

The Consumer Voice in Europe

EUROPEAN COLLECTIVE REDRESS – WHAT IS THE EU WAITING FOR?

BEUC initial contribution to the 2017-2018 EU initiatives
on collective redress



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Why it matters to consumers

Lack of compensation for harm suffered is a major loophole in a legal system and allows for illegal profit to be retained by business. Judicial collective redress for consumers currently operates nationally only in limited number of 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.

Summary

Pan-European collective redress system is long overdue in Europe. Without it, billions of euros in unrecovered damages in the EU remain in the pockets of the wrongdoers.

Moreover, national 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. The EU Recommendation on the common principles for collective redress of 2013 did not have a satisfactory impact for this problem.

Mass claims cannot be addressed by the injunction procedures, as injunctions have different scope and objectives.

Numerous examples prove that often amicable settlements cannot be reached while there is no judicial procedure to back them.

There is a patchwork of national systems in the EU, and only a handful of them function efficiently. The gaps of the European redress possibilities are very well exposed in the Volkswagen emission fraud case, where the company refuses to compensate European car owners despite having done so for the American consumers.

BEUC is calling for the EU binding legislation that would ensure that all Member States have collective redress procedures, based on the minimum requirements:

- Wide scope of application;
- Legal standing for consumer associations;
- Adaptation of the 'loser pays' principle;
- Opt-out to be available;
- Active role of the judge in the proceedings, to act as a safeguard;
- Principles of how to regulate third party funding;
- To be applicable both for national and cross-border cases.

1. The background – what is collective redress for compensation and the state of play in the EU

Collective redress is a procedure when consumers who have suffered the same or very similar loss or harm caused by the same trader come together and seek redress in court as a group, in one legal claim. Also known as a group action or a class action, it enables a group of consumers who have had their rights violated to be represented by a third body (for example, by a consumer organisation) which seeks compensation for them in situations where consumers would otherwise face major obstacles to bring a legal claim due to the high economic risks, time and even fear to go to court and face a major company.

Judicial collective redress for consumers currently does not exist in 7 Member States. In another 10 countries, some kind of procedure is available, but it is either too burdensome or not effective at all, and cannot be used in practice.

These national procedures also do not provide for cross-border solutions. This leads to a significant **discrimination in access to justice**, to the detriment of consumers.

Lack of tools to obtain compensation for harm suffered is a major loophole in most Member States' legal system and allows for illegal profit to be retained by unfair traders. This is bad for consumers, this is also bad for competitors. According to the press release of the European Commission, in the EU, in anti-trust scenarios alone, unrecovered damages are estimated to surpass €20 billion each year¹. 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.

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 the talk of abuse is misplaced.

The European Commission pointed out in its previous consultation paper², that 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 U.S. American legal system, are either not to be found or used 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 any potential abuses and allow for the respect of legitimate interests of both parties.

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 to flood the courts with cases. Neither are such fears supported by

¹<http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/554&format=HTML&aged=0&language=EN&guiLanguage=en>

² Public consultation: Towards a Coherent Approach to Collective Redress, SEC(2011)173 final, p.9.

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 access to justice and to redress.

The European Commission has since 1987³ been looking into the gap of redress created by the lack of group action procedures in Europe. In the recent past between 2008 and 2013 it issued a Green Paper, an evaluation study and two consultations. The latest consultation of 2011 showed substantial interest by civil society (300 participants in the public hearing on 5 April 2011, 310 replies from the stakeholders and more than 19,000 replies from citizens to the consultation of 2011⁴). The results demonstrated that most stakeholders agree that establishing common principles for collective redress at EU level is desirable⁵. However, the European Commission did not propose binding legislation.

In 2013 the European Commission adopted a Recommendation on common principles for collective redress mechanisms in the Member States⁶. The Recommendation calls on the Member States to have collective redress systems at national level that follow the same basic principles throughout the Union, taking into account the legal traditions of the Member States and safeguarding against abuse. This year the Commission will assess how the Recommendation has been implemented and whether further EU action is necessary. To this end the Commission has in May 2017 published [a call for evidence](#) on the operation of collective redress arrangements in the Member States of the European Union⁷ and asked for examples of national cases that were or could have been addressed by collective redress procedures. This position paper forms part of BEUC and our members' response to the call for evidence mentioned above.

In parallel, the European Parliament has, with a clear majority and cross-party support, called for the establishment of an EU-wide system of collective redress in its vote on 4 April 2017 on the Parliament's inquiry into emission measurements in the automotive sector.⁸

2. Why consumers need EU wide collective redress

2.1. Access to justice and to compensation

Existing individual redress mechanisms are unsuitable for mass consumer claims⁹. Over the years the evidence of this fact has piled up and has been acknowledged by policy makers¹⁰, so we will not come back to the long list.

³ COM (87) 210 Communication on consumer redress.

⁴ Communication from the Commission 'Towards a European Horizontal Framework for Collective Redress', COM(2013) 401 final.

⁵ Idem, page 6.

⁶ Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ L 201.

⁷ Published on 22 May 2017 on http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=59539

⁸ European Parliament recommendation of 4 April 2017 to the Council and the Commission following the inquiry into emission measurements in the automotive sector (2016/2908(RSP)), P.59.

⁹ 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.

¹⁰ Commission Green Paper on Consumer Collective Redress, COM(2008) 794 final.

Experiences in Member States with effective collective redress mechanisms demonstrate that consumers make use of it.

For example, in Belgium, where collective redress procedure is fairly recent (since the 1st of September 2014), our member organisation Test-Achats/Test-Ankoop has already launched 5 actions, representing more than 58,000 consumers.

In Italy, our member Altroconsumo has initiated 11 cases so far. More than 60,000 consumers have subscribed to the last 3 actions¹¹.

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, many European consumers are unable to obtain compensation while others residing in another Member State do have judicial means to that purpose. This creates inequalities of treatment. Moreover, **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. Therefore, European measures which set 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 fact, there are two layers of problems:

- In some countries, there is no collective redress procedures;
- In no system, there is a sufficient attention granted to cross-border cases, or to the bundling of cases of consumers in different countries towards the same trader.

2.2. Not enough to have injunctions

Lately there have been reflections within the EU to provide for collective claims through injunctions proceedings. We are strongly convinced a separate procedure is necessary for compensation claims.

Injunctions procedure is not an adequate response in mass claim situations. In most Member States, the injunction order can currently only be used to stop the infringement, but not to compensate the consumers that were harmed by it.

Even if consumers were able to individually rely on injunctions judgements to claim redress in follow-on individual actions, it would not be enough. This would raise the same problems of consumers abandoning redress possibilities for the lack of financial resources, time, or fear of litigating against companies.

¹¹ Volkswagen emissions defeat device case, misleading fuel consumption case and Smartphone Samsung memory capacity case.

2.2.1. Different objectives

It is important to keep in mind that an injunctive action is not comparable to a collective redress action.

An injunction is not a damage action. Its main purpose is to stop an illegal practice or to prevent the start of it. This is why the court order states that the company must stop doing something. Contrary to this functionality, the damage action aims at compensating and thus identifies whether the claimant has suffered a harm until the present moment.

2.2.2. Different nature of claims

The main outstanding feature of a collective damage action is that it provides specific procedural measures to allow for “plurality of claims”. In an injunction proceeding however, the claimant is an entity that brings one action in the collective interest of a group. It is not a plurality of claims that are bundled before a court. For this, a procedural law mechanism is needed that deals with all procedural questions of collectivity and bundling.

One may think to bring the injunction proceeding closer to a collective damage proceeding, by, for instance, an option to grant restitution. However, even if the judge would be able to look into assessing the damage, the procedure to effectively collect claims would still be lacking.

2.2.3. Major time limitation of injunction claims: only for ongoing infringements

The injunction can only be brought in relation to an ongoing infringement. However, it can often happen that the action for compensation needs to be brought after the infringement has already ceased.

2.2.4. Public authorities with injunction powers have no power to decide on compensation

In multiple EU countries not the courts, but public authorities issue injunctions, and those authorities will not be well placed to also decide on compensations.

2.2.5. No injunction claims for consumer organisations in some countries

Not in all EU countries consumer organisations can apply for an injunction.

Therefore, a separate collective redress procedure is necessary even if the Injunctions directive would be reviewed to become more effective.

2.3. A means to encourage amicable settlement and to complement ADR

Judicial collective redress procedures cannot be replaced by Alternative Dispute Resolution (ADR) or amicable settlements.

Parties to a dispute should remain free to recourse to alternative means of dispute resolution before or in parallel to the formal introduction of a judicial claim. But, Alternative Dispute Resolution alone is not a sufficient 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.

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. do not qualify for alternative means of dispute settlement.

In addition, most ADR bodies would not have the capacity to provide proceedings for mass claims, as is illustrated by the fact that currently there are very few schemes doing this¹². Also, where it exists, collective ADR has substantial limitations – the procedure is available 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)¹³.

The limits of the out of court settlements, not supported by the possibility of the judicial procedure, have also been demonstrated in The Netherlands. The mechanism established by the Act on collective settlement of mass damages¹⁴ has only been employed seven 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 dependent on the other party’s willingness to settle and the Act does not provide enough incentive for the latter to reach a settlement¹⁵.

It is important to note that the study on the Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union, carried out by the European Commission also came 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 are easily accessible.¹⁶ This is further demonstrated by the fact that all Nordic countries have introduced judicial collective redress procedures despite the very successful ADR regimes for individual consumer complaints.

Therefore, for multiple claim situations, ADR could be part of the ‘consumer toolkit’, but never the only mechanism available.

3. The gaps in the current situation in the EU

3.1. A patchwork of national situations

A patchwork of national collective redress mechanisms is currently in place in the EU.

3.1.1. Systems that have demonstrated effectiveness

Unfortunately, only very few national mechanisms can really be used effectively by victims. Among those we can mention Portugal, Italy, Spain and Belgium, where BEUC member organisations regularly bring collective cases to court.

¹² Spanish Arbitration System, Swedish and Finnish Consumer Complaint Boards

¹³ 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.

¹⁴ WCAM, Dutch Act on Collective Settlements, Law of 23 June 2005

¹⁵ With a view to this, a draft law is pending in the Netherlands that will allow a judicial collective action

¹⁶ Study on the Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union, by Civic Consulting (Lead) and Oxford Economics, 2008, available on the Commission’s [website](#), p.99

3.1.2. Recent introductions where effectiveness still has to be demonstrated

France and Malta have relatively recently introduced new procedures, so it still needs to be seen how those will develop.

Across the UK, a new collective redress mechanism was recently introduced – on an opt-out basis – for consumers who have suffered loss due to a breach of competition law.

3.1.3. Systems where flaws have been identified

The Nordic countries have mechanisms where both public authorities and consumer associations can initiate a collective case (however, for instance in Denmark and Finland, only the Consumer Ombudsman can bring a case on an opt-out basis). In Poland, the law leaves it up to the victims to self-organise (and to cover their costs,) or rely on certain public bodies. Austria has developed a procedure that is not enshrined in law, but which is used by the Austrian consumer association in the absence of a proper procedural tool.

The Netherlands is worth a special mentioning: since 2005 the Netherlands rely on a special amicable settlement procedure for mass claims that has indeed been used for several cases with very high number of consumers involved. However, as there is no possibility of a judicial procedure, there is a lack of incentive for the companies to negotiate with the consumers or their representatives.

3.1.4. Unsatisfactory or missing systems

Unfortunately, the rest of the European countries do not have procedures that work (for instance, in Romania, the claims may only be brought by individuals, in Hungary – only by the Hungarian Competition Authority as follow-on competition infringements cases) or do not have any collective procedure for consumer compensation at all (Cyprus, Czech Republic, Estonia, Ireland, Latvia, Luxembourg, Slovakia and Slovenia).

3.2. A case study: Dieselgate lessons

The gaps and limits of the collective redress landscape in Europe are very well demonstrated by the Dieselgate scandal.

In September 2015 Volkswagen Group admitted to installing a 'defeat' device in 11 million vehicles so as to cheat on emissions tests. Over 11 million cars have had this defeat device installed worldwide, 8 million of them – in Europe.

In the United States, the US Environment Protection Agency was very swift in investigating the issue and imposing substantial sanctions on the company: Volkswagen had to pay \$ 2,7 billion into a special trust that supports environmental programmes plus \$ 2 billion more to promote zero emissions vehicles.

As class action procedures function, very effectively in the US, consumers were also quick to try to obtain compensation – more than 200 class actions were launched in the US courts. Those class actions were finally bundled into one, and the parties have reached a settlement. According to this settlement consumers could either choose to return the vehicle to the company, which then would compensate them the car value, or get the car repaired. In both options, the consumers would also get a compensation payment of \$ 5,000 - 10,000.

Meanwhile in Europe, the company refuses to compensate consumers – despite multiple attempts by consumer associations and even the European Commission. The information on repairs is also often confusing – consumers are not informed neither about the timetable, nor about the consequences of the repair. 90% of impacted cars are not repaired yet, and it is not clear when this will be done. Only 1 public authority – the Italian Competition and Consumers Authority - has imposed a fine on the company for the breach of consumer law. However, even if the fine is the maximum the Authority can impose - €5 million - it is not dissuasive for such a huge company (the bonuses of the top managers of Volkswagen have only in 2017 been capped to €5,5 million¹⁷). On top of these elements, it appears now that Volkswagen asks in some instances that car owners pay for the repair of their illegally defective car, as our Dutch member Consumentenbond recently reported¹⁸.

Regrettably, taking into account the limited number of functioning collective redress procedures in Europe, only in 4 Member States (Belgium, Italy, Spain and Portugal) was it possible for BEUC members to bring collective redress claims against the company. In addition to that, it is not possible to bundle all the actions before one court, so the outcomes of the cases might be different.

This case is a striking example of the situation where the gaps of enforcement and of access to justice play into the hand of a strong company. The harm to affected European car owners is similar, but only part of them will hopefully receive compensation, proving that internal market fails to function for mass harm situations. And this compensation might be different depending on the Member State in which the compensation claim is brought.

3.3. Other examples

Situations abound in the Member States where it was not possible to obtain any compensation at all.

In **Latvia**, a large consumer credit company, BigBank has been deemed to be misleading consumers with respect to interest rates in credit cards for a period of approximately two and a half years¹⁹. As a result of this unfair commercial practice, many consumers have suffered damages up to €10,000. Even though the total amount of damages is not easy to be measured, it is safe to assume that several thousands of Latvian consumers have been victims of this practice, without collective compensatory relief available.

A recent predatory lending case in **Slovenia** involved the collaboration of Czech and Slovenian companies that were not permitted to lend money, as they were not registered as required under the Slovenian law. The Slovenian consumers' association managed to get court rulings rendering the loan contracts concluded void. However, they are now struggling along with individual consumers to seek compensation through separate claims, covering damages of €1,000 to €2,500 per case.

In 2005 and 2012 the **German** Federal Court of Justice ruled against several insurance companies, rendering certain contract clauses regarding life insurance's surrender value null and void. As estimated, millions of consumers were affected by the aforementioned decisions. According to the regional consumer association of Hamburg, such claims would in total add up to between 1.3 and 4 billion Euros. Since collective compensatory actions are not available under German law, the Hamburg consumer association tried to represent

¹⁷ <http://www.reuters.com/article/us-volkswagen-results-managementpay-idUSKBN16321P>

¹⁸ Published on Consumentenbond website on 24 July 2017 -

<https://www.consumentenbond.nl/nieuws/2017/schade-door-update-komt-voor-rekening-volkswagen>

¹⁹ From December 2008 to April 2011.

consumers in several tens of individual cases. Finally, only those represented 80 consumers were compensated for €114,000, just a tiny fraction of the estimated damages.

More than 300.000 women worldwide were implanted with defective breast implants made by the same **French** laboratory. The implants were not only defective, which resulted in the need of subsequent operations to change them, but also severely harmful for the health. In France, there were around 30.000 victims of this malpractice, others – in other countries. Average individual damage in this case was estimated at €10,000. Unfortunately, in the absence of a collective redress instrument that would allow cross border cases, no action on behalf of all European victims could be taken against the company.

4. What kind of initiative BEUC is calling for (features and safeguards)

4.1. A procedure to be available in all EU Member States, based on minimum requirements

BEUC's key demand is for a **binding instrument at EU level**. 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.

The efficient and effective system of collective redress should be based on the principles outlined further in this paper. 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.

In terms of scope, compensatory collective redress should cover all the areas of consumer law (including, among others, financial services, passenger rights and travel, product liability and damage to health) and competition. However, consumer detriment is not always related to merely non-respect of specific consumer law. It's often caused by breaches of basic, common contract or tort law which is not harmonized at EU level. Therefore, alongside infringements of consumer and competition law, collective redress procedures should be also possible for non- respect of contract law (as is the case in Belgium) and tort law.

In terms of damages, both material and moral damages should be available (compensation for moral damages is currently not possible for example under the French instrument).

It is also crucial that the European mechanism caters for **cross-border cases**, both intra-European and involving the traders from third countries. The Recommendation provisions on cross-border cases (points 17 – 18), aiming to make sure that there could be a single collective action in a single forum and that qualified entities enjoy legal standing in other Member States, could be a starting point.

4.2. Legal standing of consumer associations

Without prejudice to the standing of other bodies, consumer organisations should be given legal standing to bring collective cases. 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 when consumer organisations take traders to court²⁰.

4.3. Opt-out to be available

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 the largest number of victims to seek compensation.

It has been shown in various cases that opt-out is much more effective than opt-in (on average, only around 1% of all harmed consumers opt-in)²¹. It is difficult to get consumers to sign-up to an opt-in action, given that they are required to do so at the start of proceedings, before they know if it will be successful.

Opt-out collective redress successfully functions in Portugal, the Netherlands, partly in Spain. It is allowed in Belgium and the UK (in the latter, for competition damages private claims, and introduced very recently, so still too early to evaluate).

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.²² This prevents consumer organisations from taking even very well-grounded cases.

A counter-argument against opt-out procedure is that from a right of access to justice point of view it would not be acceptable to litigate on behalf of individuals who have not yet expressed their will to be involved. This issue can be solved with robust rules on how to inform consumers that they can opt-out of the action. It is important to note that the right of access to justice is also a fundamental right in countries where opt-out class actions systems are in place, such as US, Canada and others, where a lot of thought is given how to properly inform the group.

The collective redress procedure needs to be available on an opt-out basis, and not only to public bodies (like in Denmark), but also to be used by consumer associations²³.

²⁰ E.g. 90% of court cases brought to courts by our Portuguese member DECO are successful. Our German member verbraucherzentrale bundesverband - vzbv wins 80-90% of their cases. (internal survey among BEUC members in 2016).

²¹ 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.

²² 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 and do the follow up with consumers.

²³ Our German member verbraucherzentrale bundesverband - vzbv does not endorse this subsection.

4.4. '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 is necessary. For instance, **Portugal** has a very effective system where the 'loser-pays' principle is not applied to consumer organisations. 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, and 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.

The Portuguese rules on costs are reproduced in the **Maltese** collective redress procedure.

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.

BEUC is calling for exemptions from the 'loser pays' principle so as to enable consumer associations to bring collective cases.

4.5. Safeguards regarding third party funding

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, 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).

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

Apart from the lawyers' and experts' fees, the claimants in collective actions are in addition often faced with huge costs into informing consumers about the ongoing actions. For instance, in Italy, our member Altroconsumo has recently had to pay €130,000 for publishing announcements to the Volkswagen car owners in five Italian newspapers²⁴.

Therefore, the issue of funding is crucial. We emphasise that consumer associations are only asking for the reimbursement of their costs. Even when consumer organisations win the case, often they are not able to recover all the costs²⁵, so without appropriate funding only a very limited number of cases can be taken.

²⁴ This publication was ordered by the court in Volkswagen emissions defeat device case.

²⁵ 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.

Third party funding is therefore often one of the pre-conditions to enable collective cases to really take place. It cannot be used in every case, as third-party funders usually apply certain conditions, for instance, on the minimum size of the claim, costs-to-return²⁶ ratio, the assessment of the merits of the case etc.

However, sometimes the defendants have concerns that the third-party funder might have a conflict of interest or try to interfere into the case (e.g., to prevent a settlement so as to have the chance of higher damages in the court ruling). In order to appease those concerns, third party funding should be regulated by national laws or/and the amicable settlements need to be approved by the court.

In this respect, the Commission Recommendation on common principles for collective redress already sets useful rules on the control of third party funding agreements²⁷, so it would be useful to put them into the binding instrument on collective redress.

4.6. Active role of the court in collective proceedings

The active role of the judge in admitting the case, overseeing the litigation costs, deciding on how the victims of a malpractice can be informed and controlling the settlement could be one of the main safeguards of the EU collective redress systems.

The judge could also decide which system – opt-out or opt-in - should be used, depending on the different elements of the case.

This active role is already in line with the legal traditions in European countries²⁸.

5. Examples of functioning systems

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.

Among those EU Member States with a system in place, **Portugal** is the country with a fully judicial collective opt-out 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 over 20 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 analysis²⁹.

The **Belgian** system, in operation since 2014, combines opt-in with the opt-out system. In order to avoid forum shopping and to develop expertise, the action has to be brought

²⁶ Usually they require that the damages potentially to be awarded surpass the costs at least up to a certain number of times, e.g. the ratios 1,5:1 or 3:1.

²⁷ Commission Recommendation of 11 June 2013 on common principles for injunctive and compensatory collective redress mechanisms in the Member States concerning violations of rights granted under Union Law, OJ L 201, points 14-16.

²⁸ The role of the court in collective redress litigation – research paper by Université libre de Bruxelles (ULB), 2012, available on www.beuc.eu

²⁹ Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union, Study by Civic Consulting.

either in the Brussels Court of First Instance or (in exceptional cases) the Brussels Commercial Court. The court will preliminarily decide whether to admit the claim or not. BEUC member Test-Achats/Test-Ankoop has been authorised to bring group claims. The group action can only be introduced in Belgium for cases where the cause of damage occurred after 1st September 2014. Since then 5 cases have been launched. Amicable agreements have already been found in two of them, resulting in compensations for consumers.

The **Italian** Consumer Code contains a provision on collective actions for damages since December 2007. The procedure is based on opt-in, covers consumer rights and competition, and has an admissibility stage controlled by the court. Our Italian member Altroconsumo is very active in bringing collective redress cases and has up till now initiated 11 of them³⁰.

6. The assessment of the implementation of the Commission Recommendation

The European Commission is now assessing the implementation of the Recommendation on common principles of collective redress, adopted in 2013. In this context, the Commission will in particular look into its impact on access to justice, on the right to obtain compensation, on the need to prevent abusive litigation, on the functioning of the single market, and on consumer trust. The Commission will also assess whether further measures are needed.

It is clear that the Recommendation did not produce necessary results for the access to justice and compensation in mass claims situations in Europe. Huge gaps continue to exist as this paper has highlighted, and the wrongdoers continue to take advantage of the lack of redress possibilities.

It is high time the Commission finally proposes binding legislation, obliging Member States to introduce collective redress procedures, based on the minimum EU requirements.

END

³⁰ Most of them still pending in Italian courts.



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