CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

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President José Manuel Barroso
European Commission
1049 Brussels, Belgium

Dear President Barroso:

I am writing to express my deep concern about recent news that the Directorate General for Competition may be planning to expedite a Proposal for a Council Directive on rules governing damages actions for infringements of Articles 81 and 82 of the Treaty, which would create an EU-wide collective redress system for antitrust actions.

The U.S. Chamber is the world's largest business federation, representing an underlying membership of more than three million companies and professional organizations of all sizes and in all industries. Not only do we represent EU-based companies, numerous U.S. Chamber members do business with or operate facilities in the EU and are therefore directly affected by the European litigation system.

While I understand that various European policymakers have reassured their constituencies that DG Competition's collective redress proposal will not recreate the problematic U.S. class action system, we firmly believe that it will bring about many of the same litigation abuses and economic consequences. The entrepreneurial U.S. plaintiffs' bar, which is ready and able to expand their lucrative business model overseas, will take advantage of the oversights in this proposal to bring systemic lawsuit abuse to Europe.

The U.S. Chamber Institute for Legal Reform has provided the Commission with constructive comments and suggested safeguards at every stage of DG Competition's drafting process. However, upon careful review of the latest draft, our legal experts find that it is missing essential protections. I have enclosed several

documents that expand upon these safeguards in more detail, but some of the most urgent examples include:

- allowing only "opt-in" actions (the current proposal permits an entity to seek damages for a large group of individuals without identifying the parties represented, which essentially constitutes an "opt-out" action);
- creating class certification standards requiring that courts determine whether it would be feasible and fair to hold one joint trial on all the plaintiffs' claims;
- integrating appropriate restrictions on litigation financing to ensure that parties do not have financial incentives to bring frivolous lawsuits;
- creating clear standards for indirect purchaser actions by requiring that indirect purchasers demonstrate real injury; and
- including choice-of-law provisions and a cross-jurisdictional coordination mechanism to prevent forum-shopping and the filing of duplicative, "copycat" actions in multiple jurisdictions.

For these reasons and others, passage of the proposal as written would bring about abusive and expensive lawsuits, many of which would be based upon dubious claims and would compensate lawyers far more effectively than they provide redress for consumers.

Further consideration of the proposal's potential impact is crucial. If the Commission takes the time to fully evaluate the recommendations being made by key stakeholders, including members of the business community, it could buttress the current proposal with much needed safeguards and create a system fairer and more efficient than the one with which we struggle every day in the U.S.

Sincerely,

Thomas J. Donohue

Enclosures

THE DG COMP COLLECTIVE ACTION PROPOSAL:
PROTECTING COMPETITION OR PROMOTING LAWSUITS?

In an effort to expand enforcement of antitrust violations in the EU, DG Comp is proposing two mechanisms for collective redress of anti-competitive activity: (1) "opt-in" group actions by affected individuals and businesses; and (2) representative actions by state-certified associations that closely resemble "opt-out" group proceedings. Although DG Comp has sought to avoid U.S.-style class action abuse by adhering to Europe's traditional "loser pays" rule, the proposal threatens to encourage litigation abuse in Europe. This is so for several reasons:

- ***First***, although DG Comp does not propose opt-out class actions *per se*, its concept for representative actions is likely to create the same incentives for filing frivolous litigation.

  - In the U.S., 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. This potential liability in turn places enormous pressure on the defendant to settle, regardless of the actual merits of the claims at issue.

  - The representative action proposal would likely have the same effect. As with an opt-out class action, a qualified entity under the Directive can initiate a representative action seeking damages for a large group of individuals without identifying the parties represented – the qualified entity would only have to define a class of parties. Each individual class member "can exercise its right not to be represented," *i.e.*, each class member must specifically opt out of the class or be bound by any judgment. Thus, as with opt-out class actions, the mere filing of a representative proceeding would create enormous settlement pressure on a defendant, even if the claim is meritless.

    - For example, if a representative action is brought on behalf of five million people, each seeking 1,000 Euros in damages, the defendant will feel pressure to settle even if the claims are weak, because a five billion dollar loss would be ruinous.

- ***Second***, unless DG Comp proposes a standard for assessing whether it would be fair and efficient to adjudicate a proceeding on an aggregate basis, there is a significant risk that the new procedures will compromise fundamental fairness rights by aggregating claims that involve different facts and circumstances.

  - One of the most important safeguards against the misuse of aggregate litigation mechanisms is a requirement that courts determine whether it would be feasible and fair to hold one joint trial on all the plaintiffs' claims. Prior to

the enactment of federal class action reform in the U.S., state courts that ignored this requirement frequently became "magnets" for meritless and abusive class actions. The Directive could invite similar abuse.

- ***Third***, DG Comp has not indicated that it will propose limits on financing mechanisms for antitrust collective actions. As a result, decisions about what actions should be brought may be driven primarily by private profit motivations.

  - In developing a framework for aggregate litigation, it is critical to establish appropriate controls and restrictions on litigation financing to ensure that parties do not have financial incentives to engage in frivolous lawsuits. If the Directive fails to address this issue, litigation is likely to be financed through existing European financing mechanisms, and several of those mechanisms – in particular third-party funding arrangements – have the potential to encourage litigation of questionable merit.

- ***Fourth,*** unless DG Comp's proposal requires indirect purchasers to demonstrate real injury, it will encourage dubious, and even frivolous, actions by such claimants.

  - Without clear standards for indirect purchaser actions, the defendant could end up with the burden of showing that the overcharge was not fully passed on to the indirect purchaser.

  - For example, a party that allegedly fixed sand prices could be subject to group actions or representative proceedings on behalf of glass purchasers, window manufacturers, homebuilders who purchased windows, and homeowners who bought homes containing such windows, with each group claiming overlapping damages. None of these claimant groups would need to make an affirmative showing that they had incurred the whole overcharge or even that they had paid any overcharge at all; rather, in each proceeding, the burden would be on the defendant to show that was not the case.

- ***Fifth***, any proposal must contain clear choice-of-law provisions and a cross-jurisdictional coordination mechanism to prevent forum-shopping and the filing of duplicative, "copycat" actions in multiple jurisdictions.

  - It is critical for DG Comp to establish clear venue requirements and choice-of-law principles for any collective actions.

  - The absence of such safeguards would lead to two serious problems. First, it would encourage forum-shopping – *i.e.*, efforts by attorneys to file large numbers of suits in whatever jurisdictions they think will be most friendly to their cause. This is precisely what occurred in the U.S. prior to class action reform – and led to the development of abusive, "magnet" courts.

  - Second, it could encourage parties to file duplicative, overlapping suits in multiple jurisdictions. For example, the party that allegedly fixed prices for

sand – if it did so on an EC-wide basis – might very well face an "opt-in" class action in the U.K. comprised of concrete manufacturers, a separate "opt-in" direct purchaser class action in Belgium involving glass makers, a representative action brought by a French consumer association representing people who purchased products with glass, and a representative action brought by an Italian trade group of real estate developers.

- Once again, the U.S. provides an object lesson on the dangers of this approach. Prior to the enactment of class action reform, dueling plaintiffs' lawyers would compete to file overlapping suits in multiple jurisdictions, resulting in inefficiency, waste and abuse.

RESPONSE TO THE PROPOSED DG COMPETITION DIRECTIVE ON RULES GOVERNING DAMAGES ACTIONS FOR ANTITRUST INFRINGEMENTS

Introduction

In April 2008, the Competition Directorate of the European Commission ("DG Comp") promulgated a White Paper on "Damages actions for breach of the EC antitrust rules" in which it proposed an EU framework for private enforcement of EC antitrust law through collective actions. In that document, DG Comp sought to thread the needle between: (a) creating a robust system of private litigation to pursue redress for antitrust violations on a collective basis and (b) avoiding the avalanche of meritless claims, unjust settlements, and other problems that have plagued U.S. aggregate litigation models in recent years. However, although DG Comp explicitly declined to include in the White Paper certain elements that almost certainly would have created a troubling U.S.-style legal regime (*e.g.*, waiver of the "loser pays" rule), it did embrace a number of concepts that have the potential to create substantial unintended adverse consequences in European legal systems.

After receiving extensive comment on the White Paper's proposals, DG Comp now has issued a proposed Directive on private antitrust litigation. Despite submissions from the Institute for Legal Reform ("ILR") and others pointing out the various structural problems in the White Paper's proposals, the proposed Directive largely recapitulates the framework set out in the White Paper. The handful of changes that DG Comp did make to its original proposal have made its proposed system more (not less) vulnerable to exploitation and subversion by the plaintiffs' bar. Simply put, we believe that over time, the proposed Directive, if implemented without modification, is likely to open the door to American-style litigation abuses in Europe.

Summary of Directive

The Proposed Directive envisions a new regime for individuals allegedly injured by infringements of EU competition law to seek redress on a collective basis. The proposal generally follows the approach advocated by DG Comp in its White Paper.

Collective Redress. DG Comp proposes "two complementary mechanisms of collective redress:"[1] (a) group actions and (b) representative actions. Monetary damages are available in either action. In either type of action, there is no threshold determination of whether the plaintiff (or group of plaintiffs) has adequately stated a claim for relief or whether the plaintiffs' claims are suitable for adjudication on a collective basis.

In group actions, two or more parties allegedly suffering harm from the same infringement affirmatively decide to pursue their claims jointly. These claims are treated as a

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[1] DG Comp, *Proposal for a Council Directive on rules governing actions for damages for infringements of Articles 81 and 82 of the Treaty* ("Proposed Directive"), Explanatory Memorandum § 4.2.

single action. Defenses unique to individual plaintiffs do not preclude the group action from proceeding. Once a group action is underway, additional plaintiffs may join at any time thereafter, "provided that this does not impair the sound administration of justice."[2]

Representative actions, by contrast, cannot be brought by individual plaintiffs. Standing to initiate representative actions is restricted to state-certified entities, or Qualified Representative Organizations ("QRO"), which purport to represent the interests of alleged victims of antitrust law violations. A group seeking to bring a representative action is not required to identify individually all the injured parties it purports to represent; rather, it merely needs to specify an identifiable class of individuals that it seeks to represent. Thus, for example, a QRO may bring suit on behalf of all purchasers of a particular product.[3]

In a representative action, the QRO must take steps to notify individuals of the pendency of the action and provide them with an opportunity to exclude themselves if they wish. Any decision on the merits of a representative action is binding on all individuals who have not taken steps to exclude themselves.[4] The Directive makes brief mention of the value of alternative dispute resolution mechanisms and requires Member States "to ensure that such mechanisms can be used effectively also by parties to court proceedings on representative actions."[5] However, the Directive does not provide any guidance to Member States regarding what steps they should take to ensure such availability.

Qualified Representative Organizations. Organizations qualified to initiate representative actions can either be: (a) entities officially designated by the state to bring representative actions generally on behalf of certain defined and legitimate interests; or (b) entities whose primary task is to protect their members' interests (*e.g.*, a trade association), which would be certified on an *ad hoc* basis with respect to a particular infringement.[6] The Directive provides broad guidance to Member States with respect to regulating QROs: they must represent "legitimate interests;" Member States must take steps to ensure that these organizations are capable of "effectively bring[ing] a representative action" and that they act "in the best interests of those [they] represent[];" and Member States must monitor them to ensure they do not abuse their right to initiate litigation.[7] The Directive requires that QROs certified to bring representative actions in one Member State be granted automatic standing in all other Member States.[8] If a QRO brings a successful representative action, it is entitled to "a part of the damages award . . . to cover expenses justifiably incurred . . . in connection with the representative action."[9]

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2 Proposed Directive Art. 5(3).

3 *Id.* Art. 6.

4 *Id.*, Recital 9.

5 *Id.*, Recital 10.

6 *Id.* Art. 7.

7 *Id.*

8 *Id.*

9 *Id.* Art. 6(5).

Discovery. Observing that key documents in many antitrust cases are exclusively in defendants' control, the Proposed Directive empowers national courts to compel parties to disclose categories of relevant evidence and to impose discovery sanctions, including the drawing of adverse inferences in civil proceedings for damages, on parties who fail to comply with disclosure or preservation orders.[10] These proposed measures apply to all types of information, including electronic records.[11] The Directive makes clear that these provisions are intended merely as a "floor" for Member States in facilitating the disclosure of evidence in actions alleging infringement of EU competition laws – Member States are free to adopt even more liberal standards for discovery.[12]

In order to obtain a ruling requiring the disclosure of evidence pursuant to the Proposed Directive, the party seeking such disclosure must first: (1) demonstrate that the evidence requested is "relevant to substantiate its claim or defense"; (2) specify the categories of evidence to be disclosed with reasonable precision; and (3) establish that it is "unable, applying reasonable efforts," to produce this information on its own.[13] In evaluating requests for disclosure pursuant to the Directive, national courts must consider whether the request is "disproportionate" in light of the relevant interests of parties (and third parties). Specifically, courts must consider: the value of the plaintiffs' claims; the likelihood of the defendant's liability; the "scope and costs of disclosure" (including any costs to be incurred by third parties); and whether any of the requested evidence is confidential. In "cases of particular urgency," the Directive permits national courts to order the disclosure of evidence without giving defendants (or third parties from whom discovery is sought) the opportunity to be heard or otherwise object to the requested disclosure.[14]

In the event that otherwise discoverable information is confidential, the Directive requires courts to take appropriate steps to protect the confidentiality of such information. However, the Directive appears to subordinate the protection of confidentiality to the need for relevant information to be made available.[15] The Directive protects from disclosure any information submitted to a competition authority pursuant to a leniency program or in connection with a settlement.[16] Moreover, competition authorities may petition the court for exceptions to these

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[10] *See generally id.* Arts. 8 – 10.

[11] *Id.* Art. 8(5) ("Evidence shall include all types of evidence admissible before the national court seised, in particular documents and all other objects containing information irrespective of the medium on which the information is stored.").

[12] *Id.* Art. 8(6) ("This Article shall not prevent the Member States from maintaining or introducing rules which provide for a system of wider disclosure of evidence.").

[13] *Id.* Art. 8(2).

[14] *Id.* Art. 8(4) ("Member States shall ensure that, before adopting a disclosure order and except in cases of particular urgency, national courts hear the addressee of such an order in accordance with the principles of fair trial.").

[15] *Id.* Art. 8(3)(d) ("Member States shall provide for effective measures so that national courts can protect confidential information ***to the greatest extent possible whilst ensuring that relevant evidence containing such information is available in the action for damages***.") (emphasis added).

[16] *Id.* Art. 9(1).

requirements to the extent that disclosure of the requested information would interfere with an ongoing investigation.[17]

Damages. The Directive specifies that victims of antitrust infringements should receive "compensation for the actual loss and loss of profit" they have suffered.[18] The Directive further entitles plaintiffs to prejudgment interest, calculated from the date the infringement originally began (*e.g.*, if a price-fixing conspiracy began in 1990, prejudgment interest on harm suffered in 1990 would run from that year, even if suit was not filed until 2008). The Directive does not specify any procedures or mechanisms for allocating damages to individual injured parties.

Standing/Presumptions for Indirect Purchasers. The Directive provides that any individual or entity harmed by anti-competitive conduct must be accorded a right to bring a private action for damages. Moreover, the Directive purports to confer upon "indirect purchasers" (*i.e.*, parties who had no direct dealings with the defendant) standing to sue. The Directive proposes allowing defendants to defend against private antitrust claims by asserting that the plaintiff passed all or part of the overcharge on to parties further down the distribution chain.

In addition, the Directive relaxes the burden of proof for indirect purchasers, entitling them to a rebuttable presumption that the alleged overcharge "has been fully passed on to the claimant."[19] A plaintiff is permitted to take advantage of this presumption if it can show: (1) the defendant committed an antitrust violation; (2) the violation resulted in an overcharge to the direct purchasers; and (3) the plaintiff "purchased the goods or services that were the subject of the infringement, or purchased goods or services derived from or containing the goods or services that were the subject of the infringement."[20] In other words, under the Directive, an indirect purchaser essentially does not need to establish the fact of injury or damages; instead, the burden lies with the defendant to demonstrate the non-existence of injury and/or damages.

Burden of Proof. In Member States in which the defendant's fault must be established before the plaintiff may be entitled to damages, the Directive essentially reverses the burden of proof, requiring a defendant to establish that "he could not reasonably have been aware that his conduct distorted competition."[21]

Binding Effect of National Competition Authority ("NCA") Determinations. The Directive provides that a final determination by any Member State's NCA that a party had violated EC competition law be treated as binding proof of such a violation in any civil

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17 *Id.* Art. 9(2). It is not clear whether the competition authority's petition is itself protected from disclosure; if it is not, the fact of an ongoing investigation would presumably be disclosed in the action.

18 *Id.*, Recital 17.

19 *Id.*, Recital 18.

20 *Id.* Art. 11(2)(c).

21 *Id.* Art. 14. *See also id.*, Recital 21 ("It should be for the infringing undertaking to demonstrate that it could ***not*** reasonably have been aware that its conduct distorted competition, taking into account the high standard of care that flows from the fact that Articles 81 and 82 of the Treaty are a matter of public policy.") (emphasis added).

proceeding against that party for damages in any EU jurisdiction.[22] In other words, if the French NCA, for example, determines that a party has engaged in illegal price-fixing, such a determination would have preclusive effect in a civil proceeding based on the same conduct brought in Germany.

Statute of Limitations. The Directive requires that the statute of limitations for private antitrust claims not run (a) before the victim of the infringement can reasonably be expected to have knowledge of the infringement and of the harm it caused him, and (b) in the case of continuous infringements, until the day on which the infringement ceases. In addition, to keep open the possibility of private parties bringing follow-on actions to public enforcement, the Directive establishes a new limitations period of at least two years from the date on which the public enforcement decision has become final.[23]

Choice of Law/Transnational Coordination. The Staff Working Paper accompanying DG Comp's White Paper stated that the law of the forum jurisdiction should govern a multi-jurisdictional collective action so long as the market of the forum state is "directly and substantially" affected by the anticompetitive conduct on which the collective action proceeding is based. The Proposed Directive is silent on this issue.

The Proposed Directive seeks to resolve the issue of duplicative collective actions proceeding in multiple Member States by suggesting that courts stay proceedings or decline jurisdiction in favor of the first-filed action.[24] Moreover, the Directive "encourage[s]" national courts to "take due account of any related action and of the resulting judgment, particularly where it finds that the passing-on has been proven."[25] There is no further discussion or provision for coordinating multiple actions and avoiding the potential resulting inefficiencies and confusion.

Analysis

As an initial matter, it should be noted that the Directive's proposals are somewhat more modest than what might have been expected at the start of DG Comp's process, with the promulgation of a Green Paper in December 2005. That Green Paper included, among other things, proposals that the burden of proving a competition violation be shifted to the defendant in certain circumstances; that the "loser pays" rule followed by virtually all European jurisdictions be waived except in cases in which the plaintiff acted in a manifestly unreasonable manner; and that the plaintiffs have the potential, at the discretion of the supervising tribunal, to recover double damages in horizontal cartel cases. None of these proposals were ultimately incorporated into the Directive, and in fact, the Staff Working Paper accompanying the White Paper made clear that DG Comp specifically considered and declined to recommend each of these options. Furthermore, the Directive does not propose U.S.-style opt-out class actions, instead proposing a hybrid system of "opt-in" class actions and representative actions brought by state-certified

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22 *See id*, Recital 20; *id*., Art. 13.

23 *See generally id.* Art. 15.

24 *Id.*, Recital 19.

25 *Id.*

associations. Although, as discussed in more detail below, the Directive's proposal for representative actions resembles opt-out class actions in certain respects, such representative actions are still (on the whole) less susceptible to exploitation than actual opt-out class actions. Accordingly, on balance, the Directive's proposal is less vulnerable to unintended misuse than its American counterpart – the absence of opt-out class actions coupled with no exemplary damages means the potential pay-off from a large class action would be lower than it is in the United States, while the preservation of the "loser pays" rule means that the cost of bringing a frivolous lawsuit would be higher.[26]

Despite these positive features, there is still a significant likelihood that parties will subvert the Directive's proposed system. As ILR observed in comments on the White Paper, the U.S. experience with class actions highlights the importance of closely scrutinizing a proposed system of aggregate litigation to determine whether it would be profitable for parties to bring claims of questionable merit. The central lesson to be drawn from the U.S. history with class actions is that plaintiffs and plaintiffs' attorneys will exploit legal procedures and abuse the legal process when it is financially rewarding to do so. In its comments on the White Paper, ILR identified several aspects of the White Paper's proposed framework which had the potential to make it profitable for plaintiffs to initiate and maintain claims of questionable merit and offered several suggestions on how such risk could be ameliorated. But the Directive did not alter any of the problematic features identified by ILR, instead only making a handful of changes to the White Paper's original design. And these changes, far from reducing the prospect of American-style litigation abuse, in fact make the possibility of such unintended adverse consequences even more likely.

The likelihood that plaintiffs' attorneys will try to exploit the Directive's proposed system is enhanced by the growing internationalization of the plaintiffs' bar. A substantial number of American plaintiffs' lawyers have invested significant resources into establishing European offices over the past few years and are also forming strategic alliances with European law firms. Many of these attorneys already have shown an ability to take advantage of legal procedure in the context of U.S. litigation; there is no reason to think they will any less determined to create leverage for themselves with the Directive's proposed framework.

There are eleven issues raised by the Directive that ILR believes warrant specific attention.

First, although the Directive does not propose actual opt-out class actions, its proposal for representative actions in practice is likely to operate in a similar fashion. As with an opt-out

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[26] In addition, and in contrast to the White Paper, the Directive explicitly recognizes that mechanisms other than collective actions may provide a viable way of ensuring that parties injured by antitrust violations are fully compensated. The Directive notes that alternative dispute resolution ("ADR") mechanisms "can serve as a useful means of resolving disputes concerning damages claims in the field of competition law" and encourages Member States to allow the use of ADR in the context of representative actions. The expanded use of ADR has played a key role in reducing class action abuse in the United States over the past decade, while still ensuring that truly injured parties receive the compensation that they deserve. On balance, the Directive falls short in this area in that it provides no specific ADR proposals; as a practical matter, in the absence of concrete requirements, ADR is unlikely to play a significant role in the Directive's proposed framework. But the recognition of the value of ADR (which was absent in the White Paper's proposals) represents a positive development.

class action, a QRO under the Directive can initiate a representative action seeking damages for each party represented without specifically identifying the parties represented – the QRO merely needs to set out a "defined" class of parties represented in the proceeding.[27] Thus, for example, a QRO can bring suit on behalf of all purchasers of a particular type of automobile or all owners of certain type of insurance policy. Furthermore, like an opt-out proceeding, the Directive utilizes essentially a court-approved notice and opt-out procedure to determine final class membership. Thus, under the Directive, the QRO is required to "take the appropriate means to inform the injured parties belonging to the group of the representative action," and submit its proposal for providing such notice to the court, which will either approve the proposed notice or order amendments.[28] The Directive provides that represented parties may then choose to not participate in the representative proceeding, but (as with opt-out classes) if a party does not affirmatively opt out of the representative proceeding, it will be bound by the proceeding's judgment. Ultimately, the principal difference between opt-out class actions and the Directive's proposed representative proceeding turns on who has standing to bring suit – in an opt-out regime, any class member can initiate the proceeding, while the Directive only permits QROs to commence a representative action.

This difference clearly does have some practical effect; for example, it is likely easier for plaintiffs' attorneys to find the requisite plaintiff to initiate an opt-out class action than it would be for those same plaintiffs' attorneys to persuade a QRO to initiate a comparable representative proceeding. But the substantial similarities between opt-out class actions and representative actions under the Directive mean that representative actions share many of the pathologies of opt-out proceedings. Most significantly, like an opt-out class action, the mere filing of a representative proceeding permits the imposition of substantial settlement pressure on a defendant, independent of the merits of the litigation. In the United States, 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. This potential liability in turn places enormous pressure on the defendant to settle, regardless of the actual merits of the claims at issue, because defendants are loath to risk even a remote possibility of a catastrophic judgment; 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."[29] Representative actions under the Directive allow plaintiffs to similarly subject defendants to substantial financial exposure through the mere initiation of an action; accordingly, it is likely that plaintiffs' attorneys will seek to exploit representative actions in the same way they exploit opt-out class actions.

Second, while the Directive proposes that only "qualified entities" be permitted to bring representative actions, the Directive's definition is sufficiently vague that plaintiffs' attorneys may be able to circumvent this restriction fairly easily. The Directive simply provides that a QRO must satisfy Member State eligibility conditions to obtain the right to bring a representative

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[27] Proposed Directive, Recital 8; *id.* Art. 6(2) ("The qualified entity shall define the group of injured parties on behalf of which it brings the representative action.").

[28] *Id.* Art. 6(3).

[29] *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (quoting Judge Henry Friendly).

proceeding, and that "[s]uch conditions shall in particular ensure that the entity has the capability to effectively bring a representative action and that it acts, and can be expected to act, in the best interests of those it represents."[30] Thus, it is possible that certain Member States will develop lax standards for certification, and that in turn could – when combined with the Directive's recommendation that entities which are certified in one Member State should automatically have standing to bring representative actions in all other Member States – potentially permit plaintiffs' attorneys to create sham consumer associations which they use to bring suit all across the European Union. The Directive does require that Member States monitor QROs and establish procedures for withdrawing a QRO's designation if there is evidence that the QRO "abuses the right to bring representative actions or does not act in the best interests of those it represents."[31] But again, the Directive's guidance in this area is limited, and it therefore is not clear that this requirement will result in meaningful oversight.

Third, the Directive does not address the issue of litigation financing in any significant respect. As a general matter, parties will only misuse aggregate litigation procedures where it is profitable for them to do so. The key factor for determining whether it is profitable for parties to initiate and maintain claims of questionable merit is how a legal system's litigation financing rules interact with the rules governing the litigation costs that unsuccessful litigants must bear. Prosecuting lawsuits, even simple ones, can be an expensive endeavor, and the cost of pursuing aggregate litigation (which can involve hundreds or thousands of claimants) can run in the millions of dollars. If a system's litigation financing rules create a situation in which it is only profitable for a party to file a lawsuit if its expected recovery exceeds its litigation costs, then parties are unlikely to bring lawsuits except when they have a strong chance of success on the merits. However, if a system's rules for litigation financing allow a party to avoid or mitigate its litigation costs, it becomes much more profitable to bring claims of questionable merit. Accordingly, it is critical, in developing a framework for aggregate litigation, to establish appropriate controls and restrictions on litigation financing to ensure that parties do not have financial incentives to engage in frivolous lawsuits. But the Directive fails to do so – the issue of financing is only mentioned once in the Directive, and there is no provision in the Directive that addresses financing in a comprehensive manner.[32] As a result, litigation under the Directive is likely to be financed through existing European financing mechanisms, and several of those mechanisms – in particular third-party funding arrangements – are capable of facilitating the cost avoidance and mitigation necessary to give rise to litigation of questionable merit.

Fourth, the Directive does not incorporate a class certification standard or set forth a procedure by which a court can assess whether a proceeding is appropriate for aggregate adjudication. One of the most important safeguards against the misuse of aggregate litigation mechanisms is a requirement that courts determine, before a putative class action or other type of

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30 Proposed Directive Art. 7(2).

31 *Id.* Art. 7(3).

32 The one provision in the Directive that does address financing is more likely to incentivize frivolous litigation than deter it. In its discussion of representative actions, the Directive provides that Member States may allow QROs to keep a portion of recovered damages in representative actions "to cover expenses justifiably incurred" by the QRO. Proposed Directive Art. 6(5). QROs are likely to be less sensitive to litigation costs than private litigants since many QROs are (at least partially) publicly-funded; however, this provision allows them to engage in some degree of cost-mitigation.

representative or collective action is permitted to proceed on its merits, whether all of the claims of the proposed class members can be adjudicated fairly in a single proceeding and established through common proof. More specifically, courts must decide whether the proposed aggregate proceeding comports with the principle "trial for one can serve as trial for all" – *i.e.*, the relevant facts and law as to each class member's claim are such that adjudicating one class member's claim (or significant issues related to that claim) ***necessarily*** resolves the claims (or the same significant issues) for the other class members. In the United States, if any courts develop a reputation for being less than rigorous in blocking putative class actions comprised of disparate claims involving diverse facts and law, plaintiffs' attorneys typically have flooded those courts with more class actions of that ilk. Since the Directive's proposal does not contemplate any judicial inquiry into whether an aggregate proceeding is appropriate with respect to either group actions or representative actions, there is a significant risk that the Directive's framework will be similarly exploited.[33]

Fifth, although the Directive does not recommend the adoption of exemplary damages for private antitrust actions, it does propose an approach to damages that has the potential to be very appealing to plaintiffs' attorneys. Under EU law, the concept of compensatory damages is broader than what is typically employed under U.S. antitrust law and includes both lost profits and prejudgment interest dating back to the date when the harm first occurred. As a result, under the Directive, the compensatory award in price-fixing cases involving conspiracies of significant duration can (as a result of the prejudgment interest) equal or nearly equal the treble damages award for comparable conduct under U.S. antitrust law.[34] Finally, while the Directive did not recommend the adoption of exemplary damages, it also did not prohibit them. Instead, it deferred the issue to the Member States, which means that certain Member States could choose to adopt exemplary damages in implementing the Directive regime.

Sixth, in both permitting indirect purchaser actions and proposing that indirect purchasers enjoy a rebuttable presumption of complete pass-on of supra-competitive overcharges, the Directive sets out a regime that can be easily exploited by plaintiffs' attorneys. Under the Directive's proposal, indirect purchasers not only are empowered to assert damages claims, but they are not even required to show either injury or damages – instead, it is incumbent on the defendant in an indirect purchaser action to show that the overcharge was not fully passed on to the indirect purchaser. Moreover, because the Directive merely encourages, but does not require, coordination or consolidation of related actions (see below), there is a significant chance that multiple classes of indirect purchasers in the same distribution chain would be able to assert the presumption simultaneously. Thus, under the Directive, a party who allegedly fixed prices for sand potentially could be subject to group actions or representative proceedings on behalf of

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[33] In fact, the Directive's conception of group actions appears specifically to permit group actions in which group members' claims turn on individualized issues. The Directive provides that, although group actions should be treated "as one single action," defendants must be permitted to raise individual defenses to particular group member's claims. The existence of individualized defenses to class member claims would be grounds to deny class certification in U.S. courts; the fact that the Directive permits group actions to proceed under such circumstances thus demonstrates a more permissive approach regarding when aggregate litigation is appropriate.

[34] In addition, it appears as though the standard for establishing damages under the Directive is somewhat more relaxed than what is required in U.S. courts. Although the Directive does not address the issue directly, the White Paper explicitly states that a party should be able to recover damages even if it could only estimate the amount of harm it suffered. By contrast, U.S. courts would not permit recovery in such a situation.

glass purchasers, window manufacturers, homebuilders who purchased windows, and homeowners who bought homes containing such windows, with each group claiming as damages the whole value of the alleged supra-competitive overcharge. None of these plaintiff groups under the Directive would need to make an affirmative showing that they had incurred the whole overcharge or even that they had paid any overcharge at all; rather, in each proceeding, the burden would be on the defendant to show that was not the case.

Indeed, the Directive's proposal is arguably more favorable for indirect purchaser plaintiffs than what presently exists anywhere in the United States. Indirect purchaser actions for damages are prohibited at the federal level in the United States, and only a handful of States permit such actions under state antitrust law. No American regime incorporates a presumption in favor of complete pass-on of overcharges; indeed, indirect purchaser actions in the United States often founder precisely because it is hard for indirect purchaser plaintiffs to demonstrate that any supra-competitive overcharge has been passed on through the chain of distribution.

In sum, the Directive creates an environment for indirect purchaser actions that substantially favors plaintiffs, allowing them the ability to claim damages without proving real injury. It is very likely that plaintiffs' attorneys will seek to exploit those advantages.

Seventh, the Directive does not significantly grapple with questions related to case management and parallel proceedings. ILR raised this specific point in its comments on the White Paper, noting that the absence of coordination and apportionment measures in the proposed framework likely would lead to wasteful and duplicative litigation and could result in over-compensation. The Directive, however, does nothing more than empower national courts to "take due account of . . . an action for damages that is related to the same infringement . . . but is brought by a claimant from another level in the supply chain;" moreover, it fails to even mention the possibility of competing collective actions arising out of the same alleged misconduct being litigated simultaneously in different Member States.[35] In other words, under the Directive, the party who allegedly fixed prices for sand – if it did so on an EC-wide basis – might very well face an "opt-in" class action in the U.K. comprised of concrete manufacturers, a separate "opt-in" direct purchaser class action in Belgium involving glass makers, a representative action brought by a French consumer association representing people who purchased products with glass, and a representative action brought by an Italian trade group of real estate developers. The Directive offers no reliable mechanism for coordinating such parallel proceedings – accordingly, there is a significant possibility that the regime recommended by the Directive will create an environment resembling the confused the pre-CAFA United States, where defendants frequently were forced to litigate largely identical class actions simultaneously in multiple jurisdictions, often with jarringly inconsistent outcomes and incentives.

Eighth, the Directive's approach to choice-of-law and venue issues creates a significant risk that if one Member State implements a pro-plaintiff legal regime, plaintiffs' attorneys will be able to flood that jurisdiction with group actions and representative proceedings on behalf of claimants across the EU. At present, the American plaintiffs' bar is effectively engaged in a traveling "road show" in which they locate a favorable jurisdiction (often called a "magnet court" because of its ability to attract litigation) and then bombard that jurisdiction's courts with

[35] Proposed Directive Art. 12.

litigation, often extracting lucrative settlements from defendants fearful of litigating in the forum. Typically, this process continues for several years (and sometimes much longer) until the "magnet court" is effectively shut down through a combination of appellate rulings and legislative reform. At that point, the plaintiffs' counsel move on to identify and exploit other "magnet courts." The Directive's proposal potentially permits plaintiffs' attorneys to engage in similar forum-shopping in Europe. The Directive does not include a venue standard or any other mechanism that would restrict plaintiffs from bringing suit in the jurisdiction most favorable to their claims. And while the Directive itself does not specify the relevant choice-of-law rule for either group or representative actions, the choice-of-law rule identified by DG Comp in connection with the White Paper – the law of the forum state controls all class claims, as long as the market of the forum state is "directly and substantially" affected by the alleged anticompetitive conduct on which the collective action is based – would allow the courts of a pro-plaintiff legal regime to apply its law to claims throughout the EU.

Ninth, although the Directive's proposals concerning discovery appear reasonable at first blush, the rhetoric accompanying those proposals suggests a potentially substantial liberalization of discovery rules. More specifically, the Directive's preamble stresses that Member States must provide parties with "effective means to access relevant evidence . . ., particularly where information asymmetry leads to their being unable to specify individual pieces of evidence" and also states that measures aimed at keeping proprietary information confidential "should not practically impede the exercise of the right to compensation."[36] Moreover, even if the Directive's proposals are taken at face value, they resemble in many respects the line-drawing that accompanied the U.S. Federal Rule of Civil Procedure 26 and many State discovery rules. Given that plaintiffs' attorneys have been able to exploit those rules to impose substantial discovery burdens on defendants in U.S. civil litigation, there is some risk that plaintiffs' attorneys will be able to similarly exploit such a rule in Europe.

Tenth, the Directive makes no provision for an early merits determination in an aggregate proceeding and suggests that an early dismissal of a pleading for failure to plead facts sufficient to state a claim would be inappropriate. In the United States, class action abuse in frequently has been driven by liberal pleading rules, which permit plaintiffs to commence a class action on the basis of only speculative or cursory knowledge of the relevant facts. Indeed, it is common in the United States for a corporate press release announcing, for example, the recall of a product to spark an avalanche of lawsuits, even though the plaintiffs bringing such claims have no more knowledge of the corporation's alleged misconduct than what is contained in the press release. Under U.S. pleading rules, such lawsuits generally are permitted to proceed, and plaintiffs are permitted to seek discovery to uncover the facts in their case; in short, the United States essentially permits a "sue first, learn about the case later" approach. The Directive appears to endorse a similar approach to pleading. Not only does the Directive fail to require any sort of preliminary determination on the merits early in the litigation process (*e.g.*, motion to dismiss for failure to state a claim), but it specifically notes that the "evidence necessary for proving a damages claim is often held by the defendant or by third parties" and that "[i]n such circumstances, strict legal requirements for claimants to assert in detail all the facts of their case at the beginning of an action . . . can unduly impede the effective exercise of the right to

[36] *Id.*, Recitals 12; 14.

compensation[.]"[37] The Directive's liberal pleading rules therefore are likely to be exploited by plaintiffs' attorneys in a manner similar to what has occurred in the U.S.

Finally, the Directive fails to account adequately for the possibility of implementation problems or future legal changes. Even assuming that the Directive's proposal presently strikes the proper balance between encouraging meritorious claims and discouraging frivolous ones, future developments – either with respect to how the Directive is implemented at the Member State level or with respect to other areas of the law – could shift the cost-benefit balance in ways that make initiating frivolous litigation profitable. Indeed, this is essentially what occurred in the United States. The modern American class action device did not immediately give rise to litigation abuse when it was first created in 1966; the device only began to be exploited to bring large numbers of specious claims later, once some courts had begun to construe the class action rule in a more expansive fashion than its drafters expected and numerous new substantive legal rights had been created.[38]

The Directive's vulnerability to developments of this sort derives from its decision to leave many aspects of the proposed framework – both in terms of substance and in terms of implementation – to Member State discretion. Most importantly, the Directive does not take an affirmative position on two traditional European safeguards against unintended adverse consequences: the "loser pays" rule and the prohibition on contingency fee arrangements Clearly, either or both of these safeguards may be relaxed in coming years; in fact, there are indications that some Member States already are moving in that direction.[39] And if significant erosion of such measures does occur, then the potential costs of initiating frivolous litigation under the Directive's proposed framework likely will decline precipitously while the potential

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37 *Id.*, Recital 11.

38 *See* Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 Harv. L. Rev. 664, 672 (1979) ("A variety of forces, most notably appellate court decisions recognizing new substantive rights or easing litigation burdens for plaintiffs pursuing existing rights, have encouraged private actions and increased awareness of their possibilities in the antitrust context. For example, lower court judges have become extremely reluctant to terminate private actions prior to trial by finding that there is no liability as a matter of law . . . . The result is that plaintiffs' attorneys, eyeing the prospects of surviving pretrial motions and reaching the jury with at least a chance for a substantial verdict, have become more inclined to institute actions pursuing less substantial violations and more avant garde theories of liability."); *see also id.* at 674-75 ("Congress, by establishing a number of new statutory rights in response to other demands for social justice, has also played a significant part in contributing to this aspect of the class action workload. For example, rule 23 cases have been brought under such post-1966 statutes as the Truth in Lending Act, the Fair Credit Reporting Act, and the Magnuson-Moss Warranty/Federal Trade Commission Improvement Act. At least initially these statutes were enacted without any class action implications in mind or any appreciation of the burden that they would impose on the federal courts.").

39 *See, e.g.*, Civil Justice Council, *Improved Access to Justice – Funding Options and Proportionate Costs*, at 53, 71 (June 2007), available at http://www.civiljusticecouncil.gov.uk/files/future_funding_litigation_paper_v117_final.pdf (recommending that third-party funding "be recognized as an acceptable option for mainstream litigation" and noting that fee-shifting, *i.e.*, "loser pays," should be eliminated if alternative funding mechanisms are insufficient); Dietmar Baetge, NATIONAL REPORT FOR THE GLOBAL CLASS ACTIONS CONFERENCE AT THE CENTRE FOR SOCIO-LEGAL STUDIES, *Germany: Class Actions, Group Litigation & Other Forms of Collective Litigation* 2 n.5 (December 2007), http://www.law.stanford.edu/display/images/dynamic/events_media/Germany_National_Report.pdf (noting that Germany's *per se* ban on contingency fees was recently declared unconstitutional).

benefits of initiating frivolous litigation remain constant, making misuse and subversion of the framework exceedingly likely.

Conclusion

European policymakers frequently have stated that they have no wish to replicate the American litigation environment in Europe. However, if the DG Comp Directive is implemented unchanged, American-style litigation abuse is likely to become commonplace in Europe. The Directive simply creates too many opportunities for exploitation, and it is unrealistic to think that the plaintiffs' bar, which is increasingly devoting resources to European opportunities, will not take advantage. ILR therefore urges the Commission to not adopt the present Directive, but instead to seek a framework that allows for the fair and efficient redress of individual rights, but does not affirmatively create opportunities for frivolous litigation and other unintended adverse consequences.