

**Response of the U.S. Chamber Institute for Legal Reform**  
**Concerning the Consultation of the Competition Appeal Tribunal (CAT)**  
**Rules of Procedure**

3 April 2015

**About the U.S. Chamber Institute for Legal Reform**

The U.S. Chamber Institute for Legal Reform is a not-for-profit public advocacy organisation affiliated with the U.S. Chamber of Commerce, the world's largest business federation, which represents the interests of more than three million businesses of all sizes, sectors and regions, in addition to state and local chambers and industry associations. Many of the U.S. Chamber's members are companies that conduct substantial business in the UK. ILR is therefore deeply interested in the orderly administration of justice in the UK.

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

**Summary**

ILR's primary interest in the Competition Appeal Tribunal ("CAT") Rules of Procedure is to ensure adequate safeguards are contained within the proposed Rules to protect against the abuse of private actions in competition law that would be introduced by clause 80 and Schedule 8 of the Bill.

In particular, ILR is concerned about the risk of abuse as a result of new opt-out collective litigation which will be introduced by paragraph 5 of Schedule 8 (by amending paragraph 47B of the Competition Act 1998).

ILR's experience with collective litigation, not only in the U.S. but also in other jurisdictions such as Canada and Australia, is that it is prone to abuse and generates

significant costs and risks for businesses of all sizes, while often delivering little benefit to victims of infringements.

In addition, ILR has serious concerns about the potential role of third party funders in the new forms of collective litigation proposed in the Bill (whether opt-in or opt-out). Experience elsewhere has shown that creating opportunities for hedge funds and other private investors to participate in private litigation, with no motivation other than to reap a profit from the dispute, is highly susceptible to abuse and drives up both the volume and cost of litigation.

ILR has mainly focussed its answers on these central concerns, and has therefore responded only to a selection of the consultation questions in the interests of brevity.

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**Q1: Do you agree with the recommended approach to promote the five principles from the Guide to be incorporated into Rule 3 as “Governing Principles”?**

**Q2: Do you agree that the Governing Principles will help the CAT both in the task of case management generally and in the application of particular Rules?**

**Q3: Do you agree with the recommended approach on setting target times and timetables for cases?**

**Q4: Do you agree with the rationale on not setting a time limit for the delivery of a decision?**

**Q5: Are there any arguments for setting a time limit for a delivery of a decision that you consider outweigh those for not doing so?**

**Q6: Do you agree with the recommended new provisions for strike out?**

**Q7: Do you consider the Rules address unmeritorious appeals at an early stage, or are there other changes you consider might help to deal with such matters?**

ILR strongly endorses and welcomes the “five principles” and their focus on ensuring both efficient dispute settlement and the active management of cases. ILR also strongly welcomes measures to ensure that cases do not take longer than is necessary.

Litigation costs have been climbing steadily in England and Wales<sup>1</sup>, which can lead to unmeritorious cases being settled simply to avoid the expense of a full defence (noting that even when costs are awarded in favour of a defendant they rarely cover the true cost). This is particularly true in relation to collective litigation as it tends to be significantly more costly and complicated to defend, and it comes with the potential of detrimental publicity. In other jurisdictions which have embraced “class actions”, the possibility of extracting a “blackmail settlement” (i.e., a settlement demanded for the withdrawal of a weak or meritless case, simply to allow the defendant to avoid the time, expense and reputational consequences of a defence) is a strong motivating factor and has consistently led to abusive litigation.

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<sup>1</sup> NERA Economic Consulting for ILR, International Comparisons of Litigation Costs: Europe, the United States and Canada (May 2013), available at: <http://www.instituteforlegalreform.com/sites/default/files/NERA%20FULL.pdf>.

ILR therefore applauds the possibility of the CAT actively managing cases to minimize cost, maximize efficiency, and facilitate the earliest possible identification and dismissal of meritless cases (per Q.7).

**Q12: Do you agree that a Fast track procedure will benefit SMEs and micro businesses, providing them with access to redress?**

For the reasons identified above, ILR supports measures to expedite the early resolution of cases to minimize the costs to the parties.

ILR cautions, however, that the goal of efficiency should never compromise due process. There will be cases where it is essential for the parties to lay out their arguments in full. The proposed Rule 57(1) suggests a mandatory cap on recoverable costs, and Rule 57(3) identifies a fast-track procedure. There may be circumstances where these rules could act as an impediment to the proper and full exploration of the pertinent facts. The proposed cap and the utilisation of a fast track procedure are therefore welcome, but should remain subject to close Tribunal supervision and discretion, and the rules should expressly reflect that the goal of efficiency can never be subordinate to the broader goal of achieving a just outcome that respects due process.

**Q14: Do you have any views on the recommended provisions for disclosure in private actions, in particular on disclosure of documents before proceedings? Please explain your answer.**

ILR notes that disclosure can account for a very significant portion of the overall cost of litigation, and this cost is itself a significant factor in motivating “blackmail settlements”. The ability of the Tribunal to tailor disclosure, and establish limits as to what is justified and proportionate, is essential.

Although collective proceedings are relatively novel, ILR sees no reason why disclosure cannot be ordered by the Tribunal through menu options as is now required under Part 31 of the CPR. By way of illustration, rather than ordering all the parties to give standard disclosure, the Tribunal could tailor the disclosure orders for each party to give effect to the governing principles of dealing with cases at a proportionate cost. By making an appropriate disclosure order, the Tribunal could save the parties from incurring time and costs in producing and reviewing thousands of documents that would have little or no impact on the proceedings.

Article 5(3) of the EU Competition Damages Directive<sup>2</sup> identifies certain disclosure safeguards. Because the UK is obliged to implement the EU Directive by 27 December 2016, there is no reason not to already take account of these safeguards in the Rules, particularly as they relate to collective actions. This provision provides that:

*Article 5(3) Member States shall ensure that national courts limit the disclosure of evidence to that which is proportionate. In determining whether any disclosure requested by a party is proportionate, national courts shall consider the legitimate interests of all parties and third parties concerned.*

*They shall, in particular, consider:*

*(a) the extent to which the claim or defence is supported by available facts and evidence justifying the request to disclose evidence;*

*(b) the scope and cost of disclosure, especially for any third parties concerned, including preventing non-specific searches for information which is unlikely to be of relevance for the parties in the procedure;*

*(c) whether the evidence the disclosure of which is sought contains confidential information, especially concerning any third parties, and what arrangements are in place for protecting such confidential information.*

ILR therefore recommends the early adoption of these safeguards to help focus disclosure requests, promote efficiency and save costs without compromising either party's interests.

ILR also has strong concerns about the proposals to allow parties to make an application to the CAT for disclosure before proceedings have started.

Instituting proceedings involves making certain declarations to the Court and engages the possibility that the claimant will be penalized in costs (or penalized in other ways for misleading the Tribunal) if the case proves meritless.

The burden of establishing at least a *prima facie* case sufficient to justify proceedings must rest with claimants, and defendants should not be required to bear the burden of responding to speculative “fishing expedition” disclosure requests where no such case can be made.

The risk arises, therefore, that requiring defendants to engage in disclosure without requiring claimants to at least be able to justify the proceedings (and bear the

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<sup>2</sup> Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union.

consequences if such proceedings prove to be groundless) would represent a charter for litigation abuse and blackmail settlements.

**Q18: Should Government introduce a presumption into the rules that organisations that offer legal services, special purpose vehicles and third party funders should not be able to bring cases?**

ILR believes that only parties with a direct interest in the claim should be able to bring a lawsuit. Where collective cases are to be organised and instigated by representative entities, it is imperative that those entities truly have the victims' interests as their central concern. It is highly unlikely that such entities will have victims' interests as their central concern when the representatives are motivated by the possibility of profit for themselves.

Permitting claims to be brought by profit-seeking third parties invites claims primarily designed to reward those parties, rather than to deliver compensation to victims of an infringement. The risk is exacerbated in collective cases, and even more so in opt-out collective cases where the financial interests of the third parties tend to become the dominant interest in the litigation.

Allowing such claims can subvert the interests of the true victims of a competition law infringement in favour of the interests of the third party. The Government should be under no illusion: the primary motivation of such third parties is not to seek redress for claimants who have suffered harm, but is instead to identify a harm done to someone else and to capture for themselves as much of the compensation due to that person as possible.

For all of the reasons that law firms, special purpose vehicles or third party funders should not be permitted to initiate claims, it is also imperative that third parties are prevented from achieving the same outcome through indirect means.

Specifically, third party funders must be prohibited from playing any role in collective litigation, particularly opt-out litigation.

In collective cases, there is typically a diffuse group of claimants, each with a relatively small stake in the outcome in percentage terms. Third party funders typically demand up to 30% to 40% of the total award in the case. Therefore, the interest of the funder is by far the dominant interest in the case. Funders can and do seek control of how such cases are run, and typically there is no unity of voice among the claimant class, or even a mechanism through which the claimant class can direct the litigation except through the funder, leading to a situation which is – in practical terms – identical to the funder taking the claim in its own name. The litigation is therefore directed in such a way that maximizes the funder's own returns, with achieving compensation for those that have suffered harm as an

entirely incidental objective. The interests of funder and claimant are not necessarily aligned. For example, funders may hold out for larger settlements that claimants would authorise if claimants had full knowledge of the facts and control over case strategies. Further, funders may also discourage non-monetary resolutions which might otherwise prove satisfactory to claimants.

ILR notes that damages-based agreements (“DBAs”) between lawyers and their clients are unenforceable if they relate to opt-out collective proceedings. This is due to the recognition that DBAs can introduce detrimental incentives and can potentially lead to victims’ interests being insufficiently guarded.

However, ILR remains concerned that DBAs will be interpreted as including only agreements in which claimants agree to give up a proportion of their damages to their lawyers. This leaves open the possibility that a third party funder will fund a claim and will have exactly the same incentives that gave rise to the concern about DBAs in the first place, i.e., that they will direct the claim in such a way that maximizes their own benefit and marginalizes the interests of those on whose behalf the claim is brought.

ILR strongly endorses excluding law firms from acting on a DBA or contingency fee basis in opt-out cases in light of the risks of abuse generated by such arrangements. However, ILR sees no basis whatsoever for allowing unregulated third party investors to do exactly what (regulated) lawyers are excluded from doing: pursuing claims for their own benefit. To remain logically consistent there must also be an outright and explicit ban on the third party funding of all collective claims, but most particularly for opt-out claims.

Such a ban should include measures to prevent circumvention and cover both direct and indirect funding arrangements. For example, it remains possible that funders have private arrangements that are unknown to the Tribunal or the defendant which alter incentives and marginalise the interest of claimants in unseen ways. It is also possible for third party funders to try to bring claims through their own law firms, taking advantage of the rules permitting alternative business structures to provide legal services.

For the reasons set out above, ILR believes that the Government should go further than a mere presumption that third parties offering legal services, special purpose vehicles and third party funders should not be able to bring proceedings. It should introduce an outright ban, including an outright ban on third party funding of collective cases.

If there are any exceptions to this rule, as foreseen in the consultation, then it is imperative that the Rules impose safeguards to protect class members and defendants from the potential for litigation abuse. Not only should any representative entity be assessed for its suitability to bring claims, but there should

be positive obligations to disclose to the Tribunal all of the facts and circumstances surrounding the entity and, in particular, how it is funded and who will benefit from any award and in what proportion. In addition, the CAT must be empowered to verify whether any such vehicle is created merely to shield litigants from the costs consequences if their claim proves meritless. Such vehicles must be sufficiently well-funded to bear any costs that may be payable.

**Q19: What are your views on the proposed certification criteria, in particular the tests on: assessing the strength of the claim and the availability of alternative dispute resolution?**

ILR's view is that the criteria for the authorisation of the class representative and certification of the claim as eligible for collective proceedings require further clarity and guidance on how they should be applied.

The certification criteria for the claim are set out in proposed Rules 77 (Authorisation of the class representative) and Rule 78 (Certification of the claims as eligible for inclusion in collective proceedings). We have considered each below, in addition to considering the assessment of the strength of the claim and the availability of alternative dispute resolution ("ADR").

*Authorisation to act as a representative in collective proceedings*

The proposed Rules state that the Tribunal may authorise a person to act as a class representative (a) whether or not that person is a class member, and (b) only if the Tribunal considers that it is "just and reasonable" that they do so.

Subrule (2) sets out the five factors that the Tribunal is required to consider in determining what is just and reasonable (including whether the person would act "fairly and adequately" in the interests of the class members, whether the representative has "a material interest that is in conflict with the interests of the class members" and whether the person would be able to pay the defendant's recoverable costs).

ILR remains concerned that the phrases "just and reasonable", "fair and adequate" and "a material interest that is in conflict with the interests of class members" are still too vague and would suggest further guidance on how these concepts are to be assessed by the Tribunal.

To ensure that representatives are genuinely representative, the proposed Rules should require at least the following factors to be taken into account:



- (a) *Government designation* – only entities which have been designated by the Government by reference to clearly defined conditions of eligibility should be entitled to become representatives;
- (b) *Presence in the UK* – entities must be physically present in the jurisdiction to permit appropriate exercise of jurisdiction by the Tribunal;
- (c) *Connection with the subject matter* – there should be a direct relationship between the main objectives of the entity and the rights granted under the Competition Act that are claimed to have been violated in respect of which the action is brought;
- (d) *Track record and expertise* – any non-claimant representative (i.e., any representative which is not itself a member of the class) should be required to demonstrate that it has acted in the interests of the parties making up the majority of the class (e.g., consumers) for a number of years and has the relevant human and financial resources and expertise to serve their interests;
- (e) *Non-profit making character* – non-claimant representatives should not have any financial motive for commencing litigation beyond their desire to obtain redress for those who have genuinely suffered harm;
- (f) *Ownership, governance and sources of funding* – to ensure representatives are not merely fronts for profit-making enterprises with an interest in litigation (e.g., law firms, third party litigation funders, claims management companies, etc.), complete transparency is essential and, if not banned (per ILR's suggestion above), then disclosure of any funding arrangement should be mandatory. The Tribunal should take account of who owns, controls and funds (as applicable) parties seeking to act as representatives; and
- (g) *Previous conduct* – the Tribunal should be permitted to take account of previous conduct, including, for example, failing to comply with regulations and codes on direct marketing, or if the person seeking to act as representative has a history of being a vexatious litigant.

Furthermore, the Rules should specify an opportunity for the Tribunal to hear from the defendant on the suitability of any representative.

### *Certification of the claims as eligible for inclusion in collective proceedings*

Rule 78 sets out the factors to be considered by the Tribunal in deciding whether claims should be certified for inclusion in collective proceedings. ILR considers that this “gateway” is key to the Tribunal preventing abusive claims from progressing further and causing defendants to incur costs unnecessarily.

ILR does not believe that the criteria to certify claims as eligible provide adequate safeguards to prevent collective claims without merit from being brought. ILR suggests that there should be express minimum requirements that claims should meet before the Tribunal can make a collective proceedings order.

No lawsuit should be allowed to proceed as a collective action unless the Tribunal determines, at the outset of the case, that a collective action is superior to all other available procedures. In making this determination, the Tribunal should apply established criteria designed to ensure that proceeding on a collective basis will be both fair and efficient. Requiring courts to make such a determination at the outset of a case protects potential claimants from being swept into a group proceeding when other procedures are preferable to protect their rights and advance their claims.

Certification also ensures that collective actions only proceed where the defendant can fairly defend itself against the group on a collective basis (i.e., there would be no need for individualised evidence). Any collective action regime should impose the following four requirements, which are similar to those in the U.S. federal system<sup>3</sup>:

- *Predominance of Common Issues/Cohesiveness* – This requirement is intended to ensure that before a collective action is permitted to proceed on its merits, a court must determine that all of the claims of the proposed group members can be adjudicated fairly in a single proceeding and established through common proof. More specifically, courts must decide whether the proposed collective action comports with the principle that “trial for one can serve as trial for all” – i.e., the relevant facts and law as to each class member’s claim are such that adjudicating one group member’s claim (or significant issues

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<sup>3</sup> In a class action, a court adjudicates simultaneously the claims of many parties, rendering the same judgment (that is, “liability” or “no liability”) as to all. Thus, before claims are handled in that fashion, a court should engage in a careful analysis to determine whether all claims are sufficiently similar that they may be fairly subjected to such a uniform liability decision. Absent such an inquiry, persons with legitimate claims may be denied relief (if the court renders a uniform ruling in defendant’s favour); alternatively, the defendant may be required to pay groundless claims if the class prevails. To ensure such an analysis, U.S. federal courts have adopted Federal Rule of Civil Procedure 23. Under that rule, the class proponent must demonstrate compliance with several prerequisites, including a requirement that issues common to the class predominate over individual ones. U.S. courts cannot certify proposed classes unless a “rigorous analysis” shows full compliance with the Rule 23 standards. Although not perfect, the rule requires a meaningful judicial inquiry about whether use of the class device will afford basic due process to all parties.

related to that claim) necessarily resolves the claims (or the same significant issues) for the other group members. While Rule 78(0)(b) recognises the need for claims to “raise common issues” and other factors, the need for predominance of common issues is not sufficiently set out.

- *Adequacy* – “Adequacy” means that any person who seeks to be a representative claimant must be willing and able to represent the group adequately. This safeguard protects group members by ensuring that any representative claimant who purports to speak for them and compromise their rights shares the same interests they do and is motivated and informed about the suit. Among other things, an adequacy requirement will help ensure that a representative is not seeking to file a lawsuit in order to extort a fast “sweetheart” settlement for him or herself and his or her lawyer, while casting aside the remaining group members. This is tied to ILR’s comments on the “authorisation to act as a representative” provisions above.
- *Typicality* – “Typicality” means that the claims of the representative claimant (assuming they have a claim) must be typical of the claims of the claimant group. This safeguard is intended to ensure that only those claimants who advance the same factual arguments may be grouped together in a collective action. The typicality requirement protects group members by ensuring that the representative claimant’s incentives align with those of other group members – and that he or she can fairly represent their interests.
- *Numerosity* – “Numerosity” means that a collective action should not proceed unless there are so many potential claimants that no other form of dispute resolution would be practical. This safeguard does not require establishment of a specific numerical threshold for claimant groups; rather, it requires courts to assess whether any purported collective action involves a sufficiently large number of potential claimants under the circumstances to make individual proceedings impractical. While Rule 78(2)(d) requires the “size and nature of the class” to be considered, the numerosity principle described here should be a mandatory threshold provision.

#### *Assessing the strength of the claim*

The proposed Rules, as drafted, do not appear to require the Tribunal to assess the strength of the case before permitting it to proceed. Rule 78(3)(a) invites the Tribunal to consider the “strength of claims” only in the context of assessing whether an opt-in or opt-out is more suitable.

A collective proceedings order could therefore be made in respect of a claim even though it was manifestly weak on the legal merits, as long as there was an identifiable class of persons, the claims raised common issues, and the claims were suitable for collective proceedings.

In ILR's view, an ability to refuse certification to claims that are very unlikely to succeed on the merits would be appropriate. We do not see any issues with the Tribunal coming to a preliminary view on the merits of the claim as this is analogous to the courts determining whether to refuse a summary judgment application on the basis that the defendant has a real prospect of success.

In addition, the Tribunal should make collective proceedings orders on an opt-in basis in all cases except where it is impracticable to do so, and only then should the Tribunal consider making an order for the proceedings on an opt-out basis. While this is alluded to in Rule 78(3)(b) the presumption against opt-out proceedings should be more explicitly stated.

### *Availability of ADR*

ILR's strongly encourages ADR as an alternative to litigation (particularly collective litigation). ADR has the capacity to be quicker and cheaper and to deliver outcomes which satisfy all parties (in a way that the "win/lose" nature of litigation sometimes cannot deliver). However, ILR does not believe that ADR should be mandatory.

Proposed Rule 74(2)(g) requires the claim form to include a statement whether the parties have used an alternative dispute resolution procedure. The Tribunal can make an order for a stay of proceedings under proposed Rule 75(4)(e) while the parties attempt to compromise the proceedings by ADR or other means.

The fundamental difference between ADR and traditional litigation is that ADR is consensual, i.e., the parties must agree to engage in this form of dispute resolution. By engaging in ADR, the parties could reach a consensus on the claim much more quickly than through the courts, leading to substantial savings in costs.

Given the potential benefits of ADR, the Tribunal should encourage parties to engage with voluntary ADR. Under the Civil Procedure Rules (CPR), there are costs consequences if a party refuses to engage in ADR without good reason.

**Q20: Should formal settlement offers be excluded in collective actions?**

**Q21: If formal settlement offers are not excluded from collective actions, should there be special provision around the disclosure of information relating to the formal settlement offer, and how would they work?**

Part 36 of the Civil Procedure Rules (as substantially mirrored in the proposed Rule 48) allows defendants to make a settlement offer during proceedings. If the claimant declines to accept the offer and continues with the litigation but

ultimately does not “beat” the offer in any final award, this is taken into account in awarding costs (as proceeding with the litigation was not necessary and it could have been resolved earlier through settlement). ILR’s position is that, as a matter of principle, formal settlement offers should not be excluded in collective actions.

ILR does not find the argument set out in the Consultation (that collective proceedings are unique in nature, and that defendants might make low offers) at all convincing. The purpose of Part 36 is to incentivise the parties to make and accept offers, curtailing the need for proceedings to go to trial. In the Government’s own example, set out in paragraph 7.10, had the claimants agreed to the settlement, they would have received more than they were awarded by the Tribunal and saved on the costs and time spent pursuing the case. This is precisely the point of settlement offers – to encourage settlement by redistributing the cost risk. There seems to be no logical basis for withdrawing this settlement incentive in collective cases – indeed, collective cases should be strongly incentivized towards settlement as they can be vastly more costly and burdensome than party-to-party cases.

The Government was also concerned that claimants may not have sufficient information to assess the reasonableness of an offer by a defendant. This is true in all cases, and nothing requires claimants to accept offers until they are comfortable doing so. The claimants could wait until after the disclosure, or even the evidence stage, before accepting an offer from the defendant, so they would have adequate information to assess the offer made.

In summary, ILR believes that formal settlement offers should be permitted in the collective proceedings procedure, in particular, to encourage defendants to make offers to claimants.

**Q22: Do you have any other comments on the proposed Rules; in particular do you consider there are other changes that could be made to achieve the objectives set out in the Terms of Reference?**

#### *Distribution of award*

ILR has concerns in relation to proposed Rules 92(4) and (6) which give the Tribunal discretion to order the payment of undistributed damages. ILR is concerned that the purpose of introducing the collective proceedings legislation, to bring redress to consumers and SMEs, would potentially be subverted by these rules by permitting undistributed damages awarded in opt-out proceedings to the class representative or to a designated charity.

The goal of collective redress must be to provide compensation to claimants who have actually been injured by the defendant. Collective litigation does not have any

proper role in law enforcement, and it is also ill-suited to promote social objectives through *cy pres* awards. The reason for facilitating competition damages claims is to permit an injured claimant to seek compensation for his or her injuries; using civil litigation to redistribute wealth to charities – at the expense of group members – turns that fundamental goal on its head. As Professor Martin Redish of Northwestern University School of Law aptly put it: *cy pres* awards merely “creat[e] the illusion of compensation.”<sup>4</sup>

As another critic of *cy pres* relief noted: “allowing judges to choose how to spend other people’s money is not a true judicial function and can lead to abuses.”<sup>5</sup>

*Cy pres* awards also create the potential for conflicts of interest between the class representative and the absent group members.

Under the proposed rules, the Tribunal has discretion to order that undistributed damages from proceedings on an opt-out basis can be paid to the class representative with respect to all or part of any costs, fees or disbursements incurred in connection with the collective proceedings under proposed Rule 92(4).

Following judgment, the Tribunal will make an award of costs pursuant to the proposed Rule 102(4) and will consider amongst other things whether costs were proportionately and reasonably incurred and whether costs are proportionate and reasonable in amount. Proposed Rule 92(4) allows the class representative to recover costs, fees and disbursements from undistributed damages that it was not awarded in the Tribunal’s order for costs. By making an additional order for costs pursuant to proposed Rule 92(4), the class representative would be recovering additional costs which were initially deemed by the Tribunal not to be proportionate or reasonable, and in effect represent a “bonus”.

Where a class representative itself stands to gain a “bonus” if class members do not come forward, the class representative loses all incentive to locate class members, and indeed has incentives which are directly contrary to those class members. Third party representatives who fund or instigate claims may seek compensation based on a percentage of a total award, not on the percentage of the award that actually compensates victims. For this reason, funders will have an

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<sup>4</sup> Martin H. Redish, Peter Julian & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 649 (2010).

<sup>5</sup> Adam Liptak, *Doling Out Other People’s Money*, N.Y. Times, Nov. 26, 2007, available at <http://www.nytimes.com/2007/11/26/washington/26bar.html> (quoting former federal judge David F. Levi); see also *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 236 F.R.D. 48, 53 (D. Me. 2006) (“Federal judges are not generally equipped to be charitable foundations: we are not accountable to boards or members for funding decisions we make; we are not accustomed to deciding whether certain non-profit entities are more ‘deserving’ of limited funds than others; and we do not have the institutional resources and competencies to monitor that ‘grantees’ abide by the conditions we or the settlement agreements set.”).

incentive to inflate claims to the highest level possible without having a corresponding incentive to deliver as much compensation as possible to victims.

Undistributed awards should be returned to defendants after a reasonable period. Any other system amounts to punitive damages in the sense that they require “compensation” to be paid out for a person who does not actually receive it. Experience in other jurisdictions shows that in opt-out cases, there is routinely significant “surplus”, i.e., unclaimed damages, which is fought over by the financial backers of the litigation, but does nothing for victims.

For further resources, research and commentary on the dangers of *cy pres* and its negative impact on the U.S. legal system, please see:  
<http://www.instituteforlegalreform.com/resource/cy-pres-a-not-so-charitable-contribution-to-class-action-practice/>

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ILR is grateful for the opportunity to provide these comments and would be pleased to provide any further information that may be of assistance.