TOWARDS A COHERENT EUROPEAN APPROACH TO COLLECTIVE REDRESS

European Commission Consultation

The European Consumers' Organisation (BEUC)'s response

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Summary

BEUC regrets that despite numerous previous consultations and studies identifying significant gaps in the existing regulatory framework, no concrete measures have yet been taken at European level to ensure consumers have real **access to justice** in mass detriment situations.

Why we think an EU action is necessary:

- Within the Internal Market, non-compliance with legal rules can easily **affect a very high number of European consumers**;
- Without redress mechanisms, despite the best EU consumer legislation, **consumers remain unable to enforce their rights efficiently.** It also results in a lack of **appropriate deterrent** for suppliers from engagement in unlawful practices;
- The integration of European markets and the consequent increase in **cross-border activities** highlight the need for EU-wide, consistent, redress mechanisms. There are numerous cross border mass detriment situations where consumers are left empty-handed due to the lack of an appropriate mechanism.

Public enforcement, injunction procedures or alternative dispute resolution (ADR) do not provide adequate answers in mass detriment situations:

Public enforcement of EU and national law do not, in themselves, enable consumers to be compensated for damage suffered. Even more importantly, public enforcement serves a different objective than private redress. The two are complementary, but independent processes - thus **private compensatory collective redress should never be subsidiary to enforcement by public bodies.**

Similarly with injunctive actions, an end can be put to a fraudulent practice, but consumers are not compensated for the harm suffered.

Early settlement of disputes should be encouraged where possible, and the courts should be viewed as a last resort. However, consensual dispute resolution, without the possibility to use a judicial collective redress procedure, has proven to be **insufficient** in providing adequate incentive for businesses to participate and to reach a fair settlement. Parties to a dispute should remain free to take recourse to alternative means of dispute resolution before or in parallel to the formal introduction of the complaint, but there must always be the 'back-up' of judicial collective redress.

BEUC's key demand is for a **binding instrument at Community level** establishing the main principles which a judicial group action mechanism must respect. These features should also serve as safeguards against the risk of abuses.

BEUC has developed concrete proposals which have already been submitted to the European Commission. In particular, **these principles should include the following**:

- Have a wide scope
- Aim at obtaining compensation
- Allow for the standing of consumer organisations
- Cover both national and cross-border cases
- Give the court discretion over the admissibility of a claim
- Cover identified, identifiable or non-identifiable consumers.
- Be accompanied by information measures directed at consumers
- Control of out-of-court settlement
- Allow for compensation to be distributed fairly
- Foresee efficient funding mechanisms

The issue of funding is crucial; without appropriate funding, no collective redress mechanism will work in practice.

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Collective redress: back to the beginning?

BEUC regrets that the European Commission, despite its longstanding awareness of the existing problems consumers and consumer organisations face in mass detriment situations (as confirmed by the findings of the Civic Consulting studies[1]) and despite recognising the performance of existing EU enforcement tools in such situations to be unsatisfactory[2], has not yet taken any concrete measure, but rather chosen to engage again in a consultation.

We believe that numerous previous consultations have allowed for the identification of the relevant gaps in the existing regulatory framework, thus providing adequate evidence of the need for an EU action in the field of collective redress.

The pressing need for an EU framework

Collective redress covers a specific situation where the (same) illegal behaviour (fraudulent or not) of a trader harms several individuals. Those individuals should be able to gather their claims in order to seek from the trader compensation of the damage they have suffered as individuals.

Judicial collective redress for consumers currently operates nationally only in 14 Member States. Even where it is available, the models and effectiveness of the mechanisms vary significantly. They also do not provide for cross-border solutions. This leads to a significant **discrimination in access to justice,** to the detriment of consumers. Cross-border redress is currently hard to implement and consumer confidence in the internal market is placed in doubt.

Lack of compensation for harm suffered is a major loophole in a legal system and allows for illegal profit to be retained by business. In the EU, in anti-trust scenarios alone, unrecovered damages are estimated to surpass €20 billion each year[3]. Aside from these figures, the current situation is not only unacceptable from the point of view of direct victims, but also imposes unequal market conditions on those businesses who abide by the rules. Furthermore, it means that there is no appropriate deterrent from engaging in unlawful practices. Therefore, the introduction of collective redress for mass damages in the EU would help not only consumers, but business also.

We agree that early settlement of disputes should be encouraged where possible, and the courts should be viewed as a last resort. It is not the intention of consumer associations to foster litigation or flood the courts with cases, neither such fears are supported by the evidence from those European countries where collective redress is in place. However, judicial collective redress must be available to level the unequal playing field between consumers and businesses and to ensure that consumers have a complete range of options for redress.

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1 Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union, Study by Civic Consulting and Study regarding the problems faced by consumers in obtaining redress for infringements of consumer protection legislation, and the economic consequences of such problems, Submitted by Civic Consulting of the Consumer Policy Evaluation Consortium (CPEC).

2 Commission Green Paper on Consumer Collective Redress, COM(2008) 794 final.

3 http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/554&format=HTML&aged=0&language=EN&guiLanguage=en

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BEUC's key demand is for a **binding instrument at Community level**, as outlined in our responses to previous consultations[4]. A collective redress mechanism should be available to every European consumer, for both national and cross border cases, irrespective of the value of the claim. We are convinced that a European initiative establishing the key features which a judicial group action mechanism must respect is the way forward and the most efficient tool to improve the functioning of the market in favour of both consumers and law-abiding traders.

I. The added value of the EU compensatory redress mechanism

Q 1 What added value would the introduction of new mechanisms of collective redress (injunctive and/or compensatory) have for the enforcement of 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, 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?

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

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?

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 level?

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?

For BEUC, it is clear that the EU should adopt legislative measures in the field of collective redress for the following reasons:

- In our mass production and mass consumption society characterised by the harmonisation of standards, it is possible for sellers to have access to a huge market (500 million consumers in the EU internal market alone, and many industries produce for global markets, not only EU). Within such a market, non-compliance with legal rules can easily **affect a high or potentially massive number of European consumers**. The collectivisation of damages justifies the collectivisation of redress claims.

[4] BEUC position paper X/049/2007 "Private Group Actions: taking Europe Forward", BEUC response to the White Paper 'Damages Actions for Breach of EC Antitrust Rules' X/047/2008, BEUC position paper X/016/2009 'Group Action: The Missing Tool', BEUC response to DG SANCO consultation paper 'Consumer Collective Redress: Time for Action' X/049/2009, all available at: www.beuc.eu

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- The integration of European markets and the consequent increase in **cross-border activities**, highlight the need for consistent, EU-wide redress mechanisms[5]. There are numerous cross-border mass detriment situations where consumers are left empty handed due to the lack of an appropriate mechanism.

Just a few examples illustrating the mass nature of some claims, as well as the cross-border elements they contain:

- In Austria, Germany, Slovakia and other Member States, a huge number of websites 'trap' consumers by either sending payments orders despite the fact that the consumer had never visited the website, or by offering 'free' services when in fact consumers conclude contracts with payment obligations. Consumer associations and public authorities try to fight these websites, but as most of the companies are domiciled in other Member States, the law cannot be enforced and consumers are not compensated.
- In Belgium, various increases in 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 can be spread to millions of consumers. An element of policyholders, while having contracted under Belgian law, may be established outside Belgium. A group action would allow for the aggregation of the legal actions of large numbers of affected consumers.
- Following Mattel toys recall in 2007 due to potential hazards of parts of the toys coloured using lead-based paint (which was highly toxic), a mass claims settlement was reached in the US, but no collective actions were launched in the EU on behalf of victims;
- 300,000 women were implanted with defective breast implants made by the same French laboratory. The implants were not only defective, which resulted in the need for subsequent operations to remedy, but were also harmful for the health. In France, there were around 30,000 victims of this malpractice, with others in other countries. Unfortunately, in the absence of a collective redress instrument, no action on behalf of victims has been taken against the company.
- In beer cartels in Belgium, The Netherlands, France and Luxembourg – the companies were fined, but there were no collective cases seeking compensation for consumers.
- In the 2011 laundry detergents cartel case involving 8 European countries – the companies had a fine imposed by the European Commission, but no collective case of compensation.
- 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). However, no actions for compensation were initiated.

[5] The study made by our Austrian member organisation VKI revealed that amongst 30 selected collective redress cases, 18 had a cross-border element.

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- More and more consumer protection rules are decided at European level, therefore minimum/basic rules on redress mechanisms should also be adopted at European level. Without redress mechanisms, even the best EU consumer legislation cannot be implemented and enforced efficiently. When EU legislation was only embryonic, the question of redress mechanisms could be left to national law. However, this is no longer the case. **The development of substantive law should go hand in hand with the development of redress tools for its effective enforcement.**

  Furthermore, the example of both the Small Claims regulation and the Injunctions and Mediation directives[6] show that the EU has the competence to act on procedural rules. Notably, IPR Enforcement Directive[7] harmonises the measures and remedies necessary to ensure the enforcement of intellectual property rights, both in cross-border and a national context. Also, the ongoing work in the Commission on Alternative Dispute Resolution (ADR)[8] does not seem to be limited to cross-border disputes.

- European consumers suffering from damage caused by the same trader should be able to coordinate their claims effectively and efficiently into one single action in all European Member States. Today, some European consumers are unable to obtain compensation while others residing in another Member State are - thus creating inequalities of treatment. **Collective redress mechanisms are being developed differently across the EU** and, as a result, consumers are being treated differently according to their place of residence. It is also worth noting that in some Member States the legislators await for the EU action on collective redress, thus national measures are not introduced. Therefore, European measures setting minimum requirements for a collective redress judicial mechanism should be put in place. The minimum requirements will ensure that collective redress within the EU is based on the same features, at the same time allowing Member States to best integrate them into the national laws**.**

- In addition to the direct benefit for consumers, law-abiding businesses and the courts, the introduction of European collective compensatory redress would result in a **preventive effect** against infringements, as the existence of a judicial redress mechanism is an incentive for businesses to comply with the law.

Fundamental right, demanded by consumers

The right to compensation and the right to access to justice (recognised at EU level[9]) should not remain theoretical. In practice, many consumers are unable to exercise these rights due to the inadequacy of existing means of redress in mass claim situations. The right to act collectively should be recognised at EU level.

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6 Regulation (EC) No 861/2007 of 11 July 2007 establishing a European Small Claims Procedure, Directive 98/27/EC of 19 May 1998 on injunctions for the protection of consumers' interests, Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters.

7 Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights.

8 Legislative proposal foreseen for 4th quarter of 2011, Commission work programme 2011.

9 Article 6 of the European Convention on Human Rights available at: http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf

Furthermore, it has been established that **a blatant majority of consumers** (an EU average of 79%, rising to 90% in Ireland) would be more willing to defend their rights in court if they could join a collective action[10].

The surveys carried out by our members[11] also confirm that the consumers strongly prefer collective actions in mass claim situations. When asked how likely they would join a group action with other persons affected by the same business behaviour, 96% said they would certainly or likely join such action.

In some Member States, petitions have been organised to show the support of citizens for the introduction of collective redress. For example, in 2008 our Belgian member organisation Test-Achats gathered more than 41,000 signatures in two months[12]. In the autumn of 2009, two French consumer organisations – UFC Que Choisir and CLCV sent a letter to President Barroso in favour of introducing an effective European collective redress instrument which was co-signed by 33,000 individuals[13].

Experiences in Member States with effective collective redress mechanisms, also demonstrate that consumers make use of it. For example, our Spanish member OCU has so far taken 35 actions of different natures, of which 20 implied the adherence of members. The total number of members in this kind of action exceeded 47,000.

An EU legislative initiative on collective redress is necessary to set the minimum features and safeguards of a collective redress mechanism and to ensure its availability in all Member States for both national and cross-border cases. BEUC acknowledges the fact that our demand for an EU initiative on collective redress has been backed up and substantiated by the results of the studies commissioned by DG SANCO. According to the latter, "consumers in Member States, which do not have collective redress mechanisms in place, are likely to suffer a detriment as a result of the unavailability of such mechanisms"[14].

It must be underlined that the European Parliament IMCO report 'On a Single Market for Europeans'[15] calls on the Commission to consider the case for minimum standards in relation to the right to compensation for damage resulting from a breach of EU law more generally, not only in relation to infringements of competition law. An EU mechanism for collective redress is also among the key recommendations in Mario Monti's landmark report on the Single Market[16].

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10 In all EU Member States (with the exception of Hungary), a majority of respondents agreed that they would be more willing to defend their rights in court if they could join with other consumers who were complaining about the same thing, Flash Eurobarometer 299 'Consumer attitudes towards cross-border trade and consumer protection', March 2011.

11 Collective redress online surveys, totalling more than 6000 responses were carried out by 12 BEUC members between March 15 and April 15 2011.

12 Press release of Test-Achats of 1/07/2008;

13 CLCV and UFC Que Choisir letter to President Barroso of 6/10/2009 with 33,000 signatures.

14 Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union, Study by Civic Consulting, Part I, page 16.

15 IMCO report (2010/2278(INI)) of 24.3.2011.

16 A new strategy for the Single Market, Report to the President of the European Commission José Manuel Barroso, 9 May 2010.

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BEUC would like to reiterate its previous position that **existing individual redress mechanisms are unsuitable for mass consumer claims**. This position is fully reflected by the European Commission's own assessment in the previous consultation paper, when defining the lack of efficiency of the current legal framework[17].

Relationship with public enforcement

With regards the strengthening of public enforcement instead of providing for judicial collective redress available to private organisations, it must be underlined that public enforcement by way of ceasing infringements and imposing fines, does not in itself enable consumers to be compensated for damage suffered[18]. In addition, even where they would have adequate powers, public authorities often have limited resources or do not necessarily see it as their priority to engage into ordering compensation for individual consumers.

Even more importantly, public enforcement serves a different objective than private redress. Therefore **private compensatory collective redress should never be subsidiary to enforcement by public bodies** – the two are complementary, but independent, processes.

While the national public authorities sanction traders by way of fines, consumers are on their own to obtain redress for individual harm. A study in **the Netherlands** shows around half a billion Euros are lost per year as a result of unfair commercial practices[19]. Also due to the shortcomings and limitations of the Dutch system in the area of collective redress, consumers rarely receive compensation in these matters in practice.

It has to be taken into account that in some countries (e.g. Germany) there is traditionally mainly private enforcement (undertaken for example by consumer organisations like VZBV) and not much public enforcement of consumer protection, so again it would not be possible to rely on public enforcement to help consumers obtain redress.

Therefore, compensatory collective redress should always be available to private representative organisations, notwithstanding whether public authorities are also entitled to claim compensation on behalf of consumers or not.

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17 Commission Green Paper on Consumer Collective Redress, COM(2008) 794 final.

18 One of many examples: all three Greek mobile companies increased the minimum chargeable time from 30 seconds to 45 seconds at the same time. Our Greek member KEPKA has notified Hellenic Telecommunications and Post Commission, who after the investigation imposed fines on the companies for not informing consumers properly prior to the increase. However, consumers were not compensated.

19 http://www.consumerauthority.nl/news/2008/consumer-authority-over-half-billion-euros-lost-result-unfair-commercial-practices

Injunctions

BEUC draws the attention to the number of injunctive actions brought by consumer organisations. By way of injunctive actions, consumer organisations act in court to put an end to fraudulent practices. However, in countries where there is no collective redress, or in cross border situations, consumers have to act individually to obtain compensation. In most cases they will not do that and remain empty-handed, once again **demonstrating the need of collective compensatory redress**. This problem could not be solved by extending the scope of existing EU rules on collective injunctive relief to other areas.

In 2000, our **German member VZBV** brought an injunction against a couple of tour operators on the basis of the legislation on unfair contract terms. In particular, the tour operators asked consumers who had booked a trip to pay an additional price due to the increase in fuel costs. Such terms, giving the tour operator the possibility to unilaterally impose additional costs, was recognised as unfair by the judge. However, despite the successful injunction claim, consumers could not get reimbursed automatically, but rather had to engage in individual litigation to enforce their rights.

In May 2009, 3 consumer organisations from different Member States (**Test-Achats – Belgium, DECO – Portugal and UFC Que Choisir- France**) launched coordinated injunctions claims against major airlines companies for breach of unfair contract terms legislation. Should the courts consider these terms unfair, collective redress should be available to consumers in order to get compensation for the detriment they have suffered as a result of the use of unfair terms in contracts. So far the judgements have only been rendered in Belgium[20].

VKI, our **Austrian member**, brings injunctions claims with the aim of clarifying the fairness of the term or practice. Once the claim for injunctive relief is successful, VKI collects claimants to bring a group action for compensation. For an illustration of such proceedings, the *Zinsenstreit* cases where unfair interest rates were applied to contractors of credit loans can be mentioned.

Legally binding approach

The adoption of a non-binding instrument will not address the problems related to the divergence of current national systems, as its effectiveness will depend on voluntary compliance by Member States. It will also insufficiently tackle the uncertainties regarding cross-border collective redress, as qualified entities will not be able to rely that the procedure in different Member States is based on the same features.

[20] In its decisions of 10 March 2010 and 29 September 2010, the Commercial Court of Namur ordered Brussels Airlines, Ryanair and EasyJet to stop applying a substantive number of clauses in their general terms and conditions.

Scope of an EU action

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?

Compensatory collective redress should have to cover all sectors where mass damage due to breaches of EU law is possible and not only be limited to the areas of consumer law or competition. For example, this would allow for cases of loss of personal data or breaches of data protection, damage to all kinds of financial services users, environmental damage, breaches of employment rights or cases of discrimination to be tackled via collective claims.

II. General principles

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?
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 EU legal tradition and the legal orders of the 27 Member States?

BEUC welcomes the definition of common horizontal principles which should apply to any initiative on collective redress. Already in 2008, the European Commission sought to consult stakeholders on the definition of benchmarks for collective redress. Most of the principles identified by the Commission in the current consultation are the same as three years ago - despite a significant number of studies and public consultations.

There is a need for the EU to define the main features of an EU-specific legal instrument of collective redress in line with the legal traditions of EU Member States. These features should also serve as safeguards against the risks of abuses which have been witnessed in third countries which, however, have diametrically different legal systems than the EU.

Member States shall make sure their collective redress schemes comply with the features established at EU level. However, they should remain free to decide the exact way on how to transpose these requirements to their national legal system. Therefore, the impact on national procedural rules will remain limited.

BEUC has developed concrete proposals which have already been submitted to the European Commission[21]. In particular, these principles should include the following:

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;

[21] BEUC position paper X/016/2009 'Group Action: The Missing Tool' and 'BEUC 10 Golden Rules for a European Group Action' both available at www.beuc.eu

5. give the court discretion in the admissibility of claims;
6. cover identified, identifiable or non-identifiable consumers;
7. be accompanied by information measures directed at consumers;
8. control out-of-court settlements;
9. allow for compensation to be distributed fairly;
10. foresee efficient funding mechanisms.

We consider all of the above principles to be essential in the establishment of an efficient system for collective redress. It is thus difficult to categorise them in terms of importance. On the contrary, their consideration needs to be made with reference to the experience from those EU Member States with a system already in place. To our knowledge, the most effective systems in Europe have been built on these principles as will be discussed below.

Additionally, European action should provide for specific rules for actions for damages for breaches of competition law, in particular with regard to the binding nature of administrative decisions taken by competition authorities, calculation of damages, access to evidence etc[22].

The definition of common principles **should not further delay the adoption of specific legislative initiatives**, be they in the field of competition or consumer protection. At a moment when EU Member States are in the process of considering the adoption of rules on collective redress, the need for common principles to apply at EU level is more necessary than ever. It is only by laying down a number of fundamental principles in a Community instrument that the principle of equal treatment of victims of illegal behaviour will become effective, irrespective of where the damage claim is brought and which national law is applicable.

Experience in Member States

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?
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 EU/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?

BEUC has always stressed the need for the EU debate on collective redress to focus on developing an EU system on the basis of Europe's legal tradition and the experiences from EU Member States. Instead of referring to the problems of the US class action system (due to different legal system and particularities of the procedure); it is high time that EU decision makers learn from the European successes and failures.

[22] Please see BEUC's reply to the Commission's White Paper on damages actions for the breach of antitrust rules (X/047/2008), available at www.beuc.eu

Among those EU Member States with a system in place, **Portugal** is the country with a fully judicial collective action system that encompasses all of the main features identified above. This mechanism works efficiently because of reduced formality requirements, wide cause of actions and reduced costs for consumer organisations in bringing such claims. The procedure allows for compensation for damages, but not punitive damages. Portuguese consumers have benefited from this legislation for 14 years and there have not been any cases of misuse or fraudulent use of the procedure. This assessment is confirmed by the European Commission's own analysis[23].

It is equally important to learn from the deficiencies of less efficient national systems. For instance, the requirement of a mandate by each individual victim for the launch of an "action en représentation conjointe" in **France** has proven both complex and time consuming. Similarly, the collective mechanisms in **England and Wales, because of the procedural barriers to start litigation and the need to opt-in,** do not provide sufficient or effective access to justice for a wide range of citizens particularly, but not exclusively, consumers, small businesses, employees wishing to bring collective or multi-party claims, while there is considerable evidence that meritorious claims, which could be brought, are currently not being pursued[24].

Lastly, the limits of out of court settlements have been demonstrated in **The Netherlands.** The mechanism established by the act on collective settlement of mass damages has only been employed five times since its enactment in 2005. What is lacking is a judicial collective action for compensation. As a result, consumers, and their representatives, are totally dependant on the other party's willingness to settle and the act does not provide enough incentive for the latter to reach a settlement.

In order to overcome the difficulties and the problems above, the development of a system complying with these listed features is essential. For instance, **the possibility for a representative body, including consumer associations, to launch a collective action on behalf of all identified, identifiable and non-identifiable victims (opt-out), without the requirement of an official mandate from each one of them, is necessary.** It would increase the representativeness of the action and would allow to the largest number of victims to seek compensation. Any concerns regarding the compliance of such a procedure with the individual right of access to justice are only theoretical, since the opt-out would only concern the launch of the action and not the receipt of the compensation, where the victims would in most cases have to opt-in.

Moreover, an opt-in action is extremely costly in terms of the administrative burden which involves the management of the files which consumer organisations need to build and keep for each member of the action.[25] This prevents consumer organisations from taking even very well-grounded cases.

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[23] Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union, Study by Civic Consulting.

[24] Civil Justice Council paper on the UK : http://www.civiljusticecouncil.gov.uk/files/Improving_Access_to_Justice_through_Collective_Actions.pdf

[25] For example, in the FORUM-AFINSA cases, our Spanish member OCU had to hire 9 full-time members of administrative staff just to collect all the necessary information, record and store all the documents, do the follow up with consumers.

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Similarly, the limits of the Dutch system would be overcome by allowing for the possibility of court action upon failure of achieving an out of court settlement deal. For further details regarding the relationship between out of court and court mechanisms, see part III.2. below.

III. The need for effective and efficient redress

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?
Q 12 How can effective redress be obtained, while avoiding lengthy and costly litigation?
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?
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?

The efficient and effective system of collective redress should be based on the principles outlined above in part II. While transposing these principles into national laws, a balance must be struck between the rights of both parties on one hand, and not making the system too complex and overburdened with procedural requirements on the other.

1. Information to consumers and cooperation of representative bodies

Information for victims about collective actions plays a major role in the effectiveness of the procedure. On one hand, in order to effectively opt-out or opt-in to the procedure, consumers need to be aware that they have been the victims of the same illegal practice and that there is a collective action launched or to be launched. On the other hand, such information should not amount to the unethical 'advertisements' of actions.

With the view to that and in order to avoid any potential abuses, the **judge should assess if everything reasonable has been done to notify potential victims of a case.** Normally the procedure could already foresee the direct notification of interested persons that are known to the parties (and it would be up to the court to confirm that the means chosen by parties are appropriate), as well as for public notification, e.g. through news reporting or announcements in newspapers, of potential victims that are unknown to the parties.

For example, in the **Shell** case (The Netherlands), the majority of victims were not known to the parties, as they were holding bearer shares or were holding shares through nominee accounts. Moreover, the majority of known shareholders were not domiciled in The Netherlands. All in all, more than 110,000 notices in 22 different languages were sent out to victims located in 105 different countries. In addition, a notice was published in 44 different newspapers worldwide. The court scrutinised whether this notification process was carried out in accordance with all applicable national and international rules and decided that it passed the test[26].

Otherwise, the victims could also be informed via the internet. For example, our member organisation Altroconsumo (Italy) has at the moment more than 10,000 consumers signed up via Altroconsumo's website for the collective action against a radio and TV broadcaster[27].

In addition, in order to facilitate cooperation between the entities qualified to take actions, especially in cross-border cases, an EU-wide register of launched and ongoing cases could be established. This register could then be consulted by the qualified entities wanting to launch a concrete action, in order to see if a similar action is being launched in another Member State. The up-to-date list of entities qualified to take action could also be helpful in order to foster cooperation among them.

Naturally, with regards to representative entities, they should be granted cross-border standing in collective redress cases, meaning that a representative entity should be both able to represent the victims of other Member States in its Member State, and represent victims in proceedings in another Member State.

2. Collective ADR

Q 15 Apart from a judicial mechanism, which other incentives would be necessary to promote recourse to ADR in situations of multiple claims?
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?
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?
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?
Q 19 Are there any other issues with regard to collective consensual dispute resolution that need to be ensured for effective access to justice?

[26] De Brauw Blackstone Westbroek N.V., International Class Action Settlements in the Netherlands after the Morrison and Ahold Decisions, para 22.
[27] http://www.altroconsumo.it/radio-tv/class-action-contro-la-rai-violazione-del-contratto-di-servizio-pubblico-s294873.htm

As one of the crucial principles, parties to a dispute should remain free to recourse to alternative means of dispute resolution before or in parallel to the formal introduction of the complaint. **However, the only really effective incentive for business to respond to ADR seriously and in good faith is the ultimate threat of a collective redress action.** Alternative dispute resolution alone is not an answer in mass detriment situations. ADR is designed to give individual consumers a quick, cheap and simple alternative to settle their disputes. Procedures are and can be less formal, because of the relatively small interests at stake, which is not the case in collective actions.

Limitations of ADR regarding collective claims

We urge the Commission to take account of the specific nature of collective claims - possibly very large numbers of consumers, complicated evaluation of the case, aggregate assessment of damages and the high total value of claim, etc.

Most ADR bodies cannot be expected to have the capacity to provide proceedings for mass claims, as is illustrated by the fact that currently there are very few schemes doing this[28]. Also, even where it exists, collective ADR has serious limitations – the procedure is available only in respect of companies who are located in the same country[29] and only up to certain limit of the value of the claim, there is no way to order interim/provisional measures (e.g. block the company's assets)[30].

Therefore, for multiple claim situations, ADRs could be part of the 'consumer toolkit', but never the only mechanism available. For the same reasons it should not be mandatory to engage in ADR before launching court procedures.

It is important to note that the study launched by the Commission also comes to the conclusion that judicial collective redress mechanisms have an added value to consumers' access to justice in all Member States where they exist, even in those where individual litigation and ADR is easily accessible.[31] This is further demonstrated by the fact that all Nordic countries have introduced judicial collective redress procedures despite the very successful ADR regimes for consumer complaints.

If collective, consensual, dispute resolution would be made mandatory as a first step before engaging into a collective judicial action (to which in principle we object), it is important to ensure that this step is effective and does not allow for delaying tactics to make it more difficult to collect evidence which might be lost as time passes, discourage potential claimants from taking the action or make judicial action impossible where prescription periods expire. Therefore, it would be very important to establish certain safeguards, e.g.:

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28 Spanish Arbitration System, Swedish and Finnish Consumer Complaint Boards.

29 A collective arbitration procedure is organised in Spain since 2008 (Real Decreto 231/2008). The main problem relates to the fact that the competent authority is based in Madrid. For small or medium consumers associations not established in Madrid or near Madrid access to this ADR body means a high cost (i.e. transport, employing temporally solicitors/procurators there…etc). Furthermore, arbitration is only possible when the dispute affects Spanish professionals. It cannot be used when the professional or company is registered in another EU country.

30 Our Portuguese member DECO was faced with a situation in which the defendant used the time of negotiations to "disappear". Even though DECO won the procedure, there were no assets left for the consumers when DECO seized the court.

31 Study on the Evaluation of the effectiveness and efficiency of CR mechanisms in the European Union, p.99.

- if a settlement cannot be reached in a certain timeframe, parties can start a judicial action;
- before or during the negotiations parties can go to court to ask for interim measures to be applied; and
- prescription periods do not run for the period where the ADR is used.

Also, any collective out of court settlement reached within ADR procedures **must be approved by the court** to ensure its fairness.

Regarding the binding nature of the outcome of a collective, consensual, dispute resolution, as we mention above, the decision issued in an ADR procedure should be always approved by the court before being enforced due to the plurality of individual interests expressed in the complaint. This would solve the question of whether the decision should be binding on the trader or on all the parties involved since the settlement would be made enforceable by court.

3. Strong safeguards against abusive litigation

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

BEUC regrets the fact that fears of abuse of collective redress mechanisms have been overstated by businesses. Experience from those EU Member States where such redress mechanisms are already in place, proves that there **has been no abuse** or liquidation of businesses[32]. For instance, our Portuguese member, DECO has brought several group action claims since the enactment of the legislation, all of which were deemed admissible by the judge.

[32] Study on the Evaluation of the effectiveness and efficiency of CR mechanisms in the European Union, p.78.

As the Commission points out in its consultation paper[33], the US 'class actions' system contains strong economic incentives for parties to bring a case to court. According to the evaluation by the Commission, these incentives are the result of a combination of several factors, which include the availability of punitive damages, the possibility of contingency fees and the discovery procedure.

It has to be underlined that those features, which are particular to the American legal system, are either not to be found in Europe or can be tackled in a future European mechanism by introducing appropriate safeguards.

Overall, we believe that the legal traditions in the EU, combined with appropriate safeguards would prevent abuses and allow for the respect of legitimate interests of both parties.

3.1. The role of the court

The court has a crucial role to play in deciding on the admissibility of the claim, representativeness of the claimant, appropriateness of opt-in or opt-out procedure, controlling the ways to inform consumers and throughout the procedure to ensure the effectiveness of the action. The judge should also determine how the compensation is to be organised and check if funding arrangements are fair.

As regards the admissibility, clear criteria have to be defined to determine if a claim is admissible or not. The court could consider whether:

- collective redress is an 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.

Naturally, the judge must have the final word 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 abuse of the system. Indeed, broad control by the court over the procedure would balance the interests of the plaintiffs and the interests of the defendant.

3.2. 'Loser pays' principle adapted to the specific nature of collective claims

The 'Loser pays' principle has been considered as one of the main safeguards against abuses. However, it can also act as a disincentive for instituting collective actions. Bearing in mind the public interest of collective actions which consumer organisations usually take, an adaptation of this principle could be justified. For instance, **Portugal** has a very effective and interesting system where the 'loser-pays' principle is not applied to consumer organisations.

[33] Public consultation: Towards a Coherent Approach to Collective Redress, SEC(2011)173 final, p.9.

Under the Consumers Rights Law, consumers who launch a 'popular action' are exempted from the preliminary costs of bringing a case. When the case is successful they do not pay the court fees, when it is lost they only pay 10% to 50% of these fees at the discretion of the judge (the plaintiff association might pay more only when the claim is considered abusive). In contrast, the defendant will have to pay the court fees whatever the issue of the case. This system is excellent to guarantee full access to justice for collective claims.

3.3 Standing of representative bodies

Without prejudice to the standing of other bodies, **consumer organisations can be considered a 'safety net'** in the system. Consumer organisations' experience with enforcement actions, their limited resources and their reputation towards the public will ensure that only meritorious claims are pursued. As experience has proven, consumer organisations will reflect seriously before dedicating resources to such litigation. This can be demonstrated by the high proportion of successful claims which consumer organisations win when taking traders to court[34].

What regards the **designation of the representative bodies** that are granted standing in collective actions, we believe these bodies might be certified by courts in a concrete case (on an *ad hoc* basis) or there might also be lists of bodies officially designated in advance according to the criteria laid down by Member States. It is important, however, that both options (ad hoc certification – open to everyone, and bodies designated in advance) are available in each Member State.

VI. Funding

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

In collective claims, several types of costs have to be borne. Some of these are inherent to collective actions, such as the preparatory costs for identifying the victims and gathering the claims (distribution of the information, collection and checking of claims, coordination) and others apply to all judicial redress mechanisms (collecting evidence, making copies, certification, legal, court and expert fees), but can be increased due to the specifics of collective actions (high number of victims, complexity of evaluating damages, proving the infringement).

[34] E.g. 95% of injunction cases brought by Austrian consumer organisation VKI are successful.

The total cost of this type of action varies widely from one country to another, as Member States are free to set the amount of their litigation fees. However, it may reach several tens of thousands of euro, even hundreds of thousands, particularly in countries where litigation fees are generally very high (e.g. the United Kingdom).

Therefore **the issue of funding is crucial**; without funding, no group action mechanism will work in practice. We want to emphasise that consumer associations are not seeking profit out of these actions and only ask for the reimbursement of their costs. We also want to draw attention to the fact that even when consumer organisations win the case, often they are not able to recover all the costs[35], so without appropriate funding only a very limited number of cases can be taken.

In order to make collective actions practically possible, Member States should ensure that adequate mechanisms for the funding of group action proceedings are made available. **Different solutions may be envisaged and where relevant combined**:

- provisions establishing a Group Fund to finance access to justice (and certain conditions on the use of it with the view of avoiding abusive litigation);
- adaptation of the 'loser pays' principle regarding court fees;
- provisions on lawyers' fees (cap on fees and/or control by the designated court[36]);
- provisions allowing for insurance to cover costs of proceedings;
- the possibility to recover administrative costs;
- provisions allowing the group representative to split the costs amongst group members, ask members of the group to join the organisation.

1. Group fund

An interesting funding option can be found in **Québec** where the law on collective redress provides for the creation of a special public fund to grant loans in order to finance collective actions. Loans from this fund are available on two conditions: the redress cannot be exercised otherwise and it relies on solid legal arguments (i.e. it is likely to succeed or at least is not unreasonable). Moreover, the beneficiary has to prove that the money will be used for the needs of collective redress. The loans can cover specific expenditures, such as lawyer fees, court fees, expert and advisers fees but also the defendant's litigation costs when the case is unsuccessful and any other useful costs related to the preparation or the handling of the case. The beneficiary will reimburse the loans only if the case is successful and only up to the received amount. Access to this fund is only available to a limited list of people/organisations namely physical persons, non-profit associations established under a certain provision of the Quebec company law, workers associations and cooperatives.

[35] The costs of calling in an external lawyer are often a big problem, even when consumer organisations win the case. E.g., in the Netherlands, only a small part of those costs has to be compensated by the losing party. In the Legionnaires disease case consumer organisation had to pay 300.000 € to the lawyer, but only recovered 3000 € back from the defendants.

[36] For example, in instances where contingency fees are allowed under national law, the judge should be given control over them. In Canada, counsel's fees become payable only after they receive specific approval by the court. Class counsel bears the burden of proving that the fee is fair and reasonable.

Such funds could be instituted within EU Member States, but also at European level. Indeed a share of the fines imposed by the European institutions could be deposited in a European fund and used to cover the costs of cross border cases or cases having a European dimension (involving European scale damages, European cartels…). The fund could also be supplied by the remainder of non-claimed compensations in collective redress cases. Consumer associations willing to bring such a large scale case could then 'apply' to receive funding.

This option would provide additional resources to fight against companies' fraudulent behaviour, but it would also be a fair way to fund consumer collective redress since the money of the fines would indirectly go back to consumers i.e. the victims.

2. Legal expense insurance

In several Member States (e.g. **Austria, Germany, UK, France**), insurance schemes are already available and are used to finance litigation costs. Such schemes can take different forms:

Both physical and legal persons can subscribe to a preventive insurance scheme ('before the event' insurance, BTE) to ensure that once they bring a claim before the court the insurance company will cover the litigation fees.

In some countries, once a conflict has arisen an insurance contract can also be agreed between the claimant and the insurance company ('after the event' insurance, ATE) to cover the risk of having to pay the defendant costs in case the latter wins.

Preventive insurance schemes do not seem to be an adequate tool for collective litigation brought by individuals. Contrary to the tendency of professionals to subscribe to such schemes, individuals rarely do so (except when it is included in other insurance policies such as motor policies and increasingly in household policies, as is common in Portugal, the United Kingdom and Denmark). Indeed, people usually feel safe and do not envisage having to take recourse to judicial proceedings. More importantly, some features of BTE insurance make its use uncertain for group actions in general:

- A BTE insurance policy will usually only cover the group members' own legal costs, and hence, it will be necessary for the consumer organisation to take out an ATE policy to protect the insured (itself, or the group members) against the liability of their own disbursements and for the adverse costs, should the defendant win the collective action.
- BTE insurers may seek to exclude or to limit insurance cover where the claimant seeks to invoke the policy in the context of grouped proceedings.

BTE insurance would also cover the additional financial load for consumer organisations, especially smaller ones for which it can be very burdensome.

After the event insurance is used in a few Member States e.g. Austria, Germany, The Netherlands and the United Kingdom. This mechanism is not widely used, even though it is increasingly recognised as being a potential solution for the litigation funding issue. It is important to note that legal insurance also tends to be much more regulated than, for instance, third party funding, and therefore presents advantages over the latter.

3. 'Loser pays' and adjustments in court fees

The principle of losing party paying the adverse costs is well established in European jurisdictions and is one of the safeguards against abusive litigation.

However, although the risk of bearing the defendant's costs can prevent unmeritorious and frivolous claims, it may also become a disincentive for serious claims since claimants face the risk of having to pay both parties' costs. To accommodate this situation, the judge usually has the power to decrease the amount to be reimbursed and a number of Member States provide for adjustments to the principle for specific cases (see the example of Portugal in part on safeguards above).

- In **France and Italy**, the judge can decide not to apply the loser pays rule when the claim brought was not unfounded and the defendant has enough financial means to cover the expenses.
- In **Spain**, the loser pays principle usually applies, however a reduction or even exemption of litigation fees can be awarded in favour of consumer associations.

4. The possibility to recover administrative costs

In addition to the funding issues described above, there should be the possibility for the winning consumer organisation to recover its administrative costs (e.g. those which the consumer organisation incurred while preparing the action for court), provided of course that those costs are reasonable[37]. The judge could again have control over deciding to what extent those costs are recoverable.

VII. Jurisdiction and enforcement

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?
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?
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?

[37] E.g. Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11July 2007 establishing a European Small Claims Procedure, Art 16 states that '…the court or tribunal shall not award costs to the successful party to the extent that they were unnecessarily incurred or are disproportionate to the claim'.

Consumer associations can be confronted with problems arising from the current rules on jurisdiction.

Our **Austrian** member VKI sued a tour operator on behalf of a group of consumers affected by large outbreak of food poisoning at a 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 decision in *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.

Other potential problems, both from the plaintiff and from the defendant perspective:

- Multiple Member States may have jurisdiction over a collective consumer claim;
- Risk of forum shopping. Given the perceived differences between Member States' legal systems in terms of both substantive law and procedural rules, there may be a 'rush to the courts' in supposedly 'claimant-friendly' jurisdictions;
- In some Member States only consumers residing in that country can benefit from an opt-out, whereas consumers from other Member States have to opt-in.

END