

COLLECTIVE REDRESS

The need for European approach

List of potential cross-border collective cases

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Summary

The list aims to give examples of potential cross-border cases in a number of areas in order to outline the need of a European group action instrument that would have a wide scope of coverage. The examples are drawn from concrete situations and are not hypothetical.

However, the list is by no means exhaustive. It should also be kept in mind that at the moment a number of burdens exist that preclude cross-border cases to be taken by consumer organizations, such as lack of knowledge of legislation and collective redress mechanisms in other Member States, no information about collective claims brought in other countries, no standing to bring claim in another Member State or inability to join claims brought in another Member State, language barriers, travel expenses and difficulties in providing adequate representation, etc...

Also, for instance financial services or energy markets still do not operate cross-border for consumers; therefore even if those areas are very much prone to mass claims, actions have to be taken on national level, and often are not possible due to the lack of appropriate instruments.

Air transport

- ✚ Ryanair credit card charge per person per flight. In an injunctive action taken by VZBV (Germany) the court declared such practice illegal, if consumers are not provided possibilities to make payments for free. However, the charge continues to apply under the different name ('administrative charges'), applies to Ryanair customers in all Member States and even though there seems to be one free option of payment proposed (a certain form of prepaid debit card), it is not available for many consumers who are thus forced to pay a fee. Meanwhile, the Catalan Competition Authority has also declared such practice illegal and in addition to stating that the airlines must have an alternative payment system completely free of charge for the customers, it also has underlined that in any case, if the airlines want to surcharge the use of credit or debit cards, the surcharge should never be superior to firm's cost to implement the 'payment by card' mechanism. No collective action for compensation has been taken so far.

- ✚ Compensating consumers for the damages due to the cancellation of flights related to the volcano ash – consumers from all the countries were affected, but there was no coordinated action. Depending on the actions and pressure from national consumer organizations, consumers from certain countries were compensated more swiftly than others, while if there were a possibility of cross-border action, all consumers would have been on equal footing to get the compensation. Similar problems arose in many European airports late autumn of 2010 when thousands of flights were cancelled due to heavy snow.

- ✚ Coordinated injunctions actions for unfair contract terms against several low-cost airlines were taken in France, Portugal and Belgium. Consumer organisations only filed for injunctions on a national level (not cross-border), because of procedural and financial constraints. As a result, it is not clear if different courts will interpret the terms in the same way (so far, the judgement has been only passed in Belgium) and if the airlines will only comply with the judgement in respect of consumers domiciled in the country where the judgement has been passed (thus leaving other customers on unequal footing). Also, what happens if some contract terms, that are declared unfair, could lead to compensation claims from the consumers? For instance, a recent court judgement in Spain declares as unfair the 40 euro fee collected by Ryanair if consumers have not checked-in online. If there were to be actions for compensation, they could only be taken on national level and only in very few countries where collective redress system exists and is efficient. All the other European consumers would be left empty-handed.

Holidays/Timeshare/Package Travel

- ✚ Our Austrian member VKI sued a tour operator on behalf of group of consumers affected by large outbreak of food poisoning at resort hotel. However, VKI could only sue on behalf of consumers who booked their holiday through the Austrian branch of a tour operator. Due to Brussels I and the ECJ on Shearson Hutton it was not possible to represent Austrian consumers who had booked their holiday with the same tour operator through the Swiss (not Austrian) branch, so those consumers were left without redress.
- ✚ Our Spanish member AVACU-CECU could not take several collective actions regarding timeshare/holiday clubs affecting Spanish consumers because companies were not legally registered in Spain or did not have open premises in Spain.
- ✚ Consumers in Estonia, Latvia and Lithuania are targeted by unfair commercial practices of a company selling timeshare packages. The company engages into aggressive selling practices, would not allow withdrawal from the contract and would not return fees paid by the consumers. As the company is based in Greece, consumers do not have adequate means to obtain compensation for the harm suffered.

Unfair commercial practices

- ✚ In Austria, Germany, Slovakia and other Member States a huge number of websites 'trap' consumers by either sending payments orders to the latter despite the fact that they never had visited the website, or by offering 'free' services when in fact consumers conclude contracts with payment obligation. Consumer associations and public authorities try to fight these websites, but since most of the companies are domiciled in other Member States, the law cannot be enforced and consumers are not compensated.
- ✚ In Baltic states consumers are targeted by direct telephone marketing by a certain company and proposed a 'free' sample of food additives for loss of weight. However, after the first delivery, consumers continue to receive new packages of food additives and are requested to pay for them, although they did not order them. The company (based in the Czech Republic) does not provide adequate means for consumers to cancel those unrequested deliveries and engages into aggressive practices to request payment for unsolicited goods, providing the data of consumers to debt collectors etc. As the company is based in another Member State, national consumer associations and public authorities are not able to stop the practice and consumers cannot initiate claims to ask for compensation for the money they paid as a result of this illegal practice.
- ✚ In Spain, a pyramid scheme between two stamp selling companies, Forum Filatelico and Affinsa affected 350.000 investors in Spain, 12.000 in Portugal and 5.000 in France. The Spanish authorities provided information and judicial assistance free of charge to Spanish consumers only.
- ✚ There have been a number of cases where consumers have not received pre-contractual information about the compatibility of digital products (software, music, video games) with other hardware and/or the application of Technical Protection Measures. The compatibility refers to the essential characteristic of the product and the consumer expects for the product to be compatible with hardware. If they are not, consumers should be able to claim compensation.

Financial services

- ✚ In Madoff case a number of banks in Germany, France, Spain, Portugal and the UK agreed to compensate their clients – victims of the Bernard Madoff fraud investment scheme. However, for instance Swiss banks refused to participate in the settlement. Also, in the absence of a European group action instrument, settlement on a national level was the only possibility for claimants, whereas if the European instrument was available, all claimants against the same bank could have joined in one action.
- ✚ Similarly, in Lehman Brothers case, various banks in Belgium, Germany, Austria, The Netherlands, Italy, etc. sold Lehman Brothers financial products to the investors in many countries. Following the collapse of the latter company, various court or settlement actions were initiated in different countries.
- ✚ In Belgium, various increases of insurance premiums were declared illegal by court decisions under injunction procedures. Those legal orders stop illegal practices for the future but offer no compensation for harms suffered which are spread throughout up to million of consumers. Part of policyholders, while having contracted under Belgian law, may be established outside Belgium. A group action would allow aggregating the legal actions of large numbers of consumers affected.

Product liability

- ✚ Following Mattel toys recall in 2007 because of potential hazards from parts of the toys which were colored using lead-based paint (highly toxic), a mass claims settlement was reached in the US, but no collective actions were launched in the EU on behalf of victims;
- ✚ Thousands of consumers in UK, France and Germany who bought their leather sofas from number of retailers suffered severe chemical burns to their skin due to the fungicide dimethylfumarate (DMF) that was placed inside the sofas by the manufacturers in China to protect the leather from mould. Part of the victims in the UK have been able to file a lawsuit for compensation, but that has not been possible in France and tens of thousands more people have been affected by the toxic furniture, without being aware of it (47.000 items sold in France, data from other countries not available).

Health

- ✚ French weight-loss drug Mediator was sold in France, Spain, Italy, Portugal and Cyprus for many years despite fears of drug's lethal side-effects. Up to date, in France more than 500 people are believed to have died from heart trouble linked to the pills and 3,500 hospital admissions had been caused by the drug. Were the European group action instrument in place, all claimants could sue the French pharmaceutical company Servier in one action for damages.
- ✚ 300.000 women were implanted with defective breast implants made by the same French laboratory. The implants were not only defective, which results in the need of subsequent operations to change them, but also harmful for the health. In France, there are around 30.000 victims of this malpractice, others – in other countries. Unfortunately, in the absence of a collective redress instrument, no action on behalf of all victims has been taken against the company.

Competition

- ✚ Bathroom equipment cartel covering 6 EU countries – no compensation to consumers;
- ✚ Microsoft/Media Player tying case – consumer associations could only initiate actions on national level, although all European customers were affected;
- ✚ Abuse of dominant position by Intel – no compensation to consumers;
- ✚ Price fixing cartel among car glass producers – no compensation to consumers;
- ✚ Beer cartels in Belgium, The Netherlands, France and Luxembourg – no compensation to consumers.

Consumer contracts

- ✚ There's a clear lack of private enforcement regarding unfair contract terms, for instance, where consumers paid over money unfairly charged by a supplier (additional charges, cancellation fees, unfairly-levied 'administrative fees', payments made where the service was suspended through no fault of the consumer, shipping charges to return defective goods to the supplier etc...). As such contractual terms are usually used in widespread and repetitive manner, they could feasibly have given rise to a lot of collective claims of compensation.

Data protection

- ✚ Various web 2.0 online service providers, including social networking sites do not comply with data protection legislation in respect to the personal data of their users, thus causing damage to consumers. However, no collective cases were initiated to claim the compensation for the harm. Among the major obstacles for consumers to claim their rights is the current uncertainty as regards applicable law and whether these service providers, established outside the EU, have to comply with EU data protection legislation
- ✚ Consumer data is abused by various companies and illegally sold on the black market (e.g., in 2008, the German Federation of Consumer Organisations (vzbv) was able to buy six million sets of consumer data on the black market for 850 Euros). However, no actions for compensation were initiated.
- ✚ Google has been accused of infringing privacy and data protection legislation with its mapping application Street View. In a number of EU Member States Data Protection Authorities have opened investigations. DPAs can only impose fines on the company but citizens whose privacy has been violated will have no means to get compensation.

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