Contribution to the

COMMISSION STAFF WORKING DOCUMENT

PUBLIC CONSULTATION:

Towards a Coherent European Approach to Collective Redress

from

World Investor Lawyer Network

Reporting Lawyer

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Preliminary statement about WIN

WIN – World Investor Lawyer Network is an association of law firms specializing in the representation of investors. Since 2006, WIN member firms from Austria (Kraft & Winternitz, Wien), Belgium (Arnauts, Brussels), Canada (Siskinds LLP, London, Ontario), France (Cohen Amir-Aslani, Paris; Cabinet Canoy, Paris), Germany (Rotter Rechtsanwälte Partnerschaft, Grünwald bei München), Liechtenstein (Schwärzler Rechtsanwälte, Schaan), Switzerland (Advakaturbüro Fischer & Partner, Zürich), United Kingdom (Edwin Coe LLP, London), United States of America (Stone Bonner & Rocco LLP, New York) and Uruguay (Posadas, Posadas & Vecino, Montevideo) have regularly exchanged information and assisted each other in domestic and cross-border collective redress litigation brought on behalf of investors.

Q1 What added value would the introduction of new mechanism of collective redress (injunctive and/or compensatory) have for the enforcement of EU law?

In the field of investor rights, the introduction of new mechanisms of collective redress would have a major impact on the enforcement of EU law, especially these directives:

- Directive on insider dealing and market manipulation (market abuse)
- Prospectus Directive
- Investment Services Directive (MiFID)

Those directives apply to entities and companies which are based in Europe and which are engaged in cross-border activities. If those entities damage investors by breaching the directives, aggrieved investors, especially CMEs and retail investors, have no adequate procedural means to obtain compensation for their losses. Specifically, the damages sustained by individual investors are often inadequate to ren-

der an individual proceeding economical. In order to achieve the economies of scale that would be necessary to justify civil proceedings, there must be an effective method for aggregating individual claims. In the litigation context, collective actions are the equivalent of collective bargaining in the employment context. The EU has long championed the rights of employees to bargain collectively, and in our respectful submission, there is no sound policy reason for denying litigants the ability to pursue their claims collectively, if the collective action is the only practical means whereby they can obtain compensation. In the absence of collective actions, the local national procedural means permit the recovery of only a minor part of the total damage. This has the effect that the party who has breached the law need not fear that the damage will be fully compensated. The result is that violations of the law are viewed by market participants as being a mere cost of doing business, and deterrence is undermined. An adequate collective redress on the EU level would overcome those shortcomings.

A hypothetical example shall illustrate the current situation in the EU.

A France-based food company is stating wrong figures concerning the profits and sales of the company in an IPO-prospectus referring to an IPO. The shares are sold in Paris and other member countries.

To obtain compensation in such cases dealing with erroneous wrong capital market information especially the CMEs and smaller institutional and private investors will firstly rely on the procedural law in the country where the investors are based. Because of the different procedural laws in the different member countries and the additional costs which are involved by mandating foreign law firms the CMEs and smaller institutional investor will normally mandate a local lawfirm, this means a law firm in the country, where the investor is based. This local lawfirm will then be mandated for examining the prospects of filing a law-suit. The local lawfirm, for example in Poland, will in the referenced case come to the conclusion that there is no jurisdiction in Poland and for the evaluation of the law-suits prospects in France, a French law firm must be mandated. As mentioned above of the CMEs and smaller investors will not

be willing to bear more costs for the losses they have incurred and the damaged investor will abandon the claim.

If there were a new mechanism of collective redress on EU level, which is then available for all investors in all member countries, this would definitely enable the damaged investors, especially the CMEs and smaller investors, to claim their compensation and would increase substantially the cost of violating EU law, which in turn would greatly enhance deterrence.

It is imperative that the guaranteed European right for freedom of gathering capital from investors of all countries of Europe be accompanied by a means of collective redress that enables the investor to participate in a civil proceeding available in each member country. As collective redress on EU-level is completely lacking, companies breaching EU-law are rarely if ever obliged to compensate the total losses to investors. This insufficient situation has almost invited criminal behaviour in the EU capital market. The case of AMIS in Austria. Parmalat in Italy, Kiener and numerous cases involving sham companies listed on the Frankfurt open market, where penny stocks are pushed by biased analyst news, are typical cases which occur on a regular bases and investors are largely left uncompensated because of a lack of collective redress.

Additionally, we strongly believe that the lack of a collective redress on EU level is finally damaging those companies who strictly comply with the law. There are different economic studies[1] which show that deficits in the field of investor protection lead to a lack of confidence of the investors and this lack of confidence increases the cost of capital for companies that abide by EU law.

Q 2 Should private collective redress be independent of, complementary to, or subsidiary to enforcement by public bodies? Is there need for coordination between private collective redress and public enforcement? If yes,

[1] cp. Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, Study: What works in securities laws? Dartmouth College, Yale University and Harvard University, June 11, 2004; Investor protection

how can this coordination be achieved? In your view, are there examples in the Member States or in third countries that you consider particularly instructive for any possible EU initiative?

Private collective redress should be independent of the enforcement of public bodies. In Germany, for example, the mandate of the financial supervisory authority BaFin explicitly excludes the protection of individual investors, especially CMEs, smaller institutional and private investors. This has the effect in Germany that the BaFin, which obtains plenty of information about wrongdoings of supervised companies, rejects any application of investors for access to this information. The BaFin in this aspect always claims that under section 8 of the German Securities Exchance Act (Wertpapierhandelsgesetz) that all of its supervisory activities are confidential and that BaFin is not allowed to give any information to investors. Even information demonstrating that the law has been infringed is not disclosed by the BaFin. A law-suit of investors against the BaFin in the case involving Porsche/Volkswagen, which referred to the German Informational Freedom Act, was granted by the Administration Court of Frankfurt. The BaFin had the possibility to clarify this legal question for the future and had the option to appeal to the highest administration court in Germany. But the BaFin did not take this opportunity, obviously to avoid a decision by the highest administrative court. So the BaFin appealed to the higher administrative court in Kassel and then it withdrew the appeal.

In other cases, where investors have been misled by for instance the omission of ad-hoc disclosure, applications for access to information by investors are again rejected and the BaFin is still asserting, that despite the judgment of the administrative court of Frankfurt, investors have no right of access to this information. If the investors refer to this judgment the BaFin simply states that it was a single decision which cannot be applied to other cases.

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and corporate valuation; Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, and Robert Vishny, May 2001.

At the moment there are several lawsuits against the BaFin about access to information pending at numerous courts in Germany. These lawsuits refer to damage claims of investors particularly against HRE AG, MLP AG and others because of wrong or omitted ad-hoc disclosure.

This example illustrate why it is absolutely necessary that collective redress be independent of public bodies.

Besides the BaFin other public bodies in Germany have shown that they see their main task as protecting companies and not investors. Lawyers who represent investors in Germany have experienced in numerous cases how public bodies are protecting companies who are sued by investors. The experience of the last decade made it quite obvious that the protection is stronger for larger companies. Three examples illustrate this situation in Germany.

In the prospectus liability case against Telekom pending in Germany the German investors asked in the United States courts for access to information which Telekom provided to U.S.-based Telekom investors who had pursued similar claims in the U.S. based on the same misrepresentations and omissions as alleged in the German action. In this proceeding by the German investors in New York the German Department for Foreign Affairs, intervened and filed a brief supporting Deutsche Telekom and stating in this brief that giving information to the plaintiffs would harm basic constitutional rights of Germany. This is a clear breach of the constitutional principle of separation of powers.

Another example of how public bodies namely the executive power protect companies (especially large ones) in civil litigation is the case of investors against the company MLP AG, a company which offers financial services. In this case the public prosecutor charged the CEO with fraud relating to MLP´s financial statements. Normally in such cases the defrauded persons have access to the files of the public prosecutor under Section 406 e StPO. Neither the public prosecutor nor the German

financial supervisory authority BaFin, which has also background information about the allegation, has granted access to this information.

In a case against Porsche at the United States District Court for the Southern District of New York the German Consulate in New York intervened and filed a brief supporting Porsche and asking the court for dismissal of the case on the grounds of forum non conveniens.

For this reason little if anything would be served by requiring coordination between private litigants pursuing collective redress and public enforcement. Nevertheless it could be useful to enhance the right of damaged investors to obtain access to the information in the possession of public bodies for example the supervisory authorities. The investor should at least have access to information related to behavior that is contrary to regulation or otherwise illegal and public bodies should be obliged to give claimants such information. To that extent coordination with public bodies can be useful.

Finally the economic study "What works in securities laws" of La Porta[2] demonstrated that public enforcement has little or no supporting effect on the stock market compared to private enforcement. The study´s conclusions are:

„First, the answer to the question of whether law matters is a definite yes. Financial markets do not prosper when left to market forces alone. Second, our findings suggest that securities laws matter because they facilitate private contracting rather than provide for public regulatory enforcement. Specifically, we find that several aspects of public enforcement, such as having an independent and/or focused regulator or criminal sanctions, do not matter, and others matter in only some regressions. In contrast, both extensive disclosure requirements and standards of liability facilitating investor recovery of losses are associated with larger stock markets"

Q 3 Should the EU strengthen the role of national public bodies and/or private representative organizations in the enforcement of EU law? If so, how and in which areas should this be done?

As far as Germany is concerned, the strengthening of national public bodies or private representative organizations would not accomplish the goals of deterrence and compensation because, as discussed above, public bodies have repeatedly demonstrated that they are more concerned with the protection of companies than with the protection of investors. Thus they are definitely not able to fairly represent the rights for CMEs, smaller institutional investors or private investors.

The strengthening of private representative organizations could nonetheless be useful, but the strengthening should never be limited to such private organizations. With private representative organizations, two problems occur and are at the moment obvious in the German market. The first problem is how one can define a representative organization. There are many organizations in Germany who claim to be representatives of investors. But upon closer examination, it becomes apparent that these organizations are not representatives for certain investors. For example, in the field of investor representation in Germany, there exist plenty of associations which were founded by law firms and their obvious main interest is to acquire clients for the founding law firms. We also have seen in Germany associations which were founded after a fraud occurred and which are backed by persons who are responsible for the fraud. The main interests of these associations were just convey the impression that someone was dealing with this fraud case, but on closer inspection it is apparent that the only interest of these entities was to appease the investors and to convince them not to pursue their rights.

[2] Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer, Study: What works in securities laws? Dartmouth College, Yale University and Harvard University, June 11, 2004.

For this reason, private collective redress should only be in the hands of the affected investors, and it should not be lead by other organizations, like private representative organizations or national public bodies.

Q 4 What in your opinion is required for an action at European level on collective redress (injunctive and/or compensatory) to conform with the principles of EU law, e.g. those of subsidiarity, proportionality and effectiveness? Would your answer vary depending on the area in which action is taken?

In our view, Artikel 81 a EUV allows the equalization or harmonization of the different procedural laws of member countries. For this reason, we do not see a problem in terms of subsidiarity. The means of collective redress should not vary depending on the area of law, and it is preferable to have a uniform procedural means covering any cases of mass damages.

Q 5 Would it be sufficient to extend the scope of the existing EU rules on collective injunctive relief to other areas; or would it be appropriate to introduce mechanisms of collective compensatory redress at EU law?

It would not be sufficient merely to extend the scope of the existing EU rules on collective injunctive relief to other areas. Especially in cases where investors have been damaged, injunctive relief would not be sufficient. In most cases involving misleading statements or omissions, compensatory redress is the only appropriate redress to victims for their damages. Compensatory redress is also a more effective deterrent.

Q 6 Would possible EU action require a legally binding approach or a non-binding approach (such as a set of good practices guidance)? How do you see the respective benefits or risks of each approach? Would your answer vary depending on the area in which action is taken?

A legally binding approach is absolutely necessary in cases in which investors have been damaged. A set of good practices guidance would not achieve the necessary goals of compensating victims of investment frauds and of deterring future wrongdoing.

Q 7 Do you agree that any possible EU initiative on collective redress (injunctive and/or compensatory) should comply with a set of common principles established at EU level? What should these principles be? To which principle would you attach special significance?

We agree that any possible EU initiative on collective redress should comply with a set of common principles established at EU level. These principles should include:

1. Affected investors –especially citizens and SMEs - must enjoy access to courts by by making available appropriate financing mechanisms and by limiting the litigation cost risk.
2. Collective redress must be effective and efficient. This principle implies that for instance with a single complaint of one citizen the running of the statute of limitation must be early and easily be suspended for all group members and against all persons and entities which are sued on a specific issue.
3. Persons who are entitled to submit a claim should easily get information about a relevant case.
4. The need to take account of collective consensual resolution as a means of alternative dispute resolution.
5. The importance of effective enforcement across the EU.
6. Abusive litigation should be avoided.

Special significance must be attached to the financing and the cost risk of the proposed collective redress. In our view, the financing and the total cost risk are the crucial issues impacting whether a collective redress would be accepted by affected in-

vestors. In this regard, it is essential that there be a limitation on the total cost risk for the individual consumer or investor who participates in such a collective redress, such as the limitations already in place in Belgium and the Netherlands.

If there is no such litigation cost risk limitation the collective redress will not be used by affected consumers. An example of this effect can be seen in Germany. In the legal regime in Germany an affected investor, who wants to participate in a lawsuit cannot calculate the maximum cost risk of doing so. In cases where investors sue companies because of misleading capital market information the total cost risk can not be estimated due to a misuse of the procedural instrument of third party notice. For example in the investor case against the German Bank HRE. HRE has named 25 third party defendants, each of which might be entitled to costs from the investor plaintiffs in the event the investor loses. Thus HRE has been able to dramatically exaggerate the cost risk the complaining investor may face in the event they lose. Normally an investor with a claim of 20,000.00 EUR, for instance, faces if the case goes through all instances a maximum cost risk of 17,589.68 EUR, if the case is dismissed. Due to the third party notices the cost risk grows by an additional 176,673.25 EUR which leads to a total cost risk for such an investor of 194,262.93 EUR. No rational investor would file a claim under these circumstances, regardless of the quality of the claim.

The high and unpredictable cost risks in Germany have the effect of chilling the filing of claims even in cases of clear and abusive fraud. This happened for instance in the case of Comroad, a company which was listed on the former *Neuer Markt* at the Frankfurter Stock Exchange, where the CEO was convicted for fraud.

For this reason the current situation is untenable for investors. On the other hand, the pan-European companies with misleading capital market information can easily deploy this strategy to silence investors.

Q 8 As cited above, a number of Member States have adopted initiatives in the area of collective redress. Could the experience gained so far by the Member States contribute to formulating a European set of principles?

As mentioned under Q7, we find that these principles are relevant and they should be established at an EU level. In the Netherlands, there is an adequate instrument for collective consensual resolution as a means of alternative dispute resolution.

The collective redress procedure for investors in Germany is called the KapMuG. Experience shows that this is not an instrument which can overcome the mentioned shortcomings. Especially in cases with more than a 1,000 claimants and more than 10 involved law firms the KapMuG is not able to overcome the shortcomings. For example, in the Telekom case, which involved estimated 20,000 investors are represented by more than approximately 600 law firm. It is estimated that the case will take presumably 15 to 20 years to complete. Such a long duration of a civil litigation will place Germany in breach of Article 6 of the European Convention on Human Rights.

The experience with collective redress in Germany shows that there is one effective and efficient collective redress, governed in the so called Spruchverfahrensgesetz (SpruchG). This law is applicable in the field of investor compensation and indemnification in company law-related issues. It is applicable for instance in cases where companies have taken over another company or where companies have merged or a major shareholder which holds for instance 95% of the shares wants to buy the remaining 5 % of the shares from the minority shareholder and the question of the fair value of the compensation of the shareholders or other stakeholders is questioned. In such cases the German law provides effective and efficient collective redress, the SpruchG. This law is in principle in Germany in force since 1936 and this experience shows that the under question 7 stated principles are of great importance (see more below).

Q 9 Are there specific features of any possible EU initiative that, in your opinion, are necessary to ensure effective access to justice while taking due account of the EUR legal tradition and the legal orders of the 27 Member States?

As mentioned, the main issue in the field of investor rights is the issue of how the litigation is financed and what total litigation cost risk the stakeholders must bear. The first question each consumer or investor asks is "what are the risks if I lose the case", "what do I have to pay for being part of the collective litigation". Investors will not participate in collective redress unless there is a realistic chance that participation will improve his or her economic and financial situation.

The great acceptance of the SpruchG in Germany is based on the fact that the defendant normally must bear the expert costs, court costs and the fees for the lawyer appointed to represent those plaintiffs who have not filed an individual complaint. Abusive litigations within the SpruchG are avoided by section 15 paras. 2 and par 4 allowing these costs to be shifted to the claimants if the applications are unfair or unreasonable. A 2001 report submitted by the Committee of Corporate Governance Experts[3] of the German government confirms that the Spruchverfahren would fail, if shareholders would normally have to pay the whole court costs and their own costs[4].

Q 10 Are you aware of specific good practices in the area of collective redress in one or more Member States that could serve as inspiration from which the EUR/other Member States could learn? Please explain why you consider these practices as particular valuable. Are there on the other hand national practices that have posed problems and how have/could these problems be overcome?

[3] The author of this paper was appointed member of this committee.

1. SpruchG

A specific good practice in the area of collective redress in Germany is as we have already mentioned the SpruchG. This SpruchG is attached to this contribution. This law is in force since 1st September 2003. Before 1st September 2003 the Spruchverfahren was regulated by Sec. 306 Aktiengesetz, Sec. 305 ff. Umwandlungsgesetz. The Spruchverfahren goes back to regulations, which were already published and put in order since 1936[5]. Therefore the Spruchverfahren is since 1936 one of the main procedural laws for minority shareholdes in Germany. The SpruchG is accepted both by companies and shareholders and it plays an important role in the field of compensation and indemnification of minority shareholders due to companies restructuring. A statistical study surveying the Spruchverfahren from 1980 to 1992 has proven that in more than 40 % of all possible cases minority shareholders have taken legal proceedings under the SpruchG and that a minority shareholder in a Spruchverfahren could achieve an average additional compensation resp. indemnification of 48 %.[6]

The SpruchG is a typical instrument of collective redress so that each affected investor is represented in this case. A shareholder either files an individual application seeking for higher compensation or he, if he is not filing an individual application seeking compensation, is alternatively represented by a representative who is appointed by the court where the case is pending. Sec. 6 of the SpruchG states that the court may appoint a representative for those persons who are entitled to file an application but who did not file such an application.[7] Under sec 13 of the SpruchG, the decision applies to all shareholders or other stakeholders which are members of the class.

In terms of the costs and the cost risk of the proceeding sec. 15 par 2 clause 1 of the SpruchG provides that normally the party adverse to the class must bear the court

[4] Baums, Bericht der Regierungskommission Corporate Governance, 2001, Rn. 175.
[5] cp. 3rd DVO from 2nd December 1936 to Gesetz über die Umwandlung von Kapitalgesellschaften from 5th July 1934, RGBl. S. 1003 cited in Fritzsche, Dreier, Verfürth, SpruchG, 2004, Einleitung Rz. 15.
[6] Fritzsche, Dreier, Verfürth, SpruchG, 2004, Einleitung Rz. 13.
[7] The author of this paper is appointed in three cases as representative in Spruchverfahren.

costs. The court can make the claimant bear the costs only on the grounds of fairness and equity. Abusive litigations is thus avoided within the SpruchG by section 15 par 2 clause 2 and sec 15 par 4 governing that if the applications are unfair or unreasonable then the court can order that the claimant has to bear the court cost and the total fees and costs of his lawyers.

Because of this proven practicability of the SpruchG the Corporate Governance Expert committee of the German government suggested in their report 2001 to enlarge the scope of the SpruchG to all cases, where wrong or misleading capital market information is at issue.[8] As Germany is – and justifiably so - considered as unfriendly environment for collective redress the SpruchG would not have survived, if it had allowed abusive litigations. Therefore we want to encourage the European Commission to analyze in depth this practicable collective device. From our point of view this collective redress is particularly valuable.

2. Netherlands – Collective Settlement

In the field of investor rights, the Dutch law from 27th of July 2005 allows a collective settlement. This represents a good model for how an effective collective redress settlement procedure could be drafted. Article 7:907 of the Burgerlijk Wetboec provides that a defendant can settle a case with a whole group of persons who are affected by the subject matter of the action. This rule allows the defendant to settle a case with a charity or an association, which is established for the purposes of representing a specific class of defined claimants.

3. KapMuG – no mean of collective redress

On 1st November 2005 a capital markets model case act (KapMuG) came into force in Germany. A model case proceeding is not a means of collective redress because each investor who is seeking compensation must file a lawsuit with the court. If an affected investor does not file a complaint he will not share in any recovery in the liti-

[8] Baums, Bericht der Regierungskommission Corporate Governance, 2001, Rn. 186.

gation. Therefore the KapMuG does not represent a good model in the area of collective redress. The KapMuG has at least improved the situation of investors in cases of misleading capital market disclosure in comparison to the regime in effect up to 31st October 2005. However, the KapMuG is problematic because investors must still file a lawsuit in order to stop the limitation period and to have the benefit of a judgment. In cases involving up to around one thousand plaintiffs, who are ordinarily be represented by five to ten law firms, the KapMuG can be an effective device. For example in the case involving Daimler, which concerned the timeliness of the disclosure of the early retirement of the former CEO Schrempp within five years after filing the application to establish a model proceeding the plaintiffs had obtained two decisions from the highest civil court in Germany, the Bundesgerichtshof. In the meantime the Bundesgerichtshof has submitted two legal questions at issue to the European court of Justice in Luxembourg.

As another example, in the model case against the MLP AG a model case proceeding was established at the higher regional court of Karlsruhe and the plaintiffs have the advantage that the expert costs are shared among the plaintiffs.

On the other hand in the model case proceedings in the Telekom case, which involved approximately 20.000 plaintiffs who were represented by estimated 600 law firms, the KapMuG will not be effective and it is expected that it will take 15 to 20 years to resolve the matter under the KapMuG.

For this reasons the KapMuG is not an appropriate model for a collective redress regime at the EU-Level.

Q 11 In your view, what would be the defining features of an efficient and effective system of collective redress? Are there specific features that need to be present if the collective redress mechanism would be open for SMEs?

In our view one defining feature of an efficent and effective system of collective redress should be rules relating to the financing of litigation and litigation cost risks. It is absolutely vital that contingency fees be allowed. Germany, for example, permits lawyers to enter into contingency fee arrangements in specific narrow defined circumstances. Germany allows non-lawyers to enter – without any restrictions - into contingency arrangements. As a result, that Germany and several other countries in Europe permit contingent fee arrangements with non-lawyers – Austria, UK, Netherlands, for example – litigation financing companies finance investor lawsuits. The existence of these litigation financing companies has ensured that more cases relating to misleading capital market disclosure have been filed during the last two or three years. This shows that the issue of how investor lawsuits are financed is crucial. If this issue is properly addressed, a collective redress regime on the EU level would be used by plaintiffs.

Q12 How can effective redress be obtained, while avoiding lengthy and costly litigation?

First of all it is important that all possible members can learn easily from the motion of establishing a group action. This can be achieved for example by establishing one website, which includes solely information about starting or pending cases under a collective redress regime. In this respect one can refer to the German complaint registry (www.ebundesanzeiger.de). But as this website www.ebundesanzeiger.de is not just dedicated to KapMuG proceedings it is difficult for possible claimants to navigate and finally find the wanted information. For this reason the website should just include information about collective actions.

If an opt-in mechanism is chosen by the EU, then it is vital that the possible claimant must easily be enabled – for instance – by filling out a clearly arranged form to register for the participation in the lawsuit. The opt-in registration should not be connected with the payment of costs. If costs are incurred they have to be easily calculated by the citizen, who wants to opt in. Complicated fee and cost calculations, will necessar-

ily result in the refusal of this collective redress by citizens and CME´s and should therefore be refused.

It is also necessary that the running of the statute of limitation must be at an early stage and easily be suspended for all group members and against all persons and entities which are sued on a specific issue. Early in this respect means already with the filing of an application for setting up a group action the running of the statute of limitation must be suspended for all group members.

Furthermore the distribution of the proceeds must effectively be organized.

Q 13 How, when and by whom should victims of EU law infringements be informed about the possibilities to bring a collective (injunctive and/or compensatory) claim or to join an existing lawsuit? What would be the most efficient means to make sure that a maximum of victims are informed, in particular when victims are domiciled in several Member States?

As mentioned before, one central website, which is linked to domains in the local native language, which can in each country be easily be memorized – e.g. in English speeking Countries www.collectiveredress.com; in German speaking countries www.sammelverfahren.de - should be advertised and announced in each country via TV, Radio, Press. This website should then include all relevant information in all member states languages – e.g. the legal basis, the starting of a case, court orders, court hearings, the outcome, settlement, judgements, deadlines – where citizens can learn everything about a specific case.

Besides this the group members should also be informed via relevant media about the outcome of a collective action. If a list of all group members do exist, for instance a customer list, then all group members should personally be informed about the outcome of the case and all relevant information (deadlines for any registration of claims etc.).

Within the regime of the SpruchG all shareholders, which are known by the company and are entitled to receive an additional compensation, get the payment via their custodian.

Q 14 How the efficient representation of victims could be best achieved, in particular in cross-border situations? How could cooperation between different representative entities be facilitated, in particular in cross-border cases?

See above Q 3.
To avoid abuses the right to litigate a collective action should not be in the hands of - sometimes self appointed - representative entities. Only the citizens or entities, like CMEs which are affected from an EU law infringement should have the right to litigate via their lawyers an EU collective redress.

Q 15 Apart from a judicial mechanism, which other incentives would be necessary to promote recourse to ADR in situations of multiple claims?

There should be the possibility of an ADR before courts are involved. Meaningful in this respect are four elements.

- Firstly this ADR-procedure should be mandatory.
- Secondly this ADR-procedure has to take place before a recognized conciliation body or mediator. These persons should have proven experience in settling complex matters. In each member country should there be several of those conciliation bodies or mediators.
- Thirdly this ADR-procedure has to include a meeting, where a personal attendance of the parties or their legal representatives is mandatory. This aspect should not be underestimated. The experience in plenty of cases has proven that parties tend to develop an unrealistic “concept of the enemy” of the respective other party, which is getting often bigger the longer the proceedings continue. By getting the parties in an

early stage to the table can help the parties to understand the viewpoint of the respective other party. Thus both parties and courts can themselves prevent from lengthy and costly proceedings. If the “plaintiff side” is already too numerous that all persons can attend, there should participate at least those ten parties with the highest involvement in the case.

- Fourthly for avoidance of a delay of the proceedings there should be a clearly defined deadline, that for example within a three month period after filing a collective redress action has to take place a meeting with the mediator or the conciliation body. There should also be a clearly defined deadline in which timeframe the mediator or the conciliation body has to render their decision, that the mediation has failed.

Q 16 Should an attempt to resolve a dispute via collective consensual dispute resolution be a mandatory step in connection with a collective court case for compensation?

Yes, mandatory as stated before.

Q 17 How can the fairness of the outcome of a collective consensual dispute resolution best be guaranteed? Should the courts exercise such fairness control?

For avoiding an unreasonable settlement, which for instance gives special benefits to certain plaintiffs or representatives of the plaintiffs, it is necessary that a court exercises a fairness control of the outcome of the collective consensual dispute resolution. Furthermore we believe it is also necessary that there is regulated the duty of disclosure and publishing of all aspects and agreements, which have been achieved within such a settlement. To avoid any side agreements, which will in the end burden the outcome it is further necessary that the parties declare, that no other agreement, written or verbal, except the published one does exist. This is of great importance to eliminate the danger that for instance a single plaintiff is payed a special benefit for abandon the lawsuit or settle the case on unreasonable conditions.

Q 18 Should it be possible to make the outcome of a collective consensual dispute resolution binding on the participating parties also in cases which are currently not covered by Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters?

Yes, the outcome of a collective consensual dispute resolution should be binding on the participating parties also in cases which are not covered by Directive 2008/52/EC.

Q 19 Are there any other issues with regard to collective consensual dispute resolution that need to be ensured for effective access to justice?
See above

Q 20 How could the legitimate interests of all parties adequately be safeguarded in (injunctive and/or compensatory) collective redress actions? Which safeguards existing in Member States or in third countries do you consider as particularly successful in limiting abusive litigation?

As already mentioned a matter of fact in Europe today is that Companies who infringe EU-law are never liable for the total caused damage to EU-citizens or CMEs. The split-up of the citizens and CMEs in plenty of member countries and the hurdles which local procedural law establishes before having access to court leads to the fact, that only a small percentage – estimated with 0 % to 5 % - of the total caused damage must be compensated by those entities. For this reason in the first place it is vital to enable e.g. the damaged investors to have generally access to court. In mass damage cases the citizens have for example no real access, if the total cost risk of the litigation is exceeding more than approximately 25 % of the suffered damage. Insofar the German system where a plaintiff with a damage of EUR 17.000 has – not included the additional cost risk of any third party notices - a total cost risk of EUR 16.940,08 has reasonably no access to court.

To get access to court contingency fees for lawyers should be allowed. In Germany the absurd situation occurs that lawyers are only under narrow defined circumstances are permitted to take contingency fees.[9] Except form lawyers there is no restriction for other persons in taking contingency fees. This had the effect that numerous litigation financing companies are active in financing litigations. If lawyers want to take contingency fees they can easily – which is known in the market - surpass this rule by setting up companies, for example in countries, where contingency fees are allowed and close there clients contract with this entity. For this reason this double moral standards should belong to the past. The main advantage of contingency fees is that a lawyer has no conflict of interest in pursuing a case. In countries where a lawyer is obliged to take a certain fee especially consumer association are often criticizing law firms in mass damage cases that they are pretending better prospects of the lawsuit as they really exist. In this respect they warn potential clients to consider that a law firm is always getting their fees, even if the case has no reasonable grounds for success. This obvious conflict of interest is solved by allowing lawyers to take contingency fees.

The system in the US-system can not be compared with European system. If there are abusive litigations in the US-systems then they are connected with the existence of punitive damages, the jury system and the wide ranging discovery process. Both elements do – as far as can be seen – not exist in the member countries. The perfect counter-evidence that an opt-out class action system does not lead to abusive litigation is the Spruchverfahrensgesetz (SpruchG) – see above – which is with amendments in force since 1936 in Germany.

Also other jurisdictions with good functioning class actions systems like in Canada and Australia demonstrate that an opt out system does not lead to abusive litigation. To avoid abusive litigations we think it is also necessary, as it is ruled in the SpruchG, that the party of a litigation, which contravenes the principles of good faith,

[9] § 4a Rechtsanwaltsvergütungsgesetz, § 49b Abs. 2 Satz 2 Bundesrechtsanwaltsordnung

has to pay for all fees and costs. Thus each citizen and their lawyers will with any mean try to avoid an abusive litigation at court, where the plaintiff has to pay for all costs. Also the Ontario Class Proceedings Act 1992, which allows to reward costs to the prevailing party is an example, how abusive litigations can be avoided.

Q 21 Should the "loser pays" principle apply to (injunctive and/or compensatory) collective actions in the EU? Are there circumstances which in your view would justify exceptions to this principle15? If so, should those exceptions rigorously be circumscribed by law or should they be left to case-by-case assessment by the courts, possibly within the framework of a general legal provision?

The loser pays role should not apply for plaintiffs. Only in such litigations should the losing plaintiff pay, when the lawsuit contravenes the principles of good faith. If the loser pays role applies in all cases then there is the risk that the collective redress will not be used.

If the loser pays role should apply then it is crucial which amount of costs and fees the loser has to pay, if the case is lost. We would reckon that there would be a great refusal against the collective redress, if the loser has to pay more then approximately 25 % of the individual suffered damage. In any case a cost risk limitation is vital for the acceptance of a collective redress, if the EU considers the application of the “loser pays”-role.

The losing plaintiff should at least not have to pay the costs of the defendants. In lawsuits, which contravenes the principles of good faith, could be governed an exemption, so that the losing plaintiff has also to pay the defendants cost. Incidentally this cost ruling systems corresponds basically to the Labor Court Law in Germany for the first instance, where the prevailing party has no claim for reimbursement of the costs e.g. of a lawyer from the adverse side.[10]

[10] § 12a Abs. 1 Arbeitsgerichtsgesetz.

The requirements, if, and under which circumstances the loser has to pay which costs and fees and any exemptions from that, should be circumscribed by law, but within the framework of a general legal provision. This allows the courts to adjust these rules to different cases and areas, where the collective redress applies.

Q. 22 Who should be allowed to bring a collective redress action? Should the right to bring a collective redress action be reserved for certain entities? If so, what are the criteria to be fulfilled by such entities? Please mention if your reply varies depending on the kind of collective redress mechanism and on the kind of victims (e.g. consumers or SMEs).

In the investor damage cases only those persons who are affected by an infringement should be allowed to bring a collective redress action (see above, especially answer to question 3).

Q 23 What role should be given to the judge in collective redress proceedings? Where representative entities are entitled to bring a claim, should these entities be recognised as representative entities by a competent government body or should this issue be left to a case-by-case assessment by the courts?

Additional to the normal role of a judge in a civil litigation, the judge should also be responsible for the class certification process, the finding of a suitable representative plaintiff or group of plaintiffs and for the assessment of a proposed settlement.

If representative entities should be allowed to bring a claim, the recognition process should only be left to a case-by-case assessment by the courts. This is the best way to avoid that a representative is not acting in the best interest of the group.

Q 24 Which other safeguards should be incorporated in any possible European initiative on collective redress?

No suggestions.

Q 25 How could funding for collective redress actions (injunctive and/or compensatory) be arranged in an appropriate manner, in particular in view of the need to avoid abusive litigation?

See above especially Q 7, Q 9, Q 10, Q 11, Q 20, Q 21.

Additionally it could be set up a public fund, which could help to finance and thus overcome the demonstrated shortcomings in respect to the lacking access to justice. Especially in cases where the citizens affected by the infringement suffered tiny damages it could help to improve the situation.

Q 26 Are non-public solutions of financing (such as third party funding or legal costs insurance) conceivable which would ensure the right balance between guaranteeing access to justice and avoiding any abuse of procedure?

See also above and especially Q 11 and Q 21.

Vital is that contingency fee arrangements are permitted for lawyers and non-lawyers. Thus also law firms are enabled to privately finance collective redress means on EU level.

The allowance of contingency fee arrangements for non-lawyers in several countries in Europe – Austria, UK, Netherlands, for example – had already the effect that litigation financing companies are financing investor lawsuits. The existence of these litigation financing companies has ensured that more cases relating to misleading capital market disclosure have been filed during the last two or three years.

Therefore we strongly believe that the permission of contingency fee agreements will help to give EU-citizens and CMEs the required access to justice.

To avoid abusive procedure it is sufficient that the losing plaintiffs have to bear a certain but limited cost risk, but only if the lawsuits contravenes the principles of good faith.

Q 27 Should representative entities bringing collective redress actions be able to recover the costs of proceedings, including their administrative costs, from the losing party? Alternatively, are there other means to cover the costs of representative entities?

In the investor damage cases only those persons who are affected by an infringement should be allowed to bring a collective redress action (see above, especially answer to question 3). Thus representative entities should not be allowed to bring collective redress actions.

Just in case representative entities are allowed to bring collective redress actions:

They should like lawyers be able to recover reasonable costs of the proceedings, including reasonable administrative costs from the losing party. But this should not apply, if the lawsuit contravenes the principles of good faith. Then the representative entity should not be enabled to recover any costs.

Alternatively a public fund, which could be established at EU level, could cover the cost of representative entities.

Furthermore representative entities should have the possibility to receive a share from the outcome, if the case is successful.

Q 28 Are there any further issues regarding funding of collective redress that should be considered to ensure effective access to justice?

See above, especially Q 7, Q 9, Q 10, Q 11, Q 20, Q 21.

Q 29 Are there to your knowledge examples of specific cross-border problems in the practical application of the jurisdiction, recognition or enforcement of judgements? What consequences did these problems have and what counter-strategies were ultimately found?

No specific experience available.

Q 30 Are special rules on jurisdiction, recognition, enforcement of judgments and /or applicable law required with regard to collective redress to ensure effective enforcement of EU law across the EU?

We think that special rules on the mentioned issues are required for an effective collective redress on EU level. Especially rules on jurisdiction have to be precise to avoid lengthy proceedings about this issue. In this respect it is also crucial that the access to court is not just limited to the registered office of a company. Thus a company could easily register at a place or change the registered address to a place, where the courts are known to be slow and inefficient. For this reason it could make sense to centralize the jurisdiction for the collective redress on EU level directly in Luxembourg at – for instance – at a new court e.g. European Court of Collective Redress.

Q 31 Do you see a need for any other special rules with regard to collective redress in cross-border situations, for example for collective consensual dispute resolution or for infringements of EU legislation by online providers for goods and services?

No suggestions.

Q 32 Are there any other common principles which should be added by the EU?

No suggestions.

Q 33 Should the Commission's work on compensatory collective redress be extended to other areas of EU law besides competition and consumer protection? If so, to which ones? Are there specificities of these areas that would need to be taken into account?

The Commissions work should in any case be extended to other areas of EU law, especially in the field of investor law, securities law, banking and capital market law. Also product liability and personal injury law are areas which should be covered with collective redress on EU level.

The regulation on collective redress should not differ on the area. The regulations should be kept precise but general, so the rules can apply to all areas where a group of citizens are affected. In this respect the regulation e.g. in Australia and Canada for instance the Ontario class proceedings Act 1992 - could be a valuable model.

Q 34 Should any possible EU initiative on collective redress be of general scope, or would it be more appropriate to consider initiatives in specific policy fields?

See before Q 33. The possible EU initiative should be of general scope and not fragment in specific policy fields.