

# Bridging the EU consumer enforcement pathways in mass harm situations

## Executive summary

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January 2024

To achieve effective and efficient enforcement for consumers in mass cases, the three pillars (private enforcement via representative actions (Representative Actions Directive), ADR (Consumer ADR Directive) and public enforcement (CPC Regulation)) should all be strengthened. The main conclusion is that these mechanisms will only lead to real consumer protection if their individual strength of enforcement is sufficiently high.

However, different interventions in the regulatory framework can **improve the interplay between these mechanisms**. First, the CPC and ADR schemes should be adapted to explicitly consider mass harm situations. As regulatory redress is particularly useful and appropriate for mass harm cases, the powers of national authorities under the CPC Regulation should include approval and coercion of redress schemes. To curtail the lack of knowhow, experience and expertise of national authorities, consumer organisations can play a key role: they are not only often the trigger for redress actions, but also have expertise in pursuing redress and assessing consumer damages. Meanwhile, the proposal to amend the ADR Directive considers the bundling of similar cases, but it is unclear how this will play out in practice.

Second, a true three pillar model of enforcement can only be created through a so-called integrated approach. For example, the threat of representative and public actions can be used to induce traders to accept (collective) ADR, and a judicial ‘fast track’ procedure for the enforcement of ADR awards could be created. Just as final decisions in representative actions, common positions issued by CPC authorities or decisions of the European Commission should constitute evidence in court. During regulatory investigations, parallel representative actions or collective ADR proceedings should be stayed and there should be no prescription. ADR entities could also be given standing to pursue representative actions. Lastly, ADR entities could be given the power to ask prejudicial questions to courts.

Third, the cooperation between national authorities and ADR entities should be strengthened, as evidence shows that both redress and behaviour change are delivered best when these techniques are combined. ADR entities are particularly suited to signal problems, while national authorities are well-suited to take structural and coercive action against recurring problems. To this end, a mandatory exchange of data and publication of this data, so that consumer organisations have access to it, seems opportune.

Nevertheless, the three enforcement pathways can also be **detrimental to each other**. Confidentiality obligations in the ADR Directive and between CPC authorities undoubtedly disturb later private (collective) enforcement. While this has been questioned, the ne bis in idem principle has no (detrimental) impact on the relationship between the CPC framework and RAD actions, since the nature (criminal vs private) and object (fine vs redress) of both actions is different.

In creating a true three pillar model of enforcement, **maximized information flows** are crucial. Qualified entities, national authorities and ADR entities should always retain a broader view and constantly monitor recurring problems and possible structural problems. Moreover, ADR entities and national authorities should create a continuous feedback loop with frequent face-to-face meetings. A unique portal for consumer disputes managed by one ADR body is essential not only for consumer accessibility but also to ensure that all information is concentrated in one entity. Within the context of a court case, the possibility to make a document request with the European Commission or court orders requiring the submission of documents by other parties or even third parties can be particularly useful. However, the impact of the GDPR on information exchanges should be closely monitored.

Lastly, **the three pillar model is honoured** as such: all enforcement methods have their pros and cons. The best method depends on the concrete facts of the case at hand and the (budgetary) situation in a specific jurisdiction. For widespread and deliberate violations of the law, public enforcement might be the only appropriate choice. In jurisdictions where representative actions are novel or disputed, alternative pathways might be prioritized. ADR entities and national authorities, as opposed to representative actions, do more than delivering redress. They provide assistance to both consumers and traders and process data, which can trigger subsequent or parallel actions.