15 August 2013

Business, Innovation and Skills Committee  
7 Millbank  
House of Commons  
London  
SW1P 3JA

Dear Sirs,

Comments of the U.S. Chamber Institute for Legal Reform on Schedule 7 of the draft Consumer Rights Bill

1. I write on behalf of the U.S. Chamber Institute for Legal Reform (“ILR”), concerning the provisions on private actions in competition law which are contained in Schedule 7 of the draft Consumer Rights Bill (the “Draft Bill”).

About the U.S. Chamber Institute for Legal Reform

2. ILR is a not-for-profit public advocacy organisation affiliated with the U.S. Chamber of Commerce, the world’s largest business federation, representing the interests of more than three million businesses of all sizes, sectors and regions, including many United Kingdom-owned businesses, as well as state and local chambers and industry associations. Since many of ILR’s members have UK-based affiliates that conduct substantial business in the UK, ILR is deeply interested in the orderly administration of justice in the UK.

3. ILR’s mission is to restore balance, ensure justice and maintain integrity within the civil legal system. We do this by creating broad awareness of the impact of litigation on society and by championing common sense legal reforms at the state, federal and global levels. Since its founding in 1998, ILR has worked diligently to limit the incidence of litigation abuse and has participated actively in legal reform efforts in the United States and in the UK.
The Policy of Introducing Opt-out Collective Actions

4. Recognising the importance of the UK as a key market for many of its members, and a leading financial centre, ILR was pleased to respond to the Department of Business, Innovation and Skills’ consultation on private actions in competition law.

5. I understand that information submitted to that consultation will be taken into account by the Committee in its pre-legislative scrutiny of the Draft Bill, and I hope that careful attention will be paid to ILR’s submission. For reference, I enclose with this letter a summary version of that submission which sets out ILR’s main concerns.1

6. The foremost of those concerns is the introduction of an opt-out regime for collective actions. ILR has significant experience of the negative consequences of U.S. class actions, which typically operate on an opt-out model. ILR was particularly concerned with the proposal to introduce opt-out collective actions in the UK and is disappointed that this proposal has been taken forward in the Draft Bill.

7. The experience of the U.S. system and other jurisdictions where an opt-out model has been adopted, such as Australia, demonstrates that collective actions are inherently prone to abuse by profit-seeking third parties such as lawyers and litigation funders. The scale of liability in such cases provides an opportunity for these parties to extract lucrative settlements from businesses which choose to settle claims as a means of avoiding the time, costs and negative publicity associated with large-scale litigation, regardless of the merits of the litigation itself.

8. ILR also opposes the policy contained in the Draft Bill of requiring that unclaimed damages in opt-out proceedings be distributed to charity. Without commenting on the merits of the work done by the Access to Justice Foundation, ILR considers the idea of distributing damages awards to non-parties to be at odds with the principle that damages should be compensatory. Designating a particular charity to receive unclaimed sums may remove some of the problems associated with the use of cy pres mechanisms in litigation, but it does not address the

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1 Both the summary and full versions of ILR’s response to the consultation are also available online at: http://www.instituteforlegalreform.com/sites/default/files/BIS_Response.pdf (full version); and http://www.instituteforlegalreform.com/sites/default/files/BIS_Response_Summary.pdf (summary version).
fundamental issue that the damages awarded will not benefit the absent class members.\(^2\)

9. Moreover, the fact that opt-out proceedings result in large sums going unclaimed calls into question whether opt-out collective actions are necessary to achieve the goal of compensation.

10. Recent analysis shows that liability costs as a proportion of GDP are greater in the United States, where opt-out class actions are well established, than in other major jurisdictions (1.66% in 2011). Meanwhile, liability costs in the UK as proportion of GDP have risen in recent years and are already greater than in other European countries (1.05% compared with 0.63% in the Eurozone).\(^3\) These high costs may deter investment and increase business’s borrowing costs, which would have a negative impact on growth, investment and job creation.

11. For the reasons set out above and in its submission to the consultation, ILR does not believe that the case has been made for introducing an opt-out model in the UK, particularly given the attendant risk of further increases in liability costs to UK businesses and the wider economy.

Comments on the Specific Provisions Contained in Schedule 7 of the Draft Bill

12. Notwithstanding its opposition to certain policies that would be implemented by the Draft Bill, and particularly the introduction of opt-out proceedings, ILR has the following comments on the detailed provisions set out in Schedule 7 of the Draft Bill:

The prohibition on damages-based agreements in opt-out collective proceedings should be extended to litigation funding agreements

13. It is proposed that a damages-based agreement ("DBA") should be unenforceable if it relates to collective proceedings.\(^4\)

14. ILR welcomes this proposal but does not believe the absence of DBAs will prevent abuse. The example of Australia is particularly instructive

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\(^4\) Paragraph 6 of Schedule 7 (new section 47C(7) of the Competition Act 1998.)
given that opt-out collective actions have been available there for some
time but, unlike in England and Wales, lawyers are not permitted to enter
into agreements equivalent to DBAs. This has not prevented abuse in
the Australian class actions system, primarily as a result of third party
litigation funding, which is well-established in Australia and is becoming
increasingly prominent in the UK.

15. In many respects, third party funding presents a greater risk in
connection with opt-out collective actions than DBAs because lawyers
are at least subject to professional conduct rules, whereas UK litigation
funders have only a voluntary code of conduct. In a debate in the House
of Lords on the Damages-Based Agreements Regulations 2013, Lord
Beecham observed that, of 25 litigation funders then established in the
UK, only nine had joined the Association of Litigation Funders which
administers the voluntary code. He went on to remark that “[t]hey
[litigation funders] are not even joining their own association, let alone being
responsible to any independent and impartial organisation to oversee their work.”

16. Arguably, the prohibition on damages-based agreements in collective
proceedings would already capture litigation funding agreements on the
basis that they fall within the definition of a DBA contained in section
58AA of the Courts and Legal Services Act 1990.6

17. However, in the absence of case law to clarify whether litigation funding
agreements do amount to DBAs, an express prohibition on litigation
funding agreements in collective proceedings should be included in the
Draft Bill.

Authorisation to act as a representative in collective proceedings

18. It is proposed that the Competition Appeal Tribunal (the “Tribunal”)
could only authorise a non-class member to act as representative in
collective proceedings if the Tribunal considered it “just and reasonable”
for that person to act as a representative.7 The same condition would
apply to the new collective settlement procedure contained in the Draft

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6 Hansard HL Deb 26 February 2013, vol 743, col GC130.

7 A “damages-based agreement” is defined as “an agreement between a person providing advocacy services, litigation services
or claims management services [emphasis added] and the recipient of those services which provides that—(i) the recipient is to
make a payment to the person providing the services if the recipient obtains a specified financial benefit in connection with the matter
in relation to which the services are provided, and (ii) the amount of that payment is to be determined by reference to the amount of
the financial benefit obtained”. For these purposes, “claims management services” means “advice or other services in
relation to the making of a claim” including “the provision of financial services or assistance” (section 4 of the
Compensation Act 2006).

7 Paragraph 5 of Schedule 7 (new section 47A(8)(b) of the Competition Act 1998).
Bill. It is further proposed that the factors to be taken into account by the Tribunal when deciding whether to authorise a person to act as a representative should be set out in the Tribunal’s procedural rules.

19. In its response to the consultation, the Government stated that claimants or “genuinely representative bodies” should be permitted to act as representatives but not law firms, third party litigation funders or special purpose vehicles.

20. To ensure that non-claimant representatives are genuinely representative, the Draft Bill or the Tribunal’s procedure rules should require at least the following factors to be taken into account:

(a) track record and expertise – any non-claimant representative should be required to demonstrate that it has acted in the interests of the parties making up the majority of the class (e.g., consumers) for a number of years and has the relevant expertise to serve their interests;

(b) non-profit making character – non-claimant representatives should not have any financial motive for commencing litigation beyond their desire to obtain redress for those who have genuinely suffered harm;

(c) ownership, governance and sources of funding – to ensure non-claimant representatives are not merely fronts for profit-making enterprises with an interest in litigation taking place (e.g., law firms, third party litigation funders and claims management companies), the Tribunal should take account of who owns, controls and funds non-claimants seeking to act as representatives;

(d) ability to comply with an adverse costs order – the “loser pays” rule is an important deterrent against frivolous litigation and provides protection to parties who are forced to incur costs responding to cases which ultimately prove to be without merit. To ensure defendants are not deprived of this protection, it is essential that non-claimant representatives have the financial means to pay defendants’ costs if ordered to do so;

(e) previous conduct – the Tribunal should be permitted to take account of previous conduct including, for example, whether the person seeking to act as a non-claimant representative has a history of being a vexatious litigant or failing to comply with regulations and codes on direct marketing.
Eligibility of claims for collective proceedings and choice of opt-in vs. opt-out

21. It is proposed that claims would only be eligible for inclusion in collective proceedings if the Tribunal considered that they raised “the same, similar or related issues of fact and law and [were] suitable to be brought in collective proceedings.” The same condition would apply in relation to the new collective settlement procedure contained in the Draft Bill. It is envisaged that factors to be taken into account when the Tribunal determines whether claims are “suitable to be brought in collective proceedings” (but not whether they raise the same, similar or related issues of fact or law) will be set out in new procedural rules. However, ILR considers that given the importance of the certification process for preventing abuse, the Draft Bill should at least specify that:

(a) the common, similar or related issues of fact and law should predominate over other issues so that resolving them will go a substantial way to dispensing with all of the claims; and

(b) there should be a sufficient volume of claims to make individual proceedings impractical.

22. When considering an application for a collective proceedings order, the Tribunal will also have to decide whether, if it grants such an order, it should specify the proceedings as opt-in or opt-out. This decision will be crucial given the greater risk of abuse with opt-out proceedings, yet the Draft Bill is silent on the point and it is unclear whether this will be dealt with in new procedural rules. If the Draft Bill continues to include a provision for opt-out proceedings, it should clarify that the burden to be discharged by an applicant for a collective proceedings order will be greater where the order sought is for opt-out proceedings. The applicant should be required to demonstrate the existence of genuine interest in the proceedings, for example by producing evidence of a threshold volume of unsolicited complaints or claims, and give reasons why opt-in proceedings would be inadequate.

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8 Paragraph 5 of Schedule 7 (new section 47A(6) of the Competition Act 1998).
Assessment of damages

23. The Draft Bill proposes that the Tribunal would be permitted to award damages in collective proceedings without assessing the amount of damages recoverable in respect of each individual claim but leaves further detail on the assessment of damages to be dealt with in new procedural rules. To ensure genuine claimants receive a fair amount of compensation and avoid disputes over distributions, the Draft Bill should at least require that any award of damages which is made on an aggregate basis specify the terms upon which damages are to be divided among class members. In ILR’s view, those terms should always require any unclaimed damages to be returned to the defendant.

24. ILR is grateful for the opportunity to provide these comments and should be happy to provide further information to the Committee, such as additional information about the negative consequences of opt-out collective actions in other jurisdictions, if that would be of assistance.

Sincerely,

[Signature]

Lisa A. Rickard