Response of the U.S. Chamber Institute for Legal Reform to the Consultation on Private Actions in Competition Law

EXECUTIVE SUMMARY

The U.S. Chamber Institute for Legal Reform (“ILR”), a nonprofit advocacy organization recognized the world over for its efforts to limit litigation abuse and ensure a simple, efficient and fair legal system, is pleased to enclose its response (“Response”) to the Department for Business Innovation and Skills’ consultation entitled, Private Actions in Competition Law: A Consultation on Options for Reform (“Consultation”).

While commending the Government for the obvious thought and efforts put into the Consultation, ILR nevertheless generally opposes any measures intended to expand the use of private collective actions in the competition field. In the Response, ILR answers the Consultation questions while stressing these critical points:

- First, ILR challenges the Consultation’s assumption that private redress in the field of competition law is lacking in the UK.
- Second, even assuming that private redress is lacking, ILR believes that implementing private collective redress would lead inexorably to lawsuit abuse, as collective cases are inherently prone to such abuse.
- Third, ILR believes that any collective redress regime that relies on private actions necessarily will supplant, rather than enhance, public enforcement of competition law by competition authorities.
- Finally, notwithstanding all of these risks, should the Government implement a private collective redress regime in the field of competition law, ILR believes it should include stringent safeguards against lawsuit abuse.

1. Private Collective Redress Is Not Necessary.

As an initial matter, ILR’s Response challenges the Government’s assertion that the private collective redress regime proposed in the Consultation is necessary to right alleged competition law infringements. The information on current practices in the Consultation shows that existing methods for collective redress are not often used, but it does not show any large-scale demand for a new regime of private collective redress, or that such a regime, if implemented, would cure the supposed defects the
Consultation finds in the existing system. For this reason, ILR urges the Government to consider whether existing enforcement mechanisms require strengthening, and, if so, to further consider less drastic means of doing so than implementing such an abuse-prone mechanism as private collective litigation.

2. Implementing Private Collective Redress Would Lead to Lawsuit Abuse.

ILR shows in its Response that adopting the proposals contained in the Consultation would lead to an increase in abusive litigation. Collective litigation is inherently more vulnerable to abuse than individual lawsuits, because it aggregates the claims of numerous litigants in a single proceeding, thus increasing both the overall amount in dispute and the cost of the dispute itself. As a result, a defendant in a collective action frequently faces both litigation exposure and costs far exceeding those faced in an individual lawsuit, which may compel defendants to settle collective actions rather than seek adjudication on the merits, regardless of the validity of the claims at issue. In these respects, collective actions are inherently coercive; because the mere act of filing a collective claim can threaten even an innocent defendant with ruinous economic harm, the availability of a mechanism to aggregate claims into a collective action can lead to increased lawsuit abuse.


ILR further reveals in its Response that the structural result of implementing private collective actions would be the partial privatization of competition law enforcement in the UK. However, ILR believes, as explained in the Response, that competition law enforcement must remain the sole province of the competition authorities which have the expertise and judgment to enforce the competition laws dispassionately and in the best interests of all consumers and businesses. Because a competition authority has experience and expertise in this area, it is far better positioned than private individuals to ascertain whether and to what extent competition law infringements actually occur. A competition authority is also better positioned to make the policy judgments surrounding every enforcement decision than private claimants who have a direct, self-interested, financial stake in a matter. ILR suggests that if the Government is determined to facilitate redress, then it should study ways in which public enforcement could be enhanced so as to deliver redress in appropriate cases, rather than promote collective litigation.

4. If the Government Implements Private Collective Redress, It Should Include Safeguards against Lawsuit Abuse.

If, after the further consideration of any need to improve competition redress that ILR advocates in the Response, and if, notwithstanding the dangers of private collective
redress that ILR discusses in the Response, the Government is still determined to move forward with the proposals contained in the Consultation, ILR urges the Government to include safeguards against litigation abuse. In specific answers to the Consultation questions, the Response discusses the following safeguards:

- **Due process.** Competition proceedings must not be expedited in ways that reduce defendants’ due process protections, including by implementing a presumption on the quantification of damages. Notwithstanding that ILR disagrees with the Government’s policy of encouraging litigation in this field, there is no justification for seeking to achieve that aim by radically altering the burden of proof.

- **Loser pays.** The “loser-pays” rule, which already is in effect in group litigation in England and Wales, powerfully deters claimants from bringing unmeritorious claims and defendants from raising unmeritorious defenses. It should be preserved in competition cases.

- **Stringent certification standards.** Any proposal for private collective actions should include a certification requirement, whereby a court must determine that all of the claims of the proposed group members can be adjudicated fairly in a single proceeding and established through common proof, before the action may go forward.

- **Treble and punitive damages.** Because collective actions already pose the risk of abuse caused by outsized awards, treble and punitive damages should not be permitted.

- **No contingency fees.** Contingency fees in private collective actions encourage lawyers to commence lawsuits to extract the highest possible settlement and take a contingency fee, even though the resulting award to individual claimants is often negligible.

- **No third-party funding of collective actions.** Third-party litigation funding presents many of the same dangers as contingency fees without the ethical safeguards that govern the client-lawyer relationship. Such funding should not be permitted in collective actions.

- **No cy pres awards.** Cy pres awards depart from the objective of providing compensation to claimants who have suffered harm. Instead, such awards provide a windfall to entities that have not themselves suffered any harm. Cy pres awards should not be allowed.
ILR would be pleased to discuss its Response with the Government, or answer any questions about the Response that the Government may have.