OPT–OUT AND OPT-IN IN COLLECTIVE REDRESS
WHY DOES IT MATTER

WHAT DOES IT MEAN

In collective redress cases, **opt–in** describes a procedure when consumers have to take active steps to be included in the represented group. This should usually be done before the judgement on compensation is adopted. Depending on the country, they may be required to register before the claim is submitted to court, or later in the procedure. Only these consumers, who opted-in will be able to benefit from the judgement and to receive due redress.

In **opt-out** procedures, on the reverse, all harmed consumers are by default presumed to be part of the group from the start of the case. They must actively step out if they want to be excluded from the group benefiting from the action. The opt-out usually happens only when a judgement on redress is adopted, so harmed individuals can make an informed choice whether they want to stay in the group, or to opt-out and go for an individual litigation to achieve a better redress.

In simple words, the opt-in system requires plaintiffs to express their wish to be included into the group, whereas the opt-out system requires them to express their desire to be excluded from it.

OPT–OUT IS MORE BENEFICIAL FOR COLLECTIVE CONSUMER CASES

The experience in Europe shows that the opt-in model is less efficient since it is costly, lengthy and requires both outreach from consumer associations and active steps of consumers.

Opt-in is costly

Opt-in massively increases the costs for consumer organisations, as they have to find harmed individuals and ask them to register in the very early stages of the procedure. For example, in Italy, our member Altroconsumo had spent more than EUR 150,000 for finding and communicating to consumers to call on them to register for the action against Volkswagen.

Opt-in is less effective in terms of the rate of consumer participation

European experience shows that rates of participation under opt-out regimes are typically very high. For example, in most collective settlement cases the Netherlands, no consumers opted out.

On the contrary, opt-in procedure in consumer claims indicates much lower rate of participation.

In a railway strikes case in Belgium, which was brought as **opt-out** action, **all 44,000** consumers affected got compensation

In a similar case in Italy, out of **700,000** affected consumers only **3,018** opted-in and got compensated.

There may be various reasons for consumers for not opting-in. Firstly, economic reasons – many people may be worried about having to bear costs in proving the common issues, let alone their individual issues; or may consider that the litigation is "not worth it" given their own individual small amount at issue. They may also not know about the litigation, despite the best efforts of the qualified entity or may not believe in the positive outcome of the action. Finally, a lot of psychological reasons exist, such as people feeling ashamed or fearing stigmatization because of the nature of their claim, as well as language or cultural issues preventing them to opt-in. So, it is impossible to get all or even the vast majority of the harmed consumers to come forward and register to the action.

Other benefits of opt-out

- Opt-out regimes enhance access to legal remedies for vulnerable consumers who would be unable for one reason or another to take the positive step of including themselves in the proceedings.
- The amicable settlement with the defendant company is more likely, if they know that with the settlement the vast majority of harmed consumers are addressed and there will be no further litigation.
- Efficiency of the courts system is increased as multiple proceedings are avoided.
- Opt-out works as a better deterrent against deliberate infringements, as the infringer is stripped of quasi totality of illegal profits. With opt-in systems, when only part of consumers claim and receive compensation, a big part of money gained from the infringement may remain in the pockets of the liable defendant.

REPRESENTATIVE ACTIONS DIRECTIVE

The Representative Actions Directive leaves Member States the possibility to choose either the opt-in mechanism, the opt-out mechanism, or a combination between the two.

Moreover, under the Representative Actions Directive, the opt-in mechanism shall always apply for consumers who are not domiciled in the same country as the one of the court or the administrative authority before which the representative action is brought.

EXAMPLES OF OPT-OUT PROCEDURES

Currently, 4 EU Member States provide for opt-out procedures: Portugal, The Netherlands, Belgium and Slovenia. In Belgium and Slovenia, both opt-in and opt-out are possible – the judge decides which one to apply. Such procedures are also available in Norway and in the UK (in the latter, only for the damages from competition law infringements).

Opting-in or option-out in Belgium? For the court to decide

In **Belgium**, judges have the possibility to decide on the opt-in mechanism or the opt-out mechanism. The judge decides once the claim has been lodged depending on the specificities of the case. There are however some exceptions to the rule.

First, when the collective action seeks reparation for physical or moral harm, the procedure is always opt-in.

Second, for group members who are not domiciled in Belgium the procedure is always opt-in.

Portugal: opt-out since 1995

Since 1995, Portuguese citizens, consumer organisations and other associations as well as certain public bodies can file collective redress actions on the opt-out basis. In these actions, the financial risks of losing the case are lower: only in the case that the plaintiff loses the lawsuit in its entirety, court fees may be payable, but even then, only between half and 1/10 of the regular rate. The role of the judge, who may collect ex-officio the evidence considered necessary, is also an important factor. These elements ensure that consumers can be represented cost-effectively. DECO, the Portuguese Association for Consumer Protection, has successfully made use of this procedure.

In **Norway**, following the unfair practices related to excessive management fees of DNB Bank for several years, the Norwegian Consumer Council sued the bank. In the opt out action, **180,000 consumers** were represented, and after several years of complex litigation, the Consumer Council won the case, and the bank was ordered to return to consumers around EUR 72 million.

MYTHS AND REALITIES OF OPT-OUT

Opponents of opt-out procedures claim, that opt-out procedures should not be adopted in European countries for the following reasons:

- *Opt-out will mean that collective actions in Europe will suffer from the same abuses as class actions in the US: massive increase of litigation, blackmail settlements and punitive damages.*

This is not correct - the alleged excesses of the "US class action" are not due to the opt-out procedure as such but to the US procedural law and the specificities of the US model. There are no examples from European countries, that already have opt-out procedures, of any negative consequences to the fairness of the procedure or the legal system in general.

- *Opt-out is contrary to the right of individual to express if she or he wishes to go to court, and therefore to the right to a fair trial (Art.6 ECHR).*

Firstly, the right to a fair trial has to be put in balance with other fundamental rights such as the right to an effective remedy (Article 13 ECHR). Opt-out procedure increases access to justice and, as a consequence, provides an effective remedy.

Secondly, there are safeguards in opt-out procedures to ensure that harmed individuals are properly informed that they can opt-out and that they have enough time for this step.

BEUC strongly recommends opt-out procedure – it will ensure that more consumers receive redress. If chosen by the legislator, there could be exceptions for the collective cases with highly individualized damage – such as in health sector or for personal injuries.

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