



EUROPEAN GROUP ACTION

Ten Golden Rules

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Imagine...

One summer, while on holiday somewhere in Europe, you buy a hair dryer for € 25, which seems a bit of a bargain. Once you get home, it catches fire and burns a section of your hair. The hairdryer is now useless, so you decide to try to either exchange it, or to obtain a refund...

You discover, incidentally thanks to your favorite consumer organisation, that people have been experiencing the same problem throughout Europe, with the same equipment.

After a number of fruitless discussions with the retailer, the only remaining solution is to go to court...

Unfortunately, it turns out that to do this, it would cost you a couple of hundred euros while it is likely that € 25 would be the maximum amount you would get compensated for.

**It's enough to make you think twice,
isn't it?**



With the Single Market and new methods of communication, European consumers are being offered more and more goods and services from professionals throughout the European Union. But the problems encountered by consumers when trying to seek redress are a real obstacle to the role they are supposed to play as «drivers of the European economy». The products or services bought can turn out to be faulty or dangerous, and very often the costs of legal proceedings are higher than the compensation which consumers could receive. Faced with this situation, consumers give up, and lose confidence in cross border shopping.

If the situation described on the left happened to you, would you feel inclined to go to court alone? It is highly unlikely... Coming to that conclusion, the European Commission has launched a debate on the need for a collective redress mechanism in Europe¹. BEUC and our member organisations warmly welcomed this initiative as we have been requesting for a very long time now that the right to redress, which is a fundamental consumer right, should be made more effective. In a number of Member States, Group Actions are either already in use or under discussion; in others, there is no plan to introduce such a system. There is a growing debate as to whether or not collective redress should be introduced at EU level...

For us the answer is **YES. A European Group Action procedure** would allow a number of consumers to bring a case together before the court to obtain compensation for a damage caused by the same trader.

In the countries where a Group Action instrument exists, it has shown to be efficient and this pleads for its introduction across the EU to allow all EU consumers to benefit from it.

Such a European tool would:

- improve the functioning of the Internal Market as consumers will have much more confidence shopping across borders;
- facilitate access to justice;
- minimise litigation costs for both consumers and defendants;
- result in less overloading of courts;
- avoid the «US-style class action» abuses by being fair and balanced;
- reduce discrimination between consumers living in Member States that do or do not provide for such a mechanism;
- help to overcome the difficulties faced by undertakings which are due to different redress mechanisms existing in Member States and can lead to distortion of the Market;
- also be advantageous to compliant businesses.

¹ The discussion was started first in 2005 with the Green Paper – Damages for Breach of the EC Antitrust Rules (COM(2005) 672, 19.12.2005) and more recently in the Consumer Policy Strategy for 2007-2013. It is now being fuelled by the White Paper on Private Enforcement, the consultation on Collective Redress Benchmarks, and finally by a Communication on Collective Redress to be issued by the end of 2008.



To be an effective tool the European Group Action instrument must comply with the following 10 rules:

- 1 **Have a wide scope**
- 2 **Aim at obtaining compensation**
- 3 **Allow for standing of consumer organisations**
- 4 **Cover both national and cross border cases**
- 5 **Give the court discretion over the admissibility of the claim**
- 6 **Foresee both opt-out and opt-in procedures**
- 7 **Be accompanied by information measures directed at consumers**
- 8 **Control out-of-court settlement**
- 9 **Allow compensation to be distributed fairly**
- 10 **Foresee efficient funding mechanisms**



1 **Have a wide scope**

The scope of the Group Action should be as broad as possible in order to include all the areas where consumers' interests protected by law are infringed; it should be applicable to very diverse situations such as price fixing agreements, sicknesses due to food poisoning or data protection and privacy infringements. It should not in any case be limited to the typical consumer contracts.

To complement the fundamental rights that will be guaranteed by the future European instrument, Member States must also be able to retain or create a Group Action that would provide a wider protection to consumers in order to adapt to national specificities.

A Group Action mechanism should be used in all cases when the solution offered by an individual action for damages is inadequate because the costs of taking an individual action exceed the damage suffered, or the case is too complex to be brought before the court individually.

Examples

Data protection

Based on their IP addresses (the identification number of your computer on the internet), 3000 Italian consumers received a letter from the lawyers of Peppermint, a German media company, requesting them to pay 330 Euros each for an alleged intellectual property rights infringement through the use of Peer to Peer networks (P2P). The Italian data protection authority ruled that the IP addresses of the 3000 consumers were obtained illegally. On this basis our Italian member Altroconsumo is considering bringing an action against Peppermint.

Unfair contract terms

Lack of price transparency and use of unfair contract terms seem to be current practices in the Nursing Home sector according to recent investigations by our Austrian and French members. A Group Action could be a way to help vulnerable consumers seek redress when such practices are conducted.

Fictional example

Food poisoning

Several consumers bought meat on the same day in the same supermarket. This meat was not fit for consumption as it was misleadingly sold after the sell-by date and consumers got sick - some even had to be treated in hospital. These consumers should be able to join together and bring a Group Action against the supermarket.



2 Aim at obtaining compensation

Obtaining compensation for the harm suffered by individuals is the «raison d'être» of a Group Action mechanism. The compensation could take several forms: payment, restitution, exchange of the faulty product or service...

All kinds of damages must be covered whatever their source (contractual or extra-contractual) or their type (financial, moral, physical or material).

At European level, some collective redress systems already exist, such as actions for injunctions, but they are not aimed at getting compensation: they permit illegal actions that are harmful to the collective interest of consumers to be ended in good time, but no direct compensation is foreseen for the victims, who would have to bring a new action before the court to get it. Similarly when competing firms get together to fix prices, to rig bids, to divide markets between themselves or to make other anticompetitive agreements, consumers lose the benefits of competition. For such offences companies can be fined millions of euros but until now victims do not receive any compensation. However, with the recently published White Paper on Private Enforcement, we are pleased that the EU has definitely started to consider the need to compensate the consumer.

Compensated

In the UK, seven suppliers including JJB Sports agreed on a fixed price for football shirts. JJB Sports was fined and consumers were reimbursed £10 or £20 for each shirt they had bought.

In the Portugal Telecom case, where almost two million consumers were affected, the compensation took the form of free phone calls on week-ends over a limited period of time.

In the Italian insurance services cartel case, where insurance services were organised as a cartel for five years and insurance premiums doubled over this period, insurance companies were fined €350 million of which not a single cent was returned to consumers.

Similarly, in the French mobile cartel case, the damage to the millions of consumers was calculated to be €1.2 billion but none were compensated.

Not Compensated

3 Allow for standing of consumer organisations

National authorities qualified to take up collective consumer redress cases, such as the Consumer Ombudsman in Denmark, or the Belgian Ministry of Economic Affairs, do not necessarily have the possibility or are not always willing to tackle a specific consumer issue. Therefore, consumer organisations have an important role to play in this field and must be entitled to initiate a Group Action procedure to protect consumers' interests – irrespective of whether national authorities are competent or not.

Example

Telecom added value services

After the failure of existing alternative dispute resolution schemes and the intervention of the Italian Communications Authority, Altroconsumo, our Italian member, is considering taking an action against telecom operators regarding added value services and dialing problems which have considerably increased consumers' bills in recent years.

In addition, consumer organisations are used to dealing with lawyers, litigation and legal jargon. They help consumers by translating a lot of «legalese» into consumer friendly wording. As they do not have a financial interest in the outcome of a Group Action, they will also ensure that costs will be kept under control.





4 Cover both national and cross border cases

A Group Action mechanism should cover both national situations and cross border cases where victims of the same rogue trader are scattered throughout several EU Member States. Currently, some EU consumers can benefit from more efficient redress mechanisms than others. In cross border cases, only a European Group Action would finally place all EU citizens on an equal footing by allowing consumers from different European countries who have suffered the same damage to join together to seek redress. A Group Action at European level is necessary to avoid having different outcomes in different countries for the same damage.

Example

Two countries - different outcomes

The Academia Opening, an English school for foreigners, had a system that required full payment in advance for upcoming lessons. More than half of the students (more than 42,000 Spanish and Portuguese students) turned to a credit provider approved by the school to finance their lessons. One day, without warning the school closed but consumers were required by the credit provider to pay for the entirety of the credit.

In Spain: Our Spanish member, OCU, brought a Group Action against Academia Opening and four credit providers on behalf of the consumers affected. The court decision fully recognised the complaints, including the refund of the important sums paid by the victims since August 2003 (with interest). In total 50,000 € plus interest had to be refunded to the consumers that OCU defended.

In Portugal: DECO, our Portuguese member, succeeded in first instance but the case is now pending before the Court of Appeal. Portuguese consumers are still waiting for a favorable outcome to be confirmed.

If a European Group Action instrument had existed, Spanish and Portuguese victims would have been treated equally.

Currently, in the Member States where a Group Action does not exist or where its scope is limited, court decisions can vary significantly. A Group Action at national level is thus equally crucial to limit possible inconsistencies between court decisions. This would also reduce overloading of courts and ensure more legal certainty.

Example

One country - different outcomes

In the Lloyds Bank case, in the UK, consumers filed over 50,000 individual complaints to claim back unfair charges levied by the banks. Cases were decided on different grounds and had different outcomes. A Group Action would have ensured legal certainty and permitted judicial economy.

5 Give the court discretion over the admissibility of the claim

The court has a crucial role to play in deciding on the admissibility of the claim and throughout the procedure to ensure the effectiveness of the action.

Clear criteria have to be defined to determine if a claim is admissible or not.

The court could consider whether:

- the Group Action procedure is the most appropriate redress option (e.g. more efficient in terms of costs compared to individual claims),
- it is based on sufficiently similar facts, and
- there are two or more victims

However, the court must have a broad discretion in applying those criteria to avoid spurious or vexatious litigation and, more generally, in assessing whether a claim is admissible and appropriate. Court control mechanisms and proportionality requirements would protect defendants against abuses of the system. Indeed a broad control of the court over the procedure would balance the interests of the plaintiffs and the interests of the defendant.

Effective control by the court is the best way to filter and manage the handling of cases and their costs.

Group Action does not mean «US-style class action»

Collective redress mechanisms have been in place for a long time in the North American legal systems, under the denomination of «class actions». They have brought major progress in offering an important number of victims increased access to justice. Unfortunately, the «class action» system has, in some countries, suffered abuses and excesses that are constantly brought forward by those who oppose the introduction of a European system of Group Action.

We do not support any system characterised by the excesses depicted in so much legal literature. Many measures can be put in place in order to prevent them, not least thanks to the European traditions in procedural rules. This is also why we believe that courts should be entrusted with wide control powers over the procedures brought before them.



6 Foresee both opt-out and opt-in procedures

In the «opt-in» procedure, consumers have to come forward and declare that they intend to join the organised procedure.

In «opt-out», all consumers affected are automatically regarded as belonging to the group, unless they explicitly declare that they do not want to participate.

In order for the European Group Action to be attractive, efficient and manageable, it should allow both for an opt-out and an opt-in procedure. It should be up to the court to decide, on the basis of objective criteria, which approach is best suited for each case. Such criteria could be for example the nature of the claim, its value, and the number of potential victims.

In general the opt-out system may offer a better protection to consumers especially when consumers are unaware that their rights have been infringed. This is also the case when the costs of a legal action are higher than the compensation the consumer would get. This approach is also easier to manage.

Recent experience in Europe of the opt-in procedure in consumer claims showed that the rate of participation is very low (less than 1%). On the contrary, under opt-out regimes, rates are typically very high (97% in the Netherlands and almost 100% in Portugal)².

It is claimed that opt-out may sometimes be more difficult to combine with the freedom to take legal action. Yet, it does not necessarily limit the plaintiff's freedom since people are able to withdraw from the group. In any case, this freedom has to be balanced against the need to ensure that all those affected can achieve access to justice.

In certain limited cases, an opt-in procedure might however be the best way forward for example when the damage is of high value or limited to a very restricted number of plaintiffs and caused by the same local trader.

² Professor Rachael Mulheron, study on «the reform of the collective redress in England and Wales: a perspective of need», Civil Justice Council of England and Wales, 2008.

7 Be accompanied by information measures directed at consumers

The aim of a Group Action is to allow a large number of consumers to obtain redress. This objective can only be achieved if they know that such action is taking place and then take the necessary steps to include or exclude themselves from the group.

In the opt-out case, the consumer who may want to exclude himself from the group, in order to bring an individual action or because he does not want to claim compensation, needs to know that such action has been initiated.

In an opt-in scenario, the consumers who have been affected by the illegal practices need to know that such an action is taking place to join the case if so they wish.

Whether the procedure is opt-out or opt-in, it is crucial that appropriate measures are taken to inform consumers, through the media, of such a procedure.



Mobile cartel case

In France, despite a clear judgement against a mobile phone operators' cartel, UFC-Que Choisir was not allowed to advertise the decision of the competition authority and to call for consumers affected by the cartel to join an action to obtain compensation. Consequently only a very small number of consumers have come forward out of the millions of subscribers affected.





8 Control out-of-court settlement

The use of out-of-court settlement or Alternative Dispute Resolution (ADR) schemes should be allowed before or in parallel to the formal introduction of the complaint; it would leave the possibility in case of failure of the ADR, to resume the Group Action mechanism.

As consumers are the weakest party, the outcome of any collective out of court settlement must be approved by the court to ensure the fairness of the reached agreement. This approval would protect both the defendant and the plaintiff, in ratifying and making official a private contract as it would allow both parties to seek redress in case of non-appliance.

Example

The situation in the Netherlands

Consumer organisations can negotiate, on behalf of victims, a settlement with the professional responsible for the damages. However, there is no obligation for the party that caused the damage to enter into such negotiations and agreement with the professional needs to be reached first before going to court – which renders consumer organisations totally dependent on the willingness of the business to cooperate and reach a settlement to obtain damages.

9 Allow compensation to be distributed fairly

In an opt-out procedure, a public authority or otherwise designated organisation must be in charge of redistributing the compensation according to individual damage in a fair manner.

In the Telecom Portugal case, almost two million consumers were affected. The compensation took the form of free phone calls on week-ends over a limited period of time.

Example

In cases where not all the compensation can be allocated, the court may order that the surplus is given to a non-profit organisation whose work indirectly benefits the group members and the public interest. In an opt-in procedure, individuals would be directly reimbursed according to their individual damage.

Example

In the UK, in the JJB case, consumers could go back to any JJB shop with the receipts to get reimbursed (£10 or £20 per shirt).

10 Foresee efficient funding mechanisms

The main obstacle for the introduction of a Group Action will be its funding. If the redress mechanism implies high and disproportionate costs for consumers or their representative(s), it will lose its effectiveness.

Several cumulative solutions can be envisaged:

- **The creation of a «Group Action fund»**

For instance, it could be decided that a certain percentage of all damages awarded in the context of consumer Group Actions or of the fines imposed by public authorities in certain areas such as consumer laws feed the fund - be it at European and/or national level. This fund could then be used to finance Group Actions.

- **Insurance to cover the costs of the proceedings**

In order to be able to finance a case, a third party financing system could be envisaged. For instance, an insurance company could insure the risks borne by plaintiffs of taking an action to court. In Austria, our member VKI often uses a company specialising in financing court case to finance their litigations.

- **Reduction/suppression of court fees except when the case is lost**

The plaintiff could be exempted from court costs unless he loses the procedure completely. He would then be condemned to pay a reduced court fee that could vary between 1/10 to half of regular court fees. This is the current situation in Portugal.





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