European Commission by Oxera in December 2009.

<sup>11</sup> *OECD Report on the Nature and Effect of Cartels* (2002).

<sup>12</sup> Connor J. M. and Bolotova Y. 'Cartel Overcharges: Survey and meta-analysis', *International Journal of Industrial Organization* (2006) Vol. 24, pp. 1109-1137.

<sup>13</sup> Oxera study of December 2009, *supra*.

<sup>14</sup> Section 88/C of the Hungarian Competition Act, adopted on 3 June 2008.



wrongs/infringements should be lifted. For example, French law prevents solicitation of claims and the website *classactions.fr* has been the subject of adverse judgments<sup>15</sup>. As solicitation is a key way of spreading information, respecting of course the choice of entities to decline participation, this ban is a key limitation on collective redress.

#### 4. Importance of information and the role of representative bodies

##### **Response to Question 13:**

**How, when and by whom should victims of EU law infringements be informed about the possibilities to bring a collective (injunctive and / or compensatory) claim or to join an existing lawsuit? What would be the most efficient means to make sure that a maximum of victims are informed, in particular when victims are domiciled in several Member States?**

Dissemination by public bodies alone is insufficient. Affected persons frequently do not follow regulatory activity, and do not realize their rights when wrongdoing is identified.

Consumer, trade and business organisations are well placed to spread information. But, there will still be gaps. Many business organisations and chambers of commerce, due to the ongoing cultural adjustment as regards collective redress, are scared of being seen to cooperate in respect of any form of collective redress. This is of particular detriment of SMEs.

Thus, private organisations that are incentivized to disseminate information should be allowed and encouraged to do so – whether for social welfare purposes (like consumer bodies) or financial purposes (like third party funders). Moreover, barriers to cooperation between lawyers, third party funders, claims aggregators and public bodies should be removed.

Ultimately, dissemination of information regarding rights to victims (which is critical for any genuine system of collective redress) will only be maximized if the role of these commercial actors such as lawyers, third party funders or claims aggregators is recognized.

To ensure that the conveyance of such information is not done unscrupulously, regulation could play a role.

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<sup>15</sup> Article L422-1 *et seq.* of the French Consumer Code, as confirmed by the Paris Commercial Court in the *UFC Que Choisir* case on 6 December 2007 and by the Paris Court of Appeal in this same case on 22 January 2010.



## 5. Collective consensual resolution

### **Response to Questions 15 and 16:**

#### **Question 15:**

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

#### **Question 16:**

**Should an attempt to resolve a dispute via collective consensual dispute resolution be a mandatory step in connection with a collective court case for compensation?**

We take it as a given that amicable approaches to settlement and ADR should be promoted ahead of litigation. The incentives for courts, claimants, defendants and third party funders alike are clear: only those litigation lawyers favouring long legal battles and the ensuing fees might rue greater promotion of recourse to ADR.

Unlike lawyers sometimes motivated by ongoing hourly billings, third party funders will inevitably support measures to optimize recovery and minimize expense (whether delay, costs, or otherwise), and typically treat ADR as the favoured objective when formulating strategy.

Recourse to ADR should certainly be encouraged but there is not one particular ADR clause or mechanism that works in all situations, and for these reasons no mandatory steps to ADR should be imposed for collective redress mechanisms in the EU.

Nevertheless, the impositions of sanctions on a party for rejecting a reasonable offer could make a material contribution to the success of ADR. In Australian jurisdictions, for example, a defendant who rejects a claimant's offer but ultimately achieves a less favourable judgment is required to reimburse, at a higher than usual rate, the costs of the claimant incurred after rejection of the offer. The procedure works in reverse, that is a claimant faces similar consequences for not accepting a defendant's offer. Similar incentives to settlement exist in the UK. The experience of these jurisdictions shows that these incentives to making an offer overcome the litigant's fear of looking weak or of making concessions early in the process. Similarly, the possible consequences of not accepting a sensible offer helps focus the mind of the recipient of the offer and is a very useful tool in facilitating settlements saving the public purse the expense of drawn out hearings.

## 6. Safeguards against abusive litigation

### **Response to Question 20:**

**How could the legitimate interests of all parties adequately be safeguarded in (injunctive and / or compensatory) collective redress actions? Which safeguards existing in Member States or in third countries do you consider as particularly successful in limiting abusive litigation?**

Abusive litigation is certainly an evil to be guarded against. However, the potential for it to occur in the EU is vastly exaggerated and simple means exist for keeping that potential in check.



Safeguards exist for claims which are vexatious, have an invalid cause of action, or which are otherwise clear abuses of process. National courts already have both the procedural tools and the discretion to strike out all or part of such claims and / or to award costs to sanction delays or other abusive conduct in the pursuit (or defence) of a claim.

Indeed, comparisons with class actions in the US are unhelpful. Omni Bridgeway shares views of the Commission and the business community that – regardless whatever one may think of the US litigation system – it is not compatible with European culture. However, there is zero risk of creating a US-style class action environment. Indeed, it would be virtually impossible to transplant or create in Europe the culture of US class action litigation. Such a culture emanates from key fundamentals in the general litigation landscape of the US, which do not (and could never) exist in Europe. For example, neither of the oft-quoted cases of McDonalds being sued for a cup of coffee being too hot, or the judge who claimed \$65million from a dry cleaner for destroying a single pair of pants, are class actions. The existence of groups of claimants seeking redress through use of Europe’s well-established procedures of conventional litigation does not and will not import the US’ litigation culture. Moreover, it is sensationalist and ill-informed to suggest that developing a form of collective redress into the existing European litigation culture will automatically import a US approach which is by no means specific to class actions.

Factors like high contingency fees for lawyers, absence of loser pays costs, reliance on juries and punitive damages are no doubt part of the factors contribution to the unique litigation culture which exists in the US . The fact that all EU jurisdictions steer clear of such factors provides additional safeguards to defendants and courts. Introducing further procedural safeguards by interfering with national court procedures is therefore unnecessary.

Indeed, beyond the US, there are many jurisdictions which have litigation cultures and systems far closer to the Europe’s, and who also have functional and moderate class action procedures: Australia, Canada, Denmark, Israel, South Africa, Sweden for example. Australia has had several decades with class actions and there has been no flood of group claims – just the development of a market facilitating access to justice that involves responsible players. A handful of cases are commenced annually and with extremely few exceptions (notably, less than for non-class actions) they are ultimately proven to be justified cases.

It is therefore perhaps quite unhelpful to treat the US, with its overall litigation environment completely incomparable with Europe’s, as any form of indicator of what would happen were proper collective redress structures to be facilitated across the EU. Accordingly, it might be said that any informed commentator who attempts to draw that unwarranted comparison with the US merely does so to be sensationalist and pander to common stereotypes in order to pursue the selfish agenda of preventing Europeans (in particular consumers and SMEs) from accessing just and modest redress as against the corporate wrongdoing which regrettably occurs from time to time.



**Response to Question 21:**

**Should the “loser pays” principle apply to (injunctive and / or compensatory) collective actions in the EU? Are there circumstances which in your view would justify exceptions to this principle? If so, should those exceptions rigorously be circumscribed by law or should they be left to case-by-case assessment by the courts, possibly within the framework of a general legal provision?**

The ‘loser pays’ principle is an important safeguard of the legitimate interests of all parties in compensatory collective redress actions. It not only reimburses defendants for costs spent in vindication of their positions, but the threat thereof is a key factor in ensuring unmeritorious claims are not pursued.

The recent decision of the European Court of Human Rights in *MGN v. UK*<sup>16</sup> noted that an excessive award of costs may deter EU citizens from exercising their fundamental rights. This is particularly true for small claimants. This can be addressed in at least two ways:

- after the event insurance, however even where premium payments are deferred until the conclusion of the case (so that the risk is limited to the cost of a premium), premiums are not on a ‘no cure no pay’ basis and are extremely expensive so that in many cases the premiums will still constitute an unaffordable risk for consumer rights bodies; and / or
- third party funders assuming liability for such costs on a complete ‘no cure no pay’ basis, which is a comprehensive solution for claimants who would otherwise be practically denied justices by the threat of the loser pays principle.

Given the existing procedural safeguards and court discretion outlined in response to Question 20 above, no exception to the ‘loser pays’ principle should be proscribed and instead should be left to a case-by-case assessment by the national courts.

**Response to Question 22:**

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

As discussed in the Introduction and in response to Questions 13 and 21, consumer bodies, trade associations and similar organisations do not have sufficient resources to conduct such claims, and are occasionally irresponsible in exposing themselves to adverse costs. For reasons expressed earlier, it is inescapable that without commercial actors collective redress procedures will be underutilized by such parties, as well as by other types of claimants.

In appropriate cases, third party funders could be permitted to finance and cooperate with consumer bodies. Notwithstanding, there should be regulation of commercial actors, for example capital adequacy requirements.

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<sup>16</sup> 18 January 2011 (Application No. 39401/04).



## 7. Mechanisms for financing collective redress

### **Response to Question 25:**

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

The theory that facilitating third party funders creates a risk of abusive litigation needs exploration, and is easily disproved.

For reasons previously stated, comparisons between European and the US litigation are not on point. And in any event the funding for US class actions is predominantly from lawyers recovering contingency fees (generally prohibited in the EU) without the need to account for the loser pays costs risk. Thus, whilst US lawyers acting on contingency fees risk their own overheads, third party funders go one step further and risk cash by paying lawyers, experts and other litigation suppliers as well as taking on the risks of the loser pays costs principal.

The most developed third party funding market in the world is Australia. The overwhelming evidence from Australia demonstrates that third party funding of collective redress has not lead to an avalanche of claims, or abusive litigation and in fact means that only claims with very high merits are brought. Since 1992 there has been a median of 11 class actions per year<sup>17</sup>. There is no evidence or even justifiable anecdotal indications of abusive class action litigation. In fact, reality demonstrates that the very significant investment and risks by third party funders in class actions means that they will perform extensive due diligence on all issues relevant to recoverability of claims (which means not only merits, but solvency of defendants as generally speaking it is not in stakeholders' interests to render defendants insolvent). An important part of the Australian litigation environment, which the EU would do well to note, is the loser pays costs principle.

Hence, the idea that third party funders would abuse the process of litigation is not one that translates into reality. Third party funders devoting millions of euros to fund and manager complex cross-border claims will certainly not take on the attendant risks of an unmeritorious case. The sheer economics of writing cheques of substantial sums – to pay for lawyers' fees and payments into court, and systems to manage the evidence and processes for hundreds of claimants – helps bring discipline to claim selection. This means that only those cases that are most likely to win/those that are most meritorious get funded – and in doing so the interests of both the third party funders and the claimants in such actions are aligned. Inherently therefore, the use of third party funders provides a safeguard for abusive litigation, because their commercial and clinical due diligence automatically operates to exclude weak cases. Beyond this structural safeguard, further requirements could be imposed by regulation, for example capital adequacy requirements.

<sup>17</sup> Morabito V. (2010) *An Empirical Study of Australia's Class Action Regimes: 2<sup>nd</sup> report on Litigation Funders, Competing Class Actions, Opt Out Rates, Victorian Class Actions and Class Representatives* Australian Government: Australian Research Council.



**Response to Question 26:**

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

See the responses to Questions 20, 21 and 25.

**Response to Question 27:**

**Should representative entities bringing collective redress actions be able to recover the costs of proceedings, including their administrative costs, from the losing party? Alternatively, are there other means to cover the costs of representative entities?**

Yes. As stated above, any successful parties should be able to recover costs from the opposing party in the interests of fairness of a party put to the expense of a defence or claim which is vindicated, and in the interests of acting as a disincentive to the bringing of unmeritorious claims.

**8. Scope of a coherent European approach to collective redress**

**Response to Question 33:**

**Should the Commission's work on compensatory collective redress be extended to other areas of EU law besides competition and consumer protection? If so, to which ones? Are there specificities of these areas that would need to be taken into account?**

The arguments in favour of collective redress, and any initiative introduced by the Commission in the area of compensatory collective redress, should be of general application to any viable claims of multiple parties, and should not be confined to the fields of competition and consumer protection. Such measures should be applied to fields including, for example, banking and securities fraud, competition law infringements and product liability.

**9. Conclusion**

It is respectfully suggested that the Commission should focus on the points outlined below when developing a coherent European approach to collective redress mechanisms.

- The necessity of private commercial actors should be recognized– not merely consumer bodies and trade associations, in particular third party funders.
- Damages laws and causes of action (for example with respect to competition law infringements) should be harmonized. In doing so special attention should be paid to:
  - time limitations – allowing sufficient dissemination of the existence of the infringement and the ability to gather data and mount a claim;
  - burdens of proofs – having regard to the information disadvantage of claimants, and reducing the possibilities for defendants to exploit uncertainties as to the precise quantification to avoid their liabilities; and
  - giving claimants greater access to agencies' files (for example, the settlement files of the European Commission).

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- In collective redress actions relating to competition law infringements, the use of both representative proceedings and a rebuttable presumption of a certain level of overcharge by the cartel would facilitate both the adducing and defending of claims.
- Regulation of third party funders could provide claimants and defendants with an additional layer of safeguards.

Omni Bridgeway would be pleased to actively cooperate with the Commission on specific policy and legislative developments in these areas, and to lend its expertise to that end.

Omni Bridgeway  
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