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

The U.S. Chamber Institute for Legal Reform ("ILR") is pleased to respond to the Department for Business Innovation and Skills’ consultation entitled, Private Actions in Competition Law: A Consultation on Options for Reform (the “Consultation”).

ILR is a not-for-profit public advocacy organization affiliated with the U.S. Chamber of Commerce, the world’s largest business federation, which represents the interests of more than three million businesses of all sizes and sectors, as well as state and local chambers and industry associations. ILR’s mission is to ensure a simple, efficient and fair legal system. Since ILR’s founding in 1998, it has worked diligently to limit the incidence of litigation abuse in United States (U.S.) courts and has participated actively in legal reform efforts in the U.S. and abroad. Many of ILR’s members have business interests in the United Kingdom (UK), and ILR is deeply committed to the orderly administration of justice in the UK.

For more than a decade, ILR has studied the effects of collective litigation and the ramifications of collective redress schemes for civil justice systems. ILR has published numerous articles on collective actions and has participated in public symposia about them. ILR has also engaged in substantial advocacy efforts in the U.S., the European Union, and in a number of countries around the world regarding legislation governing collective actions. ILR has been recognized as an expert and constructive partner in reform efforts relating to collective actions. A number of European governments have consulted or are consulting ILR when legislating in this area.

Introduction

ILR commends the Government for the obvious care and attention to policy detail put into the Consultation. ILR also commends the Government’s stated goal of avoiding U.S.-style class actions in the UK. Indeed, we understand that the Government’s purpose is to further protect consumers from infringements of competition law. We question, however, whether a need exists in the UK for private collective redress in the field of competition law. Moreover, if such a need does exist, we do not believe that the proposals set out in the Consultation would be the best approach. We believe that the proposals, if implemented, will have a number of unintended negative consequences for consumers and for the administration of civil justice in the UK. In addition, if the proposals were implemented, they would to some extent supplant public enforcement of competition law by competition authorities with private enforcement by self-interested claimants.

The Absence of Need for the Proposals and the Dangers of Collective Actions

As a threshold matter, ILR does not believe that the Consultation shows that a need exists in the UK for the introduction of new mechanisms for private collective actions relating to alleged
competition law infringements. The information on current practices in the Consultation shows that existing methods for collective redress are not often used, but the Government nonetheless bases its far-reaching proposals on an assumption of large-scale demand for new methods. In section 5 of the Consultation, for example, the Government discusses the *JJB Sports* collective action brought by Which? The consultation notes that, despite efforts by Which? to encourage participation in that case, and despite what the Consultation calls “wide press coverage,” only 130 claimants, or fewer than 0.1% of those eligible, signed up for compensation. The Government does not appear to question whether everything possible was done to explain to consumers the advantages of participating in what – at the time – was an entirely novel procedure. Nor does the Government question the efficacy of its own role in communicating to consumers the opportunities available to obtain redress.

Instead, the Government attributes the low number of collective cases in general to just two factors: the time it takes for there to be an infringement decision which can form the basis of a follow-on action and an assumption that the requirement to communicate a choice to participate (i.e. by opting-in) is too burdensome for consumers.

As to the first issue, establishing whether a competition infringement has occurred is often complex, and the time required for due process should not be characterized as a systemic flaw. As to the second issue, ILR firmly believes that the decision to participate in litigation is a serious one, with potentially significant consequences. Opting-in to a case is a very simple matter for those that have made the informed choice to do so. ILR strongly disagrees that it is somehow fairer to adopt an opt-out regime which runs the risk that some claimants (who are not aware of the litigation or how to opt-out) will have the decision of whether or not to participate in a legal action made for them.

There are many possible reasons for the low uptake in the *JJB Sports* case, none of which are properly considered in the Consultation. It is possible that consumers did not participate in the *JJB Sports* case either because they did not know about it or because they did not feel they had a sufficient understanding of the consequences. If so, better information from the Government and/or Which? might have led to different results. Provided consumers make informed choices about whether or not to participate in a legal process, those choices should be respected, and it is not the Government’s place to inflame consumer disputes into court-based litigation. The reasons for the limited uptake in *JJB Sports* require further consideration; it does not necessarily make the case for the mechanisms now proposed by the Government.

This is especially worrying because of the damaging unintended consequences that would almost certainly flow from adopting the proposals. As we explain in detail in responding to questions 13 and 14 below, collective litigation is inherently more vulnerable to abuse than individual lawsuits, because it aggregates the claims of numerous litigants in a single proceeding. When numerous claims are aggregated in this way, the overall amount in dispute increases – as does 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. This may compel defendants to settle collective actions rather than seek adjudication on the merits, regardless of the validity of the claims at issue. Indeed, many defendants often agree to settle collective actions on sub-optimal terms rather than take their chances at trial. This is true even when the defendant has meritorious

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1 Consultation ¶ 5.4-5.5.
defenses, or when the claims of the class members lack validity. At the same time, because collective actions aggregate numerous individual claims – without individualized proof – they include weak or non-meritorious individual claims along with any valid claims, without any effective mechanism to litigate them individually.

In these respects, collective actions are inherently coercive; because the mere act of filing a collective claim can threaten a defendant – even (in the case of stand-alone actions) an innocent defendant – with ruinous economic harm, the availability of a mechanism to aggregate claims into a collective action can lead to an alarming uptick in nonmeritorious litigation.

Moreover, the argument that collective actions increase what proponents call “access to justice” is at bottom merely an acknowledgement that such actions increase the ability of claimants to sue defendants in court. No one could dispute that increasing claimant access to the courts also increases the likelihood that any potential defendant will be haled into court on a frivolous claim – especially if stand-alone collective actions are not prohibited. Increasing court access necessarily increases the risk of meritless litigation, and the attendant harm to business, the economy, and, ultimately, to consumers themselves.

For these reasons, and based on ILR’s years of study of collective actions, we do not believe that such aggregate litigation should be introduced as a means of enforcing competition law in the UK. Instead, the Government should consider further whether a need actually exists in the UK to enhance redress in competition cases. Only then, if the Government determines that such a need does exist, should it consider other, less dangerous options for satisfying that need. As noted above, collective actions of the kind proposed by the Government are inherently open to abuse, but other, less risky means for providing collective redress exist. For example, voluntary alternative dispute resolution (“ADR”) schemes may provide a suitable alternative to collective actions. The European Commission’s Directorate General for Health and Consumers has recently proposed legislation aimed at ensuring access to such schemes and, in our view, the principle that ADR mechanisms should be available, and should be considered (though not imposed) before court proceedings are commenced, applies as much to aggregate litigation as any other form of litigation. ADR is just one possibility for addressing any under-compensation of victims of competition law infringements. We urge the Government to consider such possibilities before launching a dangerous and potentially damaging regime featuring extended collective actions.

**Private vs. Public Enforcement**

Aside from the danger of lawsuit abuse created by the extended collective action regime envisioned in the Consultation, the structural result of such a regime would be the partial privatization of competition enforcement in the UK. As the Consultation states, the Government “believes that, in certain limited circumstances, private actions can complement public enforcement, enhancing the benefits of the competition regime in our economy.”  ILR respectfully disagrees with this assertion and submits that competition 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. In doing so, a competition authority must – and does – consider what is in the public interest.

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2 Consultation ¶ 3.5.
Accordingly, public enforcement by a competition authority is superior to private enforcement through collective litigation. 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 that surround every enforcement decision than private claimants who have a direct financial stake in a matter.

Unlike a competition authority, private parties are predominantly interested in commencing litigation for the prospect of financial reward. Accordingly, while individuals must be able to enforce their legal rights, their choosing to do so should not be considered a supplementary form of law enforcement, which necessarily involves policy judgments by the authority bringing the enforcement action.

For these reasons, to the extent the Government believes that public competition enforcement is lacking, ILR suggests studying ways to improve, rather than supplanting it with private collective enforcement. One way in which the Government could enhance public enforcement (if necessary) would be to consider legislation to empower the OFT to skim ill-gotten gains from proven infringers and return those illicit profits to consumers, or to distribute penalties paid by proven infringers to consumers. Indeed, ILR believes that public enforcement can be an effective means to provide compensation to victims of unlawful activity. In the U.S., for example, the “Fair Funds” mechanism of the Securities and Exchange Commission (the “SEC”) demonstrates one possible approach to meeting the dual goals of public enforcement and private compensation. Each year, the SEC collects substantial civil penalties and disgorgement amounts from securities law violators. In 2010 and 2011, the SEC ordered recoveries of $2.8 billion per year. Since 2002, the SEC has been able to place these recoveries into Fair Funds, which it can choose to distribute to investors harmed by the punished conduct. The SEC administers and distributes these funds pursuant to plans that must be approved either by a court or by the SEC after a period for public comment. The amount of money that the SEC has transferred to date has been significant, between 2002 and 2010, 128 Fair Funds were created, and $6.9 billion was returned to investors.

The Fair Funds mechanism has clear advantages over the U.S. private securities litigation system. The SEC, as a government agency staffed by experts and charged with a public purpose, can ensure that funds are distributed only when recovery is justified on the merits, rather than for the more self-interested reasons that can motivate private litigants and their lawyers. In addition, lawyers’ fees and other costs do not reduce the amount available for Fair Fund distributions.

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3 The SEC’s power to require companies to disgorge ill-gotten gains is analogous to the skimming authority in European countries.


6 See GAO, SEC Fair Fund Collections and Distributions, GAO-10-448R, at 31 (22 April 2010).

7 See Paul S. Atkins, Comm’r, SEC, Remarks before the ILR (16 February 2006) (observing that “we do not allow any of the funds from the SEC action to be paid to private lawyers”), http://tinyurl.com/6yxhlbr4.
The Fair Funds mechanism is a useful model that the Government could consider for achieving the dual aims of public enforcement and redress. ILR urges the Government to study such alternatives to collective litigation as a means to facilitate redress before seeking to extend, or promote the use of, the UK’s collective actions regime.

Answers to the Consultation’s Questions

With these overarching themes in mind, we are pleased to provide specific answers to the Government’s questions, as follows:

Q.1 Should Section 16 of the Enterprise Act be amended to enable the courts to transfer competition law cases to the CAT?

In principle, ILR is in favor of the use of specialized courts and tribunals. Institutions with expertise in a particular field are likely to be more efficient at resolving disputes and also better equipped to identify frivolous cases at an early stage. On that basis, ILR supports the proposal to amend Section 16 of the Enterprise Act when considered in isolation.

When considered in the context of the Government’s overall package of proposals, however, the proposal to amend Section 16 of the Enterprise Act raises many practical concerns in terms of the volume and nature of the litigation which would come before the CAT. It is apparent that encouraging more litigation would be a deliberate consequence, rather than merely a side effect, of the proposals outlined by the Government. Putting aside the flaws in the proposition that more litigation will encourage economic growth (as to which see question 10), ILR questions whether the Government has conducted a sufficiently robust analysis of the impact its proposals could have for the CAT when considered in their totality. It seems unrealistic, for example, to assume that the CAT, which has historically heard an average of 2.25 cases per year, will not be adversely affected by being called upon to hear not only cases which would presently be brought in the High Court, but also cases which would not have been brought at all but for the Government’s proposals, some of which would be opt-out collective actions involving entirely new and untested procedures.

ILR questions why the Government’s assessment of the impact of collective actions on court costs only utilizes figures on the number of cases brought in Canada and Australia. The fact that the Government asserts that it does not intend to adopt all of the features of the U.S. class action system does not mean that an extended UK regime would be immune from the abuses seen in the U.S. Accordingly, the frequency and costs of collective antitrust litigation in the U.S. should be taken into consideration. The Government should also study whether, as a result of the multi-jurisdictional scope of EU competition law and the operation of the EU rules on jurisdiction, the UK courts are more exposed to forum shopping by foreign claimants than the courts of non-EU jurisdictions such as Canada and Australia. As explained in response to question 35, the Government should be wary of making the UK even more attractive to forum shoppers than it is already.

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8 Impact Assessment ¶ 77.

9 In 2011 there were 235 private putative collective antitrust cases filed in U.S. federal courts, according to U.S. court dockets. Scaled down in proportion with the UK’s lower GDP, that level of activity would equate to 36 cases being filed in the UK.
Q.2 Should the Competition Act be amended to allow the CAT to hear stand-alone as well as follow-on cases?

As stated in response to question 1, ILR is generally in favor of the use of specialist courts and tribunals where appropriate. On that basis, it has no objection to the CAT, as a specialist competition tribunal, hearing stand-alone cases when that proposal is considered in isolation.

The more fundamental issues at stake here are: (a) the form of stand-alone actions which the CAT should be allowed to hear; and (b) ensuring that the procedures followed in those actions are fair and in accordance with due process.

In relation to the form of stand-alone actions which might be heard in the CAT, collective actions are of particular concern to ILR given its experience with the U.S. class action regime. The Government rightly recognizes that restricting collective actions to the CAT could act as an “additional safeguard” against the use of those procedures in other forums. However, while it would be advantageous to restrict the use of collective actions to a specialist tribunal, this should not detract scrutiny from the shortcomings of the proposed safeguards which would govern the use of such procedures in the CAT. In other words, ILR opposes the use of collective actions as an enforcement mechanism and therefore supports the idea of restricting such actions to a specialist tribunal. However, containment of such actions to the CAT is not sufficient on its own. If collective actions must be introduced in any context, they must be accompanied by adequate safeguards and procedures which adhere to fundamental principles of justice.

Accordingly, ILR objects to the CAT (or the general courts) being allowed to hear stand-alone actions which involve any of the following: capping recoverable costs at an unrealistic level; granting interim injunctions without the applicant’s providing a cross-undertaking in damages; departing from the “loser pays” principle where there is a party supporting the litigation with the means to pay adverse costs; and/or allowing presumptions on the quantification of damages. The rationale for each of these objections is more fully explained in the responses which follow.

Q.3 Should the CAT be allowed to grant injunctions?

ILR respectfully submits that the Government should not allow the CAT to grant injunctions for two reasons:

First, when considered in the context of the Government’s overall package of proposals and its policy of promoting litigation, ILR does not support the proposal to allow the CAT to hear stand-alone actions (see question 2). Nor would ILR support the introduction of stand-alone collective actions in any circumstances (see question 13). It is ILR’s position, therefore, that the CAT should continue to focus on actions which follow a decision of a competition authority. These decisions already order unlawful conduct to be brought to an end. As a result, the CAT would have no need for the power to grant injunctions.

Second, ILR suggests that, before allowing the CAT to grant injunctions, the Government should give further consideration to enhancing mechanisms by which public authorities can ensure short-term relief is available to alleged victims of unlawful conduct. ILR understands, for example, that the Enterprise and Regulatory Reform Bill, in addition to establishing the new Competition and Markets Authority (CMA), will also lower the threshold for determining when the CMA may grant
interim measures pending the outcome of an investigation. As with other aspects of the Government’s proposals, possibilities to augment public enforcement should be fully investigated before taking the risks associated with encouraging private litigation.

If, however, the Government does not agree with ILR’s position and goes ahead with its proposal to allow the CAT to grant injunctions, the CAT’s discretion to grant such relief should be no broader than that currently exercised by the courts and must be subject to the same safeguards. In particular, an applicant for an interim injunction should always be expected to provide an undertaking in damages in favor of the respondent and, where appropriate, any third parties whose interests may be affected by the relief sought. Without calling into question the competence of those members of the CAT who are not members of the judiciary, ILR respectfully submits that it would also be necessary to ensure that the CAT could not grant an injunction without the President or a member of the panel of chairmen being on the tribunal at the time.

**Q.4 Do you believe a fast track route in the CAT would help enable SMEs to tackle anti-competitive behavior?**

ILR is in favor of measures which assist SMEs but is not convinced that creating a fast track route for litigation is necessarily an appropriate means of assisting SMEs which are faced with supposedly anti-competitive behavior.

Competition cases are complicated by nature. Justice must be applied in an even-handed way to all natural and legal persons. To the extent that “fast track” implies cutting due process corners in order to reach a speedy (though somewhat approximate) outcome, then ILR is fundamentally opposed. The burden of proof in factually complex cases should not be adjusted up and down merely as a factor of the size of the party making the allegation. Such a concept gravely offends natural justice.

The consultation paper notes that SMEs may be vulnerable as a result of the OFT not prioritizing local or regional cases. ILR sympathizes with local businesses which cannot obtain the assistance they require but, for the reasons more fully explained in response to question 31, private litigation should not be promoted as a solution to limitations in the public enforcement regime. ILR questions whether other possibilities have been adequately explored, such as enabling local authorities to investigate possible infringements of competition law.

As the Competition Pro-Bono Service (CBPS) indicated, many SMEs who believe they are being subjected to unlawful behavior do not have a strong case and those who do have viable cases may be able to resolve them through other methods, if they are assisted.\(^{10}\) This suggests that, in the first instance, more should be done to support services like the CBPS which provide advice to SMEs rather than focus on litigation. More should also be done to ensure ADR is available to SMEs where there are genuine legal issues underlying their concerns. As the Government itself has stated in other contexts, litigation should be a last resort.\(^{11}\) Providing a fast track mechanism, the very

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10 Consultation ¶ 4.29.

11 See the Ministry of Justice’s Proposals for the Reform of Legal Aid in England and Wales (November 2010), ¶ 1.8 and also The Dispute Resolution Commitment: Guidance for Government Departments and Agencies which, in the context of disputes involving the Government itself, states that “it is government policy that litigation should usually be treated as the dispute resolution method of last resort” (¶ 1.4).
purpose of which is to circumvent the traditional safeguards such as the need to establish one’s case, would encourage SMEs to attempt litigation before other dispute resolution methods had been attempted.

**Q.5 How appropriate are the design elements proposed, in particular cost thresholds, damage capping and the emphasis on injunctive relief?**

ILR would support reasonable measures to enable SMEs with genuine grievances to obtain justice through the courts if they have been unable to do so by engaging directly with the other parties or, in appropriate cases, using ADR. However, such measures would certainly not include extended collective actions of the kind envisaged by the Government’s proposals, nor would they include the kinds of measures proposed by the Government for a fast track route in the CAT, which are entirely inappropriate for the following reasons:

**Costs Capping**

The proposal on costs capping is both unworkable and unjust. It is also at odds with the statement in the Government’s Impact Assessment that “as companies facing vexatious claims would be able to claim back costs in court if the case is unsuccessful, there would be a zero net cost to business.”

Competition law cases are often extremely complex and may present issues which would not be easy to resolve based on the arguments and evidence contained in a short-form application, even to a member of the CAT’s panel of chairmen. As a result, there is a risk that costs caps will be set at inappropriate levels.

This risk is exacerbated by the fact that there is also likely to be insufficient information available at the allocation stage for other parties to assess the issues that might arise and to make meaningful representations on an appropriate costs cap. It is unconscionable that parties in this position would have no right to appeal the decision imposing a costs cap at a particular level and yet, as a consequence of that decision, they may later find themselves unable to recover costs reasonably incurred in defending themselves.

As to the proposed maximum costs cap of £25,000, this figure is far too low for such a complex area of litigation. As stated below in response to question 17, justice requires that a party should receive a full indemnity with respect to legal costs that it was forced to incur by the conduct of another party.

**Damages Capping**

If the Government plans to take the extraordinary step of dispensing with due process in the name of expediency – for example by allowing fast track procedures to permit approximate results based on cursory assessments – then ILR would support damages capping. In those circumstances, capping the damages available when taking advantage of fast track procedures would be essential to mitigate the potential injustices which those procedures could allow to prevail.

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12 Impact Assessment at 13.
Injunctive Relief

As stated in response to question 3, ILR does not believe it necessary for the CAT to be permitted to grant injunctions. If it is permitted to do so its discretion should not be any broader than that of other courts and should be subject to the same safeguards.

In the context of the proposed fast track, however, there would be real concerns that the CAT, under a simplified procedure, would not possess sufficient information to take decisions on whether imposing injunctive relief would be just and convenient.

Were it possible to apply for injunctive relief using a fast track procedure without giving notice to the respondent, it would be essential that the applicant was under a duty to provide full and frank disclosure to the court. In addition, the requirement to give an undertaking to pay damages to the respondent if the court ultimately holds that the injunctive relief should not have been granted should certainly not be waived or limited.

Even in cases where a defendant was on notice that injunctive relief was being sought, ILR is concerned that a simplified procedure would not provide the respondent with a fair opportunity to oppose such a request. In these circumstances, a claimant should be required to give a cross-undertaking in damages pending a full examination of the merits.

In more general terms, ILR fears that the serious consequences of injunctive relief for respondents is in danger of being overlooked as a result of the Government’s apparent desire to lower the threshold for SMEs seeking such relief. In many cases, injunctive relief may have a devastating impact on a business’s operations. It is therefore essential that safeguards are in place to protect the respondents. Where procedures are simplified, the importance of such safeguards is heightened rather than reduced.

Q.6 Should anything else be done to enable SMEs to bring competition cases to court?

As indicated in response to question 4, ILR believes that the best way of assisting SMEs is to ensure they have the information and assistance they require to understand the competition issues they face and to present their concerns to the relevant parties. ADR also has a valuable role to play in appropriate cases. Litigation should be a last resort, and it is misguided to attempt to assist SMEs by proposing measures which promote litigation. More litigation does not mean greater justice. By proposing measures which would facilitate litigation by creating shortcuts through the courts, the Government actually runs the risk of creating greater injustice.

Q.7 Should a rebuttable presumption of loss be introduced into cartel cases? What would be the most appropriate figure to use for the presumption?

The Notion of a Presumption of Loss

ILR strongly opposes the introduction of a rebuttable presumption of loss in cartel cases. The long-standing due process safeguard against frivolous or vexatious claims – that a claimant must overcome the burden of proving its loss on the balance of probability – should only be varied (if at all) in duly justified exceptional circumstances and, in this instance, ILR does not accept that such circumstances have been identified.
Furthermore, the particular presumption proposed by the Government does not stand up to scrutiny. Even if economic literature allowed the firm conclusion that cartels lead to an average 20\% overcharge – which it does not – an average of the effects of other, entirely unrelated, cases is of no relevance whatsoever to any particular new case. As the European Commission recognizes in the recent draft guidance paper cited by the Government, estimated overcharges vary enormously. Some cartels are estimated as having overcharged by 50\% or more whereas others are estimated as having resulted in no overcharge at all.\footnote{European Commission Draft Guidance Paper, *Quantifying Harm in Actions for Damages Based on Breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union*, at 42.} If statistical averages could be relied upon as a basis for legal presumptions in other areas, absurd results would follow. When sentencing motorists for speeding offenses, for example, it would be absurd to adopt a legal presumption that each motorist broke the speed limit by a specific amount based on an average calculated from previous incidents of speeding, unless the contrary could be proven.

The Government states in its consultation paper that it has considered amending the burden of proof “to facilitate redress for those who have suffered loss.” ILR urges the Government to bear in mind that its proposal would also facilitate “redress” for those who have not suffered loss by strengthening the negotiating position of claimants seeking to extract lucrative settlements, possibly with support from third parties. A cartel may be pursued and sanctioned on the basis that it had the object of preventing, restricting or distorting competition without it also being shown that it had any such effect on competition. If loss could be presumed on the part of purchasers, however, then participants in a cartel would come under increasing pressure to pay compensation rather than risk the additional cost and reputational damage of court proceedings, even though the cartel might not actually have had any effect on market conditions. There may be some truth in the Government’s observation that “the quantifiable effect of [anti-competitive behavior] on intermediate purchasers and consumers is frequently a difficult question with many intricacies and variables” but the solution to these difficult questions should not be to alter the burden of proof. To do so would risk unjustly enriching claimants and unduly penalizing defendants by ordering them to pay damages which ought to be compensatory.

The proposal is supposedly justified by defendants’ “informational advantage” relative to claimants. This concept, however, is far from straightforward. The current rules on disclosure of evidence have proved themselves adequate in other areas of complex litigation, and there is nothing inherently special about competition cases that would merit a new approach. The English rules on disclosure are already perceived as relatively “claimant friendly” when compared to those in other EU jurisdictions – particularly those with civil law systems – and provide an incentive for foreign claimants to attempt to litigate in England and Wales. Creating new presumptions, or otherwise altering procedural rules in claimants’ favor, carries the risk of exacerbating claimants’ incentives to engage in forum shopping. The negative consequences of this phenomenon are discussed in greater detail in response to question 35.

In addition, effects of cartels are often based on speculative economic theory which cannot be definitively proved either way. A defendant implicated in a cartel which involved market sharing or production quotas will not necessarily be able to isolate and quantify the effect of that conduct on prices. Such defendants may be placed in the impossible position of proving a negative (that their conduct did not affect prices) despite there being no reasonable prospect – absent a legal presumption based only on assumptions about unrelated cases – of the claimants proving such an effect did exist, even with full access to the available evidence.
Finally, ILR urges the Government to consider the effect that introducing such a presumption could have for forum shopping. By introducing a presumption of this kind, England and Wales would become a draw jurisdiction for competition claims to an even greater extent than it is already. While this might be welcomed by English law firms, the Government would be wise to also consider the attractiveness of collective litigation involving presumptions on the quantification of damages from the perspective of businesses looking to carry on business in the jurisdiction (see question 35).

**The Appropriate Figure for Such a Presumption**

It follows from the issues of principle raised above that there is no appropriate figure for a presumption of loss, but regardless, the proposed figure of 20% which the Government has seized upon is too high. The Government claims that the figure of 20% “represents the lower end of the range,” yet this cannot be true given that it is the mean average of a sample of estimates.

It is also important to keep in mind that all figures cited for cartel overcharges are merely estimates rather than the result of direct observation, since it is impossible to know what prices would have been charged “but for” the existence of a cartel. While the research conducted for the Commission did estimate the mean average to be “around 20%,” it also recognized – as the Commission rightly acknowledged in its draft guidance paper – that care must be taken in interpreting such statistics. In particular, the methodology used in that research may give greater attention to those cartels which actually affect price than those which do not. This potential bias is one of a number of methodological problems with the estimation of overcharges which have been identified by Boyer and Kotchoni. Their analysis estimated a bias-corrected mean overcharge of 17.5%, and that figure is reduced still further, to 13.6%, if estimates outside the range of 0-50% are excluded. This shows that, even if a presumption of loss could be justified, and even if it were accepted that such a presumption should be based on the best estimate of the mean average overcharge, the figure of 20% is still too high.

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<th>Q.8 Is there a case for directly addressing the passing-on defense in legislation? If so, what outcome is desired and how, precisely, should this best be done?</th>
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As a matter of principle, claimants should only be awarded damages as compensation for loss they have actually suffered. Accordingly, it should be possible for a defendant to raise as a defense the fact that an overcharge (if proved) was passed on by the claimant. Equally, it should also be possible for a defendant to raise as a defense against an indirect purchaser the fact that an overcharge (if proved) was not passed on to the claimant. ILR supports the use of the passing on defense but is not aware of any significant impediment to raising this defense at present and therefore questions the need for legislation.

As a further point, ILR disagrees with the Government’s view that an expanded regime for collective actions would warrant consideration of mechanisms for the apportionment of damages between direct and indirect purchasers. The potential for conflicts between sub-classes of claimants is one of the procedural difficulties associated with collective litigation. Such issues may be complex...
and expensive to resolve but it should be for each sub-class of claimants to prove its loss rather than for the court to apportion damages between them.

Q.9 The Government seeks your views on how well the current collective action regime is working and whether it should be extended and strengthened.

ILR questions the Government’s view that the current collective action regime is inadequate. Based on its experience of more far-reaching collective action regimes in other jurisdictions, ILR also cautions the Government against extending and strengthening the current regime in the UK.

The Government’s view that the current collective action regime is inadequate seems to stem partly from the fact that only one body has been certified as being capable of bringing collective actions and that body has only brought one case. In ILR’s view this fact raises questions about the appetite and need for collective litigation, rather than an argument in favor of introducing it. As explained in response to question 22, there are serious risks associated with allowing too broad a range of parties to commence collective actions.

The Government’s view also stems from the fact that only one case has been brought under the current regime and only a small proportion of eligible consumers chose to participate. This appears to be the basis for the conclusion that the current regime “is inadequate in delivering fair redress for consumers and businesses.” While ILR understands the Government’s desire to provide effective mechanisms for redress, it is very dangerous to assume that extending the scope for collective actions in the UK will result in redress which could consistently be described as fair. As explained in response to question 10, such a policy might increase the volume of litigation in the UK but not the quality of justice, and it will also introduce the potential for new forms of abuse. There are a number of possible reasons why so many eligible people did not participate in the JJB Sports case, but, as explained in response to question 14, the costs of allowing third parties to represent such persons’ claims without their consent outweigh the potential benefits.

Q.10 The Government seeks your views on whether the proposed policy objectives for extending collective actions, taking into account redress, deterrence and the need for a balanced system, are correct.

As discussed in the introduction, ILR does not believe that the Government has demonstrated a need for extending collective actions in the competition arena, and, thus, as a threshold matter, ILR respectfully does not believe that the proposed policy for extending such actions is correct.

In addition, ILR generally opposes the policy objectives set out in the Consultation to the extent they would result in the privatization of competition law enforcement. As ILR discusses in the introduction, competition law enforcement is, and should remain, the responsibility of competition authorities, which have the expertise and the policy judgment to carry out enforcement properly.

Taking into account redress, deterrence, and the “need for a balanced system,” ILR believes that effectively privatizing an element of competition law enforcement is the wrong policy objective.

- **Redress.** There are far less dangerous ways of increasing consumer redress (to the extent that it is necessary) than promoting private collective actions. As noted in the introduction,
alternative methods, such as the SEC’s Fair Funds, exist to combine public enforcement with redress for consumers. ILR urges the Government to consider such an option as a superior means of providing redress to consumers as compared to private collective actions. This is especially true because representative claimants in collective actions are, at bottom, self-interested, and therefore are not as well positioned as public authorities to seek redress on behalf of entire groups of consumers. Moreover, ILR emphasizes that, to the extent a consumer or business wishes to obtain redress for a perceived competition law infringement, nothing in current law prevents it from filing an individual lawsuit seeking compensation.

- **Deterrence.** Deterrence also will not be enhanced by promoting the use of private collective actions. Enforcement by public authorities, who are charged with considering when enforcement is in society’s best interest, provides the correct level of deterrence against misconduct. Private collective actions threaten to over-deter – that is, to chill legal conduct because companies rightly fear frivolous collective suits brought by aggressive claimants backed by lawyers and litigation funders. Over-deterrence has been a feature of U.S. class actions, especially in the tort arena, since claimants’ lawyers in the U.S. have become adept at devising and suing on new theories of liability, which has had the effect of penalizing companies for conduct that was not improper at the time they engaged in it.¹⁶

- **“A Balanced System.”** ILR fundamentally believes that there is no way to have a “balanced system” once private collective actions of the sort envisaged by the Government are introduced. Such actions would be inherently coercive, as ILR discusses at length in the introduction. Given ILR’s view that the consultation does not demonstrate any threshold need to promote, or extend the regime for, private collective actions, we believe that the potential unintended consequences of adopting the policy proposals contained in the Consultation outweigh any possible benefits.

### Q.11 Should the right to bring collective actions for breaches of competition law be granted equally to businesses and consumers?

Again, as discussed in the introduction, in response to question 10, and throughout this response, ILR believes that private collective actions are not, and will never be, an effective or beneficial way to enforce competition law. Instead, enforcement of competition law should be reserved to competition authorities. ILR believes neither businesses nor consumers should be empowered to bring such actions, and the Government should not interpret the low uptake of the existing regime for consumer collective actions as indicating a need to facilitate collective actions of any kind.

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¹⁶ For example, one study by the RAND Institute for Civil Justice found that in the medical-devices and pharmaceutical industries, some products have been removed from the market unnecessarily, and other products are more expensive than they would otherwise be, as a result of manufacturers’ concerns over potential tort liability. See Steven Garber, *Product Liability and the Economics of Pharmaceuticals and Medical Devices*, RAND Institute for Civil Justice (1993), at 103 and 122.
Q.12 Should any restrictions be introduced to prevent such cases being used as a vehicle for anti-competitive information sharing?

ILR has no specific comments on whether restrictions should be introduced to prevent collective actions from being used as vehicles for anti-competitive information sharing, save that it sees no reason why existing competition rules would not be applicable to such circumstances. Any concerns raised about the possibility of collective actions being used as a vehicle for unlawful conduct merely provide a further reason why such actions should not be extended to the UK.

Q.13 Should collective actions be allowed in stand-alone as well as in follow-on cases?

Collective actions should be limited to follow-on actions, if permitted at all.

As ILR discusses at length in the introduction and in its answer to question 14, collective actions are inherently prone to abuse by claimants, lawyers, and funding companies seeking to exploit the potential ruin a collective action could bring to a company in order to obtain an unjustified settlement. If such actions are to be promoted, limiting such actions to situations in which a competition authority has proven an infringement is therefore proper.

Moreover, as ILR also discusses in the introduction, public enforcement authorities are the correct bodies to decide whether to bring enforcement actions. As ILR notes in the introduction and in its response to question 22, rather than facilitate private collective redress, the better course of action would be to consider alternatives which combine public enforcement with mechanisms to provide redress – this might include consideration of a mechanism similar to the SEC’s Fair Fund.

Finally, ILR notes that the Government’s Impact Assessment states that “collective actions are particularly uneven in how the benefits fall year by year, as they involve fewer, larger cases. Some experts have stated they would not expect any stand-alone cases, reducing deterrence and eliminating the cartel prevention benefits.” This calls into question why the Government is even considering running the risk of introducing collective stand-alone actions.

Q.14 The Government seeks your views on the relative merits of permitting opt-out collective actions, at the discretion of the CAT, when compared to the other options for collective actions.

To the extent the Government decides to extend the UK regime for collective actions, it should certainly not implement opt-out actions, which pose dangers both to claimants and to defendants.

Danger to claimants

Opt-out collective litigation should be rejected because of its negative consequences for claimants. Most notably: (1) it leads to internal (intra-class) conflicts; (2) it causes conflicts between the claimants and the lawyers purporting to represent them; and (3) it can create litigation risks for

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17 Impact Assessment at 4 (Summary of Policy Option 3).
claimants without their knowledge or agreement. All of these effects harm businesses and consumer claimants and degrade their ability to obtain effective redress.¹⁸

First, opt-out systems carry a strong risk of internal class conflict because claimants often suffer disparate losses – and thus have different motivations in pursuing litigation. This would be particularly true in collective competition cases, where the claimants may include direct and indirect purchasers, large corporate customers, and individual consumers. In such circumstances, particular claimants within the class will have different strategic interests regarding the course that the case should take and the distribution of any judgment or settlement award. This can mean that decisions regarding how to prosecute the claims and how to distribute any award are driven by the largest claimants, sometimes with limited regard for individual consumers.

Second, in addition to intra-class conflicts, opt-out procedures also lead to conflicts between the class and the claimants’ counsel. In a large collective action, the average claimant has very little money at stake – and, consequently, little interest in the progress of the case. Thus, the average claimant (assuming he or she even knows about the suit) merely waits until the court awards damages or the defendants settle. The claimants’ counsel, by contrast, invests significant resources in the case. As a result, the lawyer fully controls the case without any real client accountability. The lawyer also bears the risk of loss if the case is not successful. This is the prevalent model in the U.S., where claimants’ lawyers typically are paid on a contingency fee basis, and it would be replicated in the UK with respect to cases in which claimants’ lawyers work under conditional fee agreements or, if the Government departs from the proposals outlined in the Consultation, under U.S.-style contingency fee agreements. (This is an additional reason why ILR opposes contingency fees in collective cases, as addressed more fully in answer to question 19, below.)

The fact that the lawyer controls the litigation – rather than the individual claimants – means that the lawyer must settle any intra-class conflicts that arise among different strata of class members. This threatens to create additional conflicts of interest between the class members (or some strata of them) and their lawyer, especially if the class includes large corporate claimants that the lawyer may favor over individual consumers.

In addition, the gap in resource investments between the lawyers and the claimants typically leads to a disparity in risk preferences. The claimants, who have invested nothing in the case, are willing to go to trial to attempt to win a significant damages award. The lawyer, on the other hand, is less eager to “roll the dice” at trial, preferring instead to enter into a settlement that minimizes risk and maximizes fees.

This inherent tension between class counsel and the class members leads to what critics call “collusive settlements” or “sweetheart settlements” – settlements that the claimants’ lawyer negotiates with the defendant primarily for his or her own benefit. Because opt-out collective actions include all potential claimants who do not opt-out, and thus preclude nearly all future litigation concerning the same subject matter as the collective action, they provide defendants the opportunity to buy nearly total peace from the claimants’ lawyer who controls the litigation. And because the claimants’ lawyer is the only person on the claimants’ side with a significant interest in

the case, the lawyer is typically willing to agree to any terms offered by the defendant that will reimburse the lawyer’s investment and provide him or her a profit.

The most notorious examples of sweetheart settlements are the infamous “coupon settlements,” in which defendants pay significant lawyers’ fees directly to class counsel and provide low-value coupons for the defendants’ products or other low-value awards to the class members. U.S. class actions had a long and tortured history with coupon settlements until the enactment of reform legislation in 2005, which limited the practice. Before that reform, one of the most infamous coupon settlement cases was *Kamilewicz v. Bank of Boston Corp.* In that case, the plaintiffs were borrowers from the defendant mortgage bank. They alleged that the defendant held too much money in escrow with respect to their mortgage loans. As a result of a sweetheart settlement in the case, each borrower had a miniscule sum of up to $8.76 added to his or her escrow account, while class counsel received between $8.5 and $14 million in fees. Even more shockingly, under the sweetheart settlement, the bank withdrew up to $90 from each plaintiff’s escrow account to pay class counsel’s fees. The end result was a net loss for the plaintiffs and a windfall for the lawyers who purportedly represented them.20

The collusive-settlement problem is exacerbated when multiple lawyers file nearly simultaneous, collective, opt-out litigation. Because only one of the cases can ultimately proceed under U.S. law, the lawyers often enter into a bidding war with the defendant, each seeking the defendant’s acquiescence to the certification of their class, in return for a diminished settlement demand. Great care needs to be taken in the UK to prevent similar situations.

Conflicts between class members and their counsel are exacerbated in opt-out cases because the claimants are generally apathetic and uninvolved. By contrast, where claimant classes are limited to those claimants who affirmatively choose to become active members of the class, the classes tend to include only claimants who are personally and actively interested in pursuing their rights. Thus, the likelihood of conflicts between claimants and the lawyers representing them is greatly diminished.

Third, the creation of an opt-out system can expose consumers to direct litigation risks, such as court-imposed obligations, penalties or costs awards. The UK currently has the loser-pays costs system (what in the U.S. is called the “English Rule”), which is critical to deter abusive litigation and should not be altered. In the absence of a rule to the contrary, a representative claimant, or even those represented in a collective action, could be exposed to liability for adverse costs. Yet under an opt-out system some of those represented might have little or no knowledge of the case. In order to avoid such consequences for claimants, if an opt-out regime were implemented, the Government might consider relaxing the loser-pays rule. Relaxing the rule, however, likely would have severe negative consequences – the rule is rightly seen as one of the UK’s primary bulwarks against lawsuit abuse. The tension between the loser-pays rule and opt-out collective actions is thus yet another reason why the Government should not adopt an opt-out system.

19 100 F.3d 1348 (7th Cir. 1996).

20 Bank of Boston was just one of a number of cases illustrating the dangers of collusive settlements. For additional examples, see John Beisner, Matthew Shors, and Jessica Miller, *Class Action “Cops”: Public Servants or Private Entrepreneurs?*, 57 Stan. L. Rev. 1441 (2005).
Danger to defendants

Opt-out collective actions carry a further risk of abuse because they impose substantial settlement pressure on defendants, independent of the merits of the litigation. As adopted in the U.S., for example, the opt-out procedure allows plaintiffs to subject defendants to massive potential financial exposure simply by filing suit – the class action filing automatically brings every putative class member’s claim into the proceeding. The settlement pressure generated in such circumstances is so great and so disconnected from the merits of the case that prominent American jurists have taken to calling such settlements “blackmail settlements.” Moreover, the pressure on defendants to settle claims regardless of merit incentivizes claimants’ lawyers to file non-meritorious claims. Opt-out procedures thus inevitably lead to lawsuit abuse.

Q.15 What are your views on the proposed list of issues to be addressed at certification?

Before answering this question, ILR commends the Government for recognizing the importance of certification as the chief safeguard against abuse in collective actions. The Consultation, however, does not address the primary reason why certification is so important: it requires that before a collective action is permitted to proceed on its merits, 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. More specifically, certification means that courts decide whether the proposed collective action comports with the principle that “trial for one can serve as trial for all” – i.e., the relevant facts and law as to each group member’s claim are such that adjudicating the representative claimant’s claim (or significant issues related to that claim) necessarily resolves the claims (or the same significant issues) for the group members.

ILR generally agrees with the elements of certification set forth in the Consultation, with these observations:

- Numerosity need not entail a specific numerical threshold – rather the question is whether the claims in a putative collective action are so numerous that proceeding on a collective basis is the best method for resolving them. Indeed, ILR believes the numerosity element of certification should not be a simple numerical threshold, lest courts begin merely to count claimants, rather than engage in a careful certification analysis.

- The likelihood of success of any collective action – while an important element in determining whether a collective action should be permitted to proceed – should be decoupled from the certification analysis and should instead constitute its own preliminary merits test, which would occur after a case is certified. ILR commends the Government for recognizing the value of a preliminary merits test for weeding out spurious collective actions. ILR believes, however, that the preliminary merits test should not be part of the certification test. By splitting these two tests and sequencing them so that certification comes first, this permits the court to limit disclosure to documents relating only to certification issues during the certification test, and not to the underling merits of the dispute. This saves costs, because, if the case is not certified, additional disclosure of documents will not be necessary.

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21 *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (quoting Judge Henry Friendly).
Finally, ILR notes that the “typicality” element of the certification test – which the Consultation includes – shows why representative organizations are not proper candidates to bring collective actions. The typicality element is intended to ensure that only those claimants who advance the same factual arguments may be grouped together in a class action. The typicality requirement thus protects class members by ensuring that the representative claimant’s incentives align with those of the class members, and that it can fairly represent their interests. Obviously, a representative organization is not “typical” of the consumers constituting a group of claimants. Such organizations therefore are not good candidates for spearheading collective actions.

Q.16 Should treble or other punitive damages continue to be prohibited in collective actions?

Treble and punitive damages should be prohibited in collective actions. As discussed in the introduction and in response to questions 13 and 14, such actions already pose the risk of abuse because of outsized awards. Providing for treble and punitive damages will only increase the risk of abuse by increasing claimant leverage. Indeed, the Government itself recognizes the dangers of treble damages.

Moreover, the primary purpose behind treble and punitive damages is not to compensate victims, but rather to punish wrongdoing and thereby deter it in the future. As a deterrence mechanism, treble and punitive damages are thus a form of law enforcement that ILR believes should be reserved exclusively to competition authorities, as discussed in the introduction and in ILR’s response to question 22.

Finally, an additional purpose of treble damages in the U.S. is to compensate claimants who have had to pay lawyers’ fees pursuing an infringer, but such a rationale is not present in the UK, which currently employs the loser-pays rule. ILR discusses the importance of maintaining the loser-pays rule in its answer to question 17.

Q.17 Should the loser-pays rule be maintained for collective actions?

The loser-pays rule should certainly be maintained in collective actions. As a matter of principle, it would be grossly unfair for parties which successfully defend collective actions not to be indemnified in respect to the costs they have been forced to incur. It would also contradict the Government’s claim that, disregarding damages paid out by companies which lose cases, these proposals would involve zero net cost to business.

As the Supreme Court of Canada has recognized, “there is no magic in the form of a class action proceeding” that means a successful party should not be entitled to its costs. While some representatives and lead claimants may claim to be acting in the public interest, the way class actions have developed in the U.S. demonstrates that they are primarily used for obtaining substantial sums of money for private parties. In any event, the reason why a claim is brought will rarely justify depriving a

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22 Consultation ¶¶ 5.33, 5.40.
23 Impact Assessment at 13.
defendant which has been vindicated in court of the right to recover its costs. If a party decides to bring a test case, for example, and fails, then the defendant should not be penalized. If such a case stands to advance important societal issues then it should be supported using public funds.

The loser-pays rule already applies as the default option for class actions in several Canadian provincial jurisdictions, in Australian federal class actions, in class actions in the Australian State of Victoria and in group litigation in England and Wales. There is simply no justification for collective actions in the field of competition law being treated differently.

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Rather than merely maintain the loser-pays rule in collective actions, ILR suggests that it could be employed as a useful tool to combat some of the problems with collective actions which have been witnessed in other jurisdictions. For instance, there is a risk in collective actions that claimants who are represented by another party and play no active role themselves can become dissociated from the process. Indeed, under an opt-out system some claimants will not only be uninterested in the claim, they will be completely unaware that their rights are being determined. Requiring that claimants must opt-in and potentially contribute to the defendant’s costs if the claim is unsuccessful would incentivize claimants to monitor and regulate the conduct of those who claim to represent their interests.

An alternative approach which has been adopted in the Canadian province of British Columbia is to apply the loser-pays rule as the default option only where a case is dismissed prior to the class being certified. Although this is preferable to the loser-pays principle being abandoned altogether, it risks exacerbating still further the significance of collective actions being certified. This stage already represents a significant threshold in collective actions, because at this point the pressure on a defendant to settle increases dramatically. Suddenly removing the prospect of being able to recover costs if the claim is successfully defended (absent exceptional circumstances) can only serve to amplify this effect. It is imperative that the loser-pays rule be maintained in collective actions and apply at all stages of proceedings.

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26 Id. at 190.
Q.18 Are there circumstances in which it should be departed from, either (a) in the interests of access to justice or (b) where the costs of the claimant could be more appropriately met from the damages fund?

(a) Departing from the loser-pays rule in the interests of access to justice

As a preliminary issue ILR would like to emphasize that “access to justice” should not be equated with “access to litigation” and still less with “access to collective litigation.” In view of their procedural complexity, excessive cost, and potential for abuse, collective actions are simply not an effective means of delivering justice. Relaxing the loser-pays rule in order to facilitate collective actions would involve removing a key deterrent to frivolous litigation in precisely the area where it is needed most.

One area in which the loser-pays rule has traditionally been relaxed in the interests of access to justice is in legal aid cases. ILR understands, however, that it is not the Government’s intention for collective actions for breach of competition law to be brought using legal aid. Instead, they are likely to be commenced, or supported, by a combination of: (i) representative organizations; (ii) legal expense insurers; (iii) law firms; and/or (iv) third party litigation funders. In circumstances where those parties promote collective actions, and may stand to benefit from them financially to a greater extent than individual claimants, it is important that they should be exposed to liability for adverse costs.

The overarching point here is that there are a variety of ways in which collective actions may be funded to ensure “access to justice,” and regardless of the means of funding, it should be possible to maintain the loser-pays principle:

- Where a claim is supported by a fund set up for the purpose of funding litigation, then the fund can meet any order to pay adverse costs. The Ontario Class Proceedings Fund, for example, takes on liability for successful defendants’ costs in cases that it supports.

- While there are considerable risks involved in allowing third parties to invest in litigation, to the extent that it is permitted, those third parties should certainly be fully liable to pay adverse costs. Lord Justice Jackson concluded that there was no evidence that funders being liable for adverse costs would have a chilling effect on the provision of litigation funding.27

- If, contrary to the Government’s stated intention, lawyers were allowed to fund collective actions before the CAT on a contingency fee basis, they should be liable for adverse costs.

- Because collective actions generally aggravate the costs to defendants beyond the costs in non-collective cases, representative claimants seeking to commence collective actions should be required to demonstrate that they could satisfy an order to pay adverse costs before they are allowed to proceed.

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• Alternatively, claimants represented in collective actions could be required to contribute to adverse costs as a matter of course. The potential for claimants to share costs is said to be one of the advantages of collective actions, and there is no reason why this rationale should not apply to liability for adverse costs as well as claimants’ own costs.

As a result, there will be few cases, if any, which would justify a departure from the loser-pays principle, and it should be possible for the courts to deal with those cases by exercising their existing discretion with the loser-pays rule remaining the default position.

(b) Departing from the loser-pays rule where the costs of the claimant could be more appropriately met from the damages fund

ILR believes that the loser-pays rule should be the default option in all cases, whether it operates to the benefit of a successful defendant or a successful claimant. Unless a representative claimant has been penalized on assessment of costs for the way it conducted the case, it seems reasonable that it should be able to recover from the damages fund any shortfall between its award of adverse costs and its actual costs.

Q.19 Should contingency fees continue to be prohibited in collective action cases?

ILR opposes contingency fees in collective actions. ILR agrees with the Government that such fees have no place in collective actions.

Contingency fees give a claimant’s lawyer a direct financial interest in the claimant’s potential award. This structure inherently creates a potential conflict between the lawyer’s ethical duty to zealously represent the client in pursuit of justice and the lawyer’s own financial interest in maximizing any recovery. As noted above in response to question 14, this problem is particularly acute in the collective-litigation arena, because contingency fees incentivize lawyers to commence collective actions to extract the highest possible settlement and take a contingency fee, even though the resulting award to individual claimants may be negligible. Moreover, collective actions are expensive, and this exacerbates the dangers posed by contingency fees. Indictments of a well-known U.S. claimants’ law firm and several of its partners in recent years, and ongoing criminal investigations into law firms and professionals involved in asbestos-related insolvency cases in the U.S., illustrate how the inherent tension between the interests of the claimant and the lawyer on contingency can affect the integrity of the judicial process.

Not only do contingency fees pose ethical concerns, but they also incentivize bad behavior by representative entities – which is another reason why representative organizations should not be permitted to bring collective actions, as discussed in response to question 22, below. Under the Government’s proposals, representative organizations would be repeat players in collective litigation. Under a traditional fee arrangement based on lawyers’ hourly rates, representative organizations would be responsible for the full costs of their litigation as those costs are incurred (notwithstanding that they may later recover some of their costs from the other side if successful). They must therefore ensure that they spend their resources wisely and limit themselves to litigation in which success seems at least reasonably likely. But in a contingency fee regime, the organization can spread

28 Consultation ¶ 5.33.
its costs: it can offset the costs from unsuccessful suits against its contingency recoveries from successful suits, a possibility that will make organizations more inclined to pursue less certain claims.

This negative influence of contingency fees on conduct is not limited to organizational claimants, however, since contingency fees also incentivize lawyers to approach individuals who will agree to serve as lead claimant for a collective action, even though those individuals may never have decided to pursue litigation on their own.

As a practical matter, the extent to which contingency fees incentivize frivolous litigation depends on the magnitude of the permissible contingency – the larger the contingent recovery, the greater the incentive for lawyers and claimants to press claims of questionable merit. This is why contingency fees – which give lawyers a direct stake in the amount of money extracted from a defendant – are more troubling than conditional fee agreements, which merely reward a successful conclusion to difficult litigation but do not directly reward the lawyer for driving up the amount of damages. The modern practice of law is a business, and contingency fees create a market reward for maximizing the damage inflicted on a defendant. And just as the legal culture of England and Wales shifted to accommodate and ultimately embrace conditional fee agreements, it ultimately will shift to make the most profitable use of contingency fees, should they be allowed.

ILR is especially concerned with the contingency fee issue because the Legal Aid, Sentencing and Punishment of Offenders (“LASPO”) Act 2012 will permit contingency fees in English litigation when it enters into force, and so secondary legislation will be required if the Government is to prevent them from being used in collective actions before the CAT. ILR opposed the move to permit contingency fees in English litigation when it was recommended by Lord Justice Jackson on the grounds noted in this answer. ILR notes that Jackson LJ proposed a safeguard to the use of contingency fees – that “no contingency fee agreement should be valid unless it is countersigned by an independent solicitor, who certifies that he or she has advised the client about the terms of that agreement.”

ILR is concerned that even if the Government were minded to implement such a safeguard, it would not be strong enough to overcome the real dangers posed by contingency fees. As an overarching matter, ILR is concerned that the LASPO Act 2012 reflected a troubling trend of encouraging private litigation in the UK. The current Consultation, with its implicit aim of partially privatizing competition enforcement through the use of collective actions, continues this trend. ILR fears – and the Government should fear – that UK private litigation is now on a slippery slope, at the bottom of which are U.S.-style class actions and the many abuses they entail.

Finally, ILR notes that, in all of these respects, contingency fees present the same dangers as funding by third party litigation funders. In answer to question 22, ILR explains why permitting such funders to bring collective actions is dangerous. ILR notes here that even permitting such funders to fund collective actions is dangerous. Experience has shown that such funding encourages the filing of frivolous litigation and exerts undue settlement pressure on defendants by providing claimants with the resources to continue litigating claims regardless of merit. These dangers are exacerbated in collective action proceedings, which already exact substantial leverage against defendants based on their sheer size and the potential for enormous exposure (regardless of merit), as noted throughout this response.

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29 Final Report at 132.
Third party funding also exacerbates another fundamental problem with collective litigation – that it is generally controlled by lawyers rather than by group members. When a third party funder is involved in collective action proceedings, the claimants (who generally have only a small stake in the outcome) are squeezed out of the picture, and the lawsuit essentially becomes a collaboration among the lawyer and the funder. Thus, the funding company will have the power to steer the direction of the litigation – and it will have every incentive to do so in a way that serves its pecuniary interests, rather than the claimants’.

In Australia, where third party funding of class actions is so common that class actions are considered investment vehicles, many judges, scholars, defense lawyers and other critics have expressed serious reservations about the practice. Recently, Federal Court Chief Justice Patrick Keane gave an interview to The Australian Financial Review in which he expressed his concerns, especially those about excessive fees charged by third party funding companies and their support for non-meritorious claims.

Q.20 What are the relative merits of paying any unclaimed sums to a single specified body, when compared to the other options for distributing unclaimed sums.

ILR opposes *cy pres* awards on the basis that it gives rise to a number of issues, some of which are acknowledged in the Consultation. ILR is not convinced that these problems would be adequately addressed by restricting payments of unclaimed sums to a single specified body or, for that matter, by adopting any other means of distributing unclaimed sums.

The goal of collective actions, if implemented, is to provide compensation to consumers who have actually been injured by the infringing defendant. Just as private collective litigation does not have any proper role in law enforcement, it is also ill-suited to promote social objectives through *cy pres* awards distributions. *Cy pres* awards do not provide compensation to injured group members, and thus depart from the objective of enabling consumers and businesses to obtain redress from those undertakings which have caused them harm. The bedrock of civil justice is that a claimant who is injured can seek compensation for his or her injuries; using civil litigation to redistribute wealth to charities – at the expense of group members – turns that fundamental goal on its head. As Professor Martin Redish of Northwestern University School of Law aptly put it: *cy pres* awards merely “create[e] the illusion of compensation.” This fundamental objection to damages being paid to entities which have not themselves suffered harm at the hands of the defendant cannot be avoided by specifying a single entity to receive unclaimed sums.

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30 See, e.g., Professor Michael Legg, Associate Professor, Faculty of Law, University of New South Wales, Australia, *Litigation Funding in Australia: Identifying and Addressing Conflicts of Interest for Lawyers*, February 2012, in which Professor Legg concludes that “[t]he combination of influence and incentives created by litigation funding arrangements create an array of conflicts of interest for the lawyer. Lawyers have sought to address conflicts of interest through seeking informed consent in the funding arrangements or by recommending the obtaining of independent legal advice ... However, concern remains as to whether lawyers and funders have identified all possible conflicts. The above discussion about the structure of proceedings and appeals suggests they have not.” Available at: http://www.instituteforlegalreform.com/sites/default/files/Litigation_Funding_in_Australia.pdf.


Experience in the U.S. demonstrates that *cy pres* awards often spawn conflicts of interest between the presiding judge and the absent group members and between group counsel and the group. In class actions, the lawyers often propose a *cy pres* award that benefits a charity with which the judge or his or her family is affiliated. This creates — at the very least — an appearance of impropriety. As one critic of *cy pres* relief noted: “allowing judges to choose how to spend other people’s money ‘is not a true judicial function and can lead to abuses.’”*Cy pres* awards also create the potential for conflicts of interest between group counsel and the absent group members, particularly where group counsel has a relationship with the recipient charity. One class action settlement in a U.S. antitrust case, for example, included an award of $5.1 million of unclaimed settlement funds to the claimants’ lawyer’s alma mater. The diversion of funds to an organization in which class counsel has such a personal interest clearly runs counter to class counsel’s duty to “fairly and adequately protect the interests of the class.”

In addition, *cy pres* awards create the potential for representative parties to steer money to a favored charity to satisfy their own financial interests. For example, in a recent AOL *cy pres* settlement that was heavily criticized in the U.S., one of the named claimants was employed by one of the recipient charities.*Cy pres* awards, accordingly, must not be available in collective cases and unclaimed awards should be returned to defendants.

Specifying a single entity to receive unclaimed funds may address some of the potential conflict of interest problems, but the problem remains that damages should not be paid to a recipient which has not suffered harm at the hands of the defendant in the first place. This problem would certainly not be solved by the even more objectionable option, raised in the Consultation, of transferring unclaimed sums to the Treasury. ILR agrees with the observation made in the Consultation that, in follow-on claims, this would effectively involve a second fine being imposed purely on account of claimants having failed to come forward.

Instead, the Government should avoid creating a regime in which damages may be awarded but not claimed by the people they are intended to compensate. In other words, the very possibility of unclaimed sums provides yet another compelling reason to avoid an opt-out regime. If such a

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33 Adam Liptak, Doling Out Other People’s Money, N.Y. Times, Nov. 26, 2007, available at http://www.nytimes.com/2007/11/26/washington/26bar.html (quoting former federal judge David F. Levi); see also In re Compact Disc Minimum Advertised Price Antitrust Litig., 236 F.R.D. 48, 53 (D. Me. 2006) (“Federal judges are not generally equipped to be charitable foundations: we are not accountable to boards or members for funding decisions we make; we are not accustomed to deciding whether certain nonprofit entities are more ‘deserving’ of limited funds than others; and we do not have the institutional resources and competencies to monitor that ‘grantees’ abide by the conditions we or the settlement agreements set.”).

34 See Ashley Roberts, Law School Gets $5.1 Million to Fund New Center, GW Hatchet (3 December 2007).

35 Fed. R. Civ. P. 23(a)(4); see also Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997) (“Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent.”); Sipper v. Capitol One Bank, No. CV 01-9547, 2002 WL 398769, at *4 (C.D. Cal. Feb. 28, 2002) (“A central concern of the Rules of Civil Procedure governing class actions is ensuring that the class action format is not hijacked by parties . . . to their own ends at the expense of the other class members.”).

36 Brief for Objector-Appellant at 7-8, Nachsin v. AOL, LLC, No. 10-55129 (9th Cir. 20 July 2010).

37 Consultation ¶ A.24.
regime were introduced then unclaimed sums should be returned to the defendant. Contrary to the point made in the Consultation, returning unclaimed awards to defendants would not result in a windfall to defendants. The English courts oversee an adversarial system in which a claimant must come forward and prove that the defendant damaged the claimant by violating the law, and that the defendant must therefore pay damages to the claimant. If potential claimants elect not to do so – for whatever reason – then the defendant should not be obligated to pay damages with respect to that particular claimant. That the claimant may be a member of an opt-out group as a procedural matter does not change this fundamental feature of English law.

Q.21 If unclaimed sums were to be paid to a single specified body, in your view would the Access to Justice Foundation be the most appropriate recipient, or would another body be more suitable?

Again, ILR opposes *cy pres* awards. The Access to Justice Foundation, whatever its merits, is designed to increase claimant access to courts. The organization is not specifically concerned with providing redress to victims of competition law infringements. It is thus not an appropriate recipient of unclaimed competition enforcement awards and this further demonstrates why *cy pres* is such a bad idea. Moreover, the difficulty of identifying an appropriate recipient of *cy pres* awards further demonstrates why, if the Government does elect to implement collective actions, they should be opt-in actions only, which would negate the problem of unclaimed awards.

Q.22 Do you agree that the ability to bring opt-out collective actions for breaches of competition law should be granted to private bodies, rather than granting it solely to the competition authority?

As a threshold matter, and as discussed above in response to question 14, ILR opposes opt-out collective actions. But, if the Government nevertheless decides to facilitate such cases, then spearheading them should be solely the responsibility of a competition authority, which has the expertise to apply policy judgments in making enforcement decisions. As discussed in the introduction, public enforcement of competition law by competition authorities is superior to private enforcement. Because government regulators have experience and expertise in the areas that they regulate, they are far better positioned than private individuals to ascertain whether and to what extent competition law infringements actually occur. Government regulators are also better positioned to make the policy judgments that surround every enforcement decision than private claimants who have a direct financial stake in a matter.
Private bodies, like representative organizations, are especially improper candidates for bringing collective cases. Although private representative organizations can play a valuable societal role, their work often involves advocating for the interests of particular groups, interests or causes, and in some cases seeking money from public and private sources to do so. For that reason, ILR is concerned that private representative organizations likely would recruit claimants to highlight particular causes, not to assist them in obtaining fair compensation.

Q.23 If the ability to bring collective actions were granted to private bodies, do you agree that it should be restricted only to those who have suffered harm and genuinely representative bodies, or would there be merit in also allowing legal firms and/or third party funders to bring cases?

As discussed in ILR's answer to question 19, permitting law firms or third party funding companies to gain control over a collective action through contingency fees or funding invites abusive behavior by those entities. This abuse would be even more pronounced if the law firms or funding companies could actually bring collective actions, as opposed to merely funding them (in the law firm’s case, through contingent fees). Allowing those parties to bring collective actions would completely remove the ability of interested claimants to monitor the decisions of the law firms or funding companies and ensure litigation is conducted in the claimants’ best interests.

Unlike claimants who bring a lawsuit, who believe they have been injured and entitled to compensation, a law firm or funding company that brings a lawsuit treats it solely as an opportunity to make money. As such, these entities will decide to file cases based upon the present value of their expected return, of which the case’s underlying legal merit is not necessarily an element. Indeed, if potential recovery from a lawsuit is sufficiently large, the lawsuit will be an attractive investment, even if the likelihood of actually achieving that recovery is small. Put simply, the present value (excluding inflation and opportunity cost) of a £500 million claim with only a 10% chance of success is still £50 million. For these reasons, the likelihood of lawsuit abuse if law firms and third party funders are permitted to bring collective actions is especially high, and therefore such entities should not be permitted to do so.

It is also noteworthy that the recent introduction of alternative business structures in England and Wales risks blurring the boundary between law firms, representative bodies and third party funders in any case, making this area particularly vulnerable to abuse.

The potential pitfalls of allowing representative bodies which have not suffered harm to bring claims are demonstrated by recent developments in the Netherlands. Dutch law currently allows parties who have allegedly suffered harm to be represented in collective procedures by a foundation (“stichting”) or an association (“vereniging”). This entity need not have any track record to establish that it is suitable to act as a representative. Indeed, it may have been created especially for
the purpose of participating in a collective procedure\textsuperscript{38} and, despite the requirement that it be a not-for-profit entity, it may be funded by law firms or third party litigation funders.\textsuperscript{39}

In an attempt to regulate these supposedly representative entities, a committee of judges and lawyers published a “Claim Code” as a form of voluntary self-regulation. The Claim Code, which has applied since 1 July 2011, is short (not to say sparse) in terms of content. Although it attempts to limit the possibilities for representative entities to be driven by profit-seeking enterprises, there is little sign that it has succeeded, and it has attracted criticism. From a legal perspective, it has been noted that the Claim Code constitutes guidance only and courts are not bound by it. Nor are there statutory sanctions for non-compliance. With regard to the Code’s contents, it has been noted that the Claim Code does not regulate the use of third party litigation funding or require transparency in terms of how representative entities are funded.

Meanwhile, these entities are free to whip up support for costly procedures which, without their interference, might never have been contemplated. This demonstrates that failing to place sufficient restrictions on who may act as a representative body results in the use of collective procedures being driven, whether directly or indirectly, by third parties which have no real interest in the welfare of those they claim to represent. If this pattern were replicated in the UK, it would completely undermine the Government’s aim of facilitating redress and growth by empowering businesses and consumers.

ILR therefore recommends that the Government should limit the right to act as a representative to those who have suffered harm themselves. At the very least, the only other bodies which should be able to participate as representatives should be those specified in legislation as suitable to perform that role by satisfying two qualifications: (a) having a track record of acting in the interests of others; and (b) not having a financial motive to commence litigation beyond their desire to obtain redress for those who have allegedly suffered harm.

Q.24 Do you agree that ADR in competition private actions should be strongly encouraged but not made mandatory?

As a preliminary issue, ILR observes that, although the question refers to “ADR in competition private actions,” one of the benefits of ADR is that it can prevent legal “actions” from being initiated at all. This is particularly true of consumer ADR (“CADR”), which offers a diverse and expanding range of systems. As Professor Christopher Hodges and others observed:

\begin{quote}
In the context of consumer-to-business (C2B) disputes, dispute resolution takes place within a different architectural structure that is entirely separate from courts. It may be that the dispute could end up being
\end{quote}

\textsuperscript{38} In the \textit{Shell} case, for example, a foundation called Shell Reserves Compensation Foundation was set up to represent investors which sought compensation and to distribute settlement amounts to those entitled to it under the terms of the court-approved settlement agreement (see https://www.royaldutchshellsettlement.com/Default.aspx).

\textsuperscript{39} See, for example, Stichting Investor Claims Against Fortis, which is funded by a consortium of law firms representing investors for whom it seeks to obtain compensation (see http://www.investorclaimsagainstfortis.com/frequently_question.php).
The recent work of Professor Hodges and his colleagues at the University of Oxford Centre for Socio-Legal Studies provides an illuminating analysis of the state of CADR in Europe. It focuses on models being operated in areas which are highly relevant to competition-based complaints by consumers; namely, financial services, telecoms, energy and general consumer trading. ILR suggests that the Government should investigate the potential for such models to deal with mass consumer complaints as an alternative to promoting court-based procedures which may be exploited by third parties.

More generally, ILR supports greater use of ADR as a fair and efficient alternative to litigation but agrees that it should not be made mandatory by a government imposed mandate. By and large, ADR is a far superior mechanism for resolving disputes than court-based litigation. ADR is efficient, flexible, and can be tailored to address the specific needs of the parties or the complexities of the case. As a result, ADR tends to be lower cost for all the parties involved. From the point of view of consumers in particular, this makes it a more accessible avenue for resolving disputes. From the point of view of businesses, it often results in less time and expense being incurred than in court-based litigation. Since ADR can be a low-cost and efficient dispute resolution mechanism, it is often less susceptible than court proceedings to abusive practices by parties.

The fundamental difference between an ADR scheme and traditional litigation is that the parties to ADR agree to less formal procedures than would be expected in a court of law. In doing so they achieve certain benefits, including flexibility, efficiency and streamlined dispute resolution. ADR is most successful where the parties maintain control of the dispute resolution process. Thus, the key to a successful ADR regime is that the parties must agree to engage in dispute resolution – and to the form of dispute resolution in which they engage. Of course, what the parties agree to differs based on the type of ADR involved. But even binding arbitration is premised on consent because the parties must agree to be bound by the arbitrator’s decision.

It should also be noted that preserving the consensual nature of ADR need not restrict its growth. Parties have plenty of reasons to prefer ADR over traditional litigation; after all, ADR can be flexible, low-cost, quick and tailored to the parties’ particular needs. Any expansion of ADR can – and should – result from broader recognition of its inherent benefits, rather than any governmental program that compels parties to use it.

For these reasons, ILR does not support governmental attempts to compel parties to use ADR and agrees with the Government’s approach that ADR should be encouraged in competition litigation but not imposed on the parties. ADR works best when the parties control the process and participate by agreement. As further explained in response to question 30, ILR is also concerned that taking companies’ use of ADR into account when determining fines against them could put companies under unreasonable pressure to use ADR. In those circumstances, although ADR would remain voluntary in the strict sense, its consensual basis would be undermined if companies were coerced into using it out of fear of receiving more severe penalties.

Q.25 Should a pre-action protocol be introduced for (a) the proposed new fast track regime, (b) collective actions and/or (c) all cases in the CAT?

(a) The proposed new fast track regime

As stated in its response to questions 4 and 5, ILR strongly opposes the Government’s proposal for a fast track regime. Were such a regime to be implemented, a pre-action protocol would be welcome insofar as it would hopefully encourage SMEs to raise issues of concern with prospective defendants and to consider ADR before commencing proceedings. Possible sanctions for failure to do so might include removal of the costs cap or, if pre-action conduct were considered at the outset, refusal to admit the case to the fast track. For the avoidance of doubt, however, ILR does not consider that such mechanisms would be capable of making up for the shortcomings of the proposal to implement a fast track regime.

(b) Collective actions

As stated in response to questions 9-11, ILR is convinced that it would not be in the interests of the UK or its justice system to extend the current regime of collective actions. As with the proposed new fast track regime, introducing a pre-action protocol for collective actions would be a positive step insofar as it would encourage information exchange and use of ADR, but it would fall far short of addressing the potential abuses described above.

In ILR’s view, if such a protocol were introduced it should cover the conduct expected of representative claimants in terms of advertising to potential claimants. It should also require parties to disclose details of their funding arrangements, including the participation of third party litigation funders and/or law firms acting on a contingency fee basis, so as to promote transparency and enable successful defendants to apply for third party costs orders.

In the Consultation, the Government mentions the possibility of courts taking into account whether reasonable attempts were made to use ADR when assessing whether to certify a case as suitable for collective action. Notwithstanding ILR’s opposition to collective actions, such a position could be justified to the extent that it required parties to give reasonable consideration to the use of ADR and failure to do so counted against certification. Under no circumstances, however, should failure to pursue ADR count in favor of certification and thereby operate as a sanction against defendants who may have good reasons for deciding that ADR was not appropriate. As stated in response to question 24, ADR works best where it is agreed to by the parties, but it is not appropriate in all cases.

(c) All cases in the CAT

In relation to CAT cases in general, ILR would welcome the introduction of a pre-action protocol subject to the proviso that it only requires parties to give due consideration to ADR rather than expose them to sanctions on account of having chosen not to use it.

ILR would particularly welcome a stipulation that claimants should disclose the existence of funding arrangements with third party litigation funders given their increasing presence in the competition field. Similarly, litigants should be expected to disclose the existence of contingency fee arrangements with lawyers. In both cases, this would promote transparency and put defendants in a
position to apply for third party cost orders if litigation is commenced and the claims against them are unsuccessful.

**Q.26 Should the CAT rules governing formal settlement offers be amended?**

ILR has no specific comments on this proposal. In general, ILR supports measures aimed at promoting settlement provided that these are not coercive.

**Q.27 The Government would be interested to hear of whether, should the reforms in this consultation be carried out, your organization would intend to establish any initiatives that might facilitate the provision of ADR for disputes relating to competition law.**

ILR's main contribution to facilitating ADR consists of promoting it as an alternative to litigation through ILR’s advocacy work. ILR is disappointed that the Government is not prepared to commit additional public money to ADR despite its clear advantages over litigation and yet is prepared to necessitate new costs for the CAT by extending the UK collective action regime. Nonetheless, ILR has identified a number of proposals relating to private sector funding mechanisms for ADR which should be of interest to the Government.

First, ILR questions whether ADR might in some cases achieve better results if all parties have a financial stake in the proceedings, notwithstanding that the financial risk borne by consumers would necessarily be modest. ILR suggests that the Government should consider the possibility of ADR schemes being funded jointly by the consumers and businesses who utilize them, provided it can be established that the cost to consumers would not render such schemes inaccessible.

Second, in addition to – or as opposed to – asking consumers to pay a fee to utilize an ADR scheme, and as an alternative to utilizing public money, consumer representative organizations could pay fees for consumers who cannot afford to commence ADR proceedings on their own. In such cases, however, the representative organization must have no further interest in the outcome of the case or control over the progress of the case. In particular, the consumer must not be bound to repay the representative organization out of any award to the consumer, because that would give the representative organization a direct financial stake in the outcome of the proceeding.

Third, in adversarial ADR proceedings where it can be established that one party has prevailed, the loser-pays rule should be the starting point for determining who bears the costs of the proceedings. If the parties so agree, liability for costs could be capped according to the value of the dispute, or the rule could be otherwise modified in particular cases. Nonetheless, consumers with meritorious claims would have an incentive to agree to a loser-pays regime because it would eliminate any cost to them of using ADR. At the same time, businesses should support a loser-pays regime because it would reduce the likelihood that any consumer would file a frivolous claim.

In no event, however, should third party litigation funding have any role in ADR schemes. Third party litigation funding encourages the filing of more – often frivolous – suits in the litigation arena, and it would do the same in an ADR scheme as well. Moreover, the use of third party funding in ADR would require consumers to cede control of their cases to a third party whose only interest in the dispute is financial. Encouraging strangers to invest in consumer disputes in the hope of turning a profit is directly contrary to the fundamental goals – and efficiency benefits – of ADR.
Q.28 Do you agree that, should a right to bring opt-out collective actions for breaches of competition law to be introduced, there would be no need to make separate provisions for collective settlement in the field of competition law?

ILR is concerned that this question appears to pre-empt the issue of whether a right to bring opt-out collective actions for breaches of competition law should be introduced. In its consultation paper, the Government states that:

“the question it must consider is not whether, in the abstract, collective settlement must be desirable, but whether, if a right to bring opt-out collective action[s] for breaches of competition law were introduced ... it would be necessary to also introduce separate provisions for collective settlement along the lines of [the Netherlands 2005 Collective Settlement of Mass Damages Act (WCAM 2005)].”

Only if a decision had already been taken to introduce opt-out collective actions would it be relevant for the Government to consider whether collective settlement would not be needed. As the Government may be aware, for the time being the Netherlands has a procedure for collective settlement but not collective actions for damages. ILR respectfully submits that, while being far from perfect, in this respect the Dutch model is superior to the Government’s proposals.

The prospect of a potential damages action operating on an opt-out basis would skew defendants’ incentives to settle cases. While the oversight role of the English court in approving collective settlement might, as the Government states, involve assessing the adequacy of the body representing claimants, it would not provide any safeguard against the defendant having effectively been coerced into reaching a settlement.

Notwithstanding this crucial point, the Government should note that, as explained in responses to question 23, the position in the Netherlands regarding the representative entities which seek to negotiate collective settlements should not be replicated in the UK. In particular, the Government should take steps to ensure that, unlike in the Netherlands, such representatives could not be supported by third party litigation funders.

Q.29 Should the competition authorities be given a power to order a company found guilty of an infringement of competition law to implement a redress scheme, or to certify such a voluntary redress scheme?

The merits of the proposal to give the OFT power to impose or certify redress schemes would depend in large part on the detailed provisions by which the proposal might be implemented, and ILR would value the opportunity to provide comments on such provisions. Considering the proposal at a high level, ILR has two main reservations.

First, as stated in response to question 24, ADR mechanisms are most effective when they are agreed to by all parties. On that basis, ILR would not oppose the certification of such schemes by the OFT where they are put in place voluntarily, provided that the criteria for certification were reasonable.

Second, it appears from the Government’s consultation paper that consumers would be free to participate in such schemes without being prevented from subsequently commencing proceedings (or possibly being recruited to an opt-out collective action) if they were not satisfied with the
outcome. In such circumstances, ILR submits that the courts should be able to impose a sanction (possibly on the representative claimant) if the outcome of that litigation were not better than that which was available under the scheme.

Notwithstanding these reservations, ILR can see merit in investigating this proposal as an alternative to extending the UK collective action regime. This is primarily because it would assist consumers in obtaining redress without the process being driven and exploited by third parties such as third party litigation funders and law firms. If the Government were to extend collective actions despite the dangers inherent in doing so, ILR submits that the Government should consider imposing a moratorium on follow-on actions for a certain time after the OFT issues an infringement decision. This might at least provide companies with time to put in place redress schemes intended to compensate consumers with genuine claims and, significantly, ensure that those consumers would receive redress without the interference of third parties.

**Q.30 Should the extent to which a company has made redress be taken into account by the competition authorities when determining what level of fine to impose?**

ILR submits that, were the Government to implement its proposal to give the OFT power to order a company to implement a redress scheme, the extent to which that company made redress through that scheme should be taken into account when setting its fine. ILR also submits that, if the investigation of individual cases in the context of an OFT-sanctioned redress scheme uncovers only relatively few instances of actual harm, it too should be taken into account when determining the appropriate level for a fine.

If the Government were to introduce opt-out collective actions as proposed, then, notwithstanding that fines and damages should perform different roles, the combined burden upon companies could leave some companies in financial peril. Even without the new wave of private actions that the Government and the European Commission seem determined to promote, the Commission has acknowledged in competition cases that the fines it imposes can, on some occasions, be a fatal blow to the companies fined. In 2008 and 2009, DG Comp received nine inability-to-pay applications following the imposition of competition law fines, pleading that the applicants would be bankrupted if the Commission enforced the fines imposed. In 2010, 32 out of the 69 companies fined submitted inability-to-pay applications. DG Comp reduced the fines for nine of those companies. As Commissioner Almunia has stated, “our fines must remain large, because companies need to understand that cartels do not pay. But at the same time my objective is not to put companies out of business.” In the current economic climate, taking redress into account when setting fines would be a sensible way of facilitating redress without reducing the deterrent effect of the fines.

An alternative proposal, which would have the added benefit of preventing follow-on actions from being exploited by profit-seeking third parties, would be to compensate individuals with valid claims out of the fines collected by competition authorities. One possible model for making fines available for redistribution is the U.S. SEC’s Fair Funds mechanism, which is described in response to question 22. ILR respectfully submits that the Government should study such possibilities before

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taking steps to promote the use of litigation, and particularly collective litigation as a means of enforcing competition law.

Outside of the context of companies making redress via OFT-sanctioned schemes, however, ILR is concerned that taking into account payment of compensation when imposing fines could place companies under pressure to settle claims for compensation which they might otherwise have been able to defend.

As the Government itself recognizes, quantifying the effects of anti-competitive behavior can be a difficult and complex exercise. A company which legitimately chooses to focus on maintaining its rights of defense in response to an objection from the OFT will not necessarily be in a position to engage in that exercise and pay compensation ahead of a fine being imposed. ILR therefore calls into question whether this kind of procedure would be workable under the current competition regime.

It should also be taken into account that once it is publicly known that a company is under investigation for alleged anti-competitive behavior it will quickly become a target for claims. Neither the opening of an investigation nor the finding of an infringement implies that all claims are meritorious. Damage, causation and quantum must still be established. There is a danger that taking redress into account when setting fines would result in companies being coerced into paying such claims to try to contain fines, and thereby lead to cases of unjust enrichment.

Q.31 The Government seeks your views on whether and how an extended role for private actions would positively complement current public enforcement.

ILR believes that the enforcement of competition law is properly the responsibility of public enforcement authorities. Private actions serve a different purpose: to compensate those who have genuinely suffered harm. While the possibility of private actions is bound also to have a deterrent effect, seeking to harness this effect by making it easier to claim damages will lead to abuse and unjust enrichment. ILR respectfully submits that the Government’s focus should be on maintaining the good reputation of its public enforcement system and that there are more appropriate means of ensuring those harmed by unlawful conduct are compensated than promoting private actions.

Public enforcement necessarily involves policy judgments by the authority bringing the enforcement action. A claimant who has a personal monetary stake in a case is ill-suited to making these policy judgments, as the U.S. class action experience has amply demonstrated. Although plaintiffs frequently couch their suits as seeking injunctive relief, there is inevitably a monetary component, and the suits are almost always driven by the prospect of lawyers’ fees rather than justice for consumers. It is for this reason that it is imperative that private bodies not be permitted to commence opt-out collective actions (see question 22). Accordingly, to the extent the Government believes public enforcement of competition law should do more to protect consumers and businesses from anti-competitive conduct, the correct response is to augment the public enforcement authorities rather than to delegate their powers to private parties whose primary motivation in most cases will be to obtain a financial award or settlement.

In addition to punishing wrongdoing, public enforcement can also be an effective means to provide compensation to victims of unlawful activity. This is demonstrated by the Fair Funds mechanism operated by the SEC which is described in response to question 22, above. ILR respectfully submits
that the Government should consider whether a scheme similar to the Fair Funds mechanism might help to achieve the dual aims of public enforcement and compensation. More specifically, studying this possibility before taking steps to expand the UK’s collective action regime may enable the UK to avoid the problems inherent in collective litigation.

**Q.32 Do you agree that some leniency documents should be protected from disclosure, and if so what sort of documents do you believe should be protected?**

ILR agrees that, given the importance of leniency programmers for detecting cartels, leniency documents should be protected from disclosure. ILR is also cognizant of the fact that, following the judgment of the Court of Justice of the European Union in *Pfleiderer*, there may be the potential for national courts to take divergent approaches to the protection of leniency documents. This could in turn create a further incentive for forum shopping, with claimants attempting to bring their claims in the courts most likely to grant them disclosure of leniency documents and related material.

For the time being, however, it appears that fears about how national courts might apply the *Pfleiderer* judgment may have been misplaced. The German court from which *Pfleiderer* was referred, for example, ultimately refused to grant disclosure of the leniency documents sought in the case. More recently in England and Wales, in the *NGET* case, the extent of the disclosure ordered in respect to material prepared for the purposes of a leniency application fell short of what was sought by the claimant in the wake of the *Pfleiderer* judgment. This was despite the perception that the English approach to disclosure is more liberal than elsewhere in the EU and the fact that Mr. Justice Roth did not agree with all of the points made by the European Commission in its written observations in that case.

In light of these developments, ILR submits that the most appropriate course of action is to wait to see how the case law on disclosure of leniency documents evolves at both national and EU level. ILR is not convinced that legislation on this issue is required at the present time.

Were the Government minded to issue guidance on which documents the English courts should seek to protect in private actions, ILR would support the Government’s proposal to protect documents created for the purpose of a leniency application. Presumably this would also include material from those documents where it appears in other documents.

**Q.33 Do you agree that whistleblowers should be protected from joint and several liability, and to what degree, if at all, do you think this should be extended to other leniency recipients?**

As noted throughout this response, ILR believes that competition enforcement should be a matter for public enforcement authorities and, rather than promote or extend the use of collective litigation, the Government should investigate other possibilities such as empowering competition authorities to provide redress to consumers through a combined enforcement-compensation mechanism (like the SEC’s Fair Fund). Such a framework would obviate the need to exempt whistleblowers from future liability in collective actions, because the infringer’s compensation of

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43 *National Grid Electricity Transmission plc v ABB Power Ltd and ors* [2012] EWHC 869 (Ch).
injured consumers, which otherwise would be the subject of the follow-on collective action, would instead be addressed as part of the competition authority’s enforcement mechanism.

Q.34 The Government seeks your views on whether there are measures, other than protecting leniency documents or removing joint and several liability, where action should be taken to protect the public enforcement regime.

ILR has no further comments on other measures which should be taken to protect the public enforcement regime. As stated above, ILR believes that the Government should look to achieve its policy objectives by augmenting the public enforcement regime rather than seeking to promote private actions. A further benefit of taking that approach is that it would, to some extent, lessen the threat posed to the public enforcement regime by private actions.

Q.35 Do you have any other comments that might aid the consultation process as a whole?

As indicated at other points in its response to this consultation, one of ILR’s key concerns is forum shopping, i.e., the practice of claimants selecting particular jurisdictions in which to bring claims on the basis of perceived advantages afforded to them by the rules of that jurisdiction.

In the U.S., claimants’ ability to shop for the most claimant-friendly forums in which to bring lawsuits has led to an increased volume of litigation in jurisdictions with reputations for being anti-defendant. Prior to the enactment of federal class action reform legislation, this problem led to the creation of “magnet” jurisdictions – otherwise unremarkable rural counties that became magnets for hundreds of class action lawsuits because the courts consistently handed down claimant-friendly rulings.

The U.S. experience demonstrates that the existence of such forums engenders great expense and inefficiency. But what is even more troubling is that forum shopping can distort the application of law by promising claimants better results if they manipulate their claims so that they can appear in “friendly” courts.

England and Wales is already a popular jurisdiction among claimants in competition cases, as demonstrated by a number of well known disputes in the English courts over jurisdictional issues. ILR is concerned that certain of the Government’s proposed reforms may enhance the perception of England and Wales as a “claimant-friendly” jurisdiction for private competition actions and attract third parties from across the European Union which seek to promote litigation as an investment opportunity. While this prospect might be attractive to UK-based legal services firms, the Government should also consider it from the point of view of those looking to carry on business in the UK.

The Government will no doubt be aware that the European Commission has for some time been contemplating a proposal on collective redress. It will also be aware of reports that DG Competition intends to propose legislation on private competition actions, possibly including provisions on collective claims. ILR is strongly opposed to action on collective redress at EU level

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44 Provimi v Aventis [2003] EWHC 961 (Comm); Cooper Tire and Rubber Company v Dow Deutschland Inc [2010] EWCA Civ 864; and Toshiba Carrier U.K. Ltd v KME Yorkshire [2011] EWHC 2665 (Ch). The Toshiba is the subject of a pending appeal.
and is far from convinced of the need for EU legislation on private competition actions. ILR respectfully submits, however, that to avoid creating new disparities between England and Wales and other EU jurisdictions which could fuel forum shopping, the Government should consider postponing its consideration of these proposals until there is greater clarity at EU level.