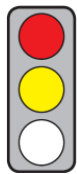


## MAIN ISSUES

**Objective of the Green Paper:** The Commission would like to instigate a discussion concerning collective redress mechanisms for consumers which will contribute to solving the problems involved with asserting mass claims.

**Groups Affected:** companies, consumers, consumer associations and firms of solicitors.



**Pros:** Consumers should be able to assert meritorious claims.

**Cons:** (1) Collective mechanisms hold the danger that the interests of the victim may not always be represented. They increase the probability of unmeritorious claims being asserted.

(2) The state financing or subsidising of claims from consumer associations is to be rejected as is the profit-sharing of these associations.

(3) It is questionable whether or not standardised EU mechanisms of collective redress are necessary for the functioning of the EU single market.

## CONTENT

### Title

**Green Paper COM(2008) 794** dated 27<sup>th</sup> November 2008 on **Consumer Collective Redress**

### Abstract

#### ► Objective of the Green Paper

- For cases where many consumers are affected by the illegal conduct of an individual trader (mass claim cases), the Commission wants to open up the possibilities of collective redress for damages claims or develop existing possibilities.
- To this end, it presents different options to address the issue which have an effect on cross-border cases as well as purely national ones.
- The Green Paper does not address collective redress for infringements of EC antitrust law. A White Paper [COM(2008) 165] (cf. [CEP Policy Brief](#)) is already available for these cases.

#### ► Outline of the problem

- The Commission names “high litigation costs and complex and lengthy procedures”, as well as a lack of awareness of the means of enforcement and redress available, as factors responsible for the fact that individual consumers only rarely take legal measures against the malpractice of traders.
- The lower the value of the claims, the less likely it is that legal action will be pursued. According to the Commission’s report, one out of five consumers will not go to court for less than EUR 1,000 and half will not go to court for less than EUR 200.
- According to the Commission, 33% of consumers especially fear facing difficulties in resolving problems when shopping cross-border in other Member States.
- 76% of consumers would be more willing to go to court if they could join together with other consumers.

#### ► Overview of current collective redress mechanisms in Member States

- Representative action, group action or test case mechanisms currently exist in thirteen Member States – including Germany. The Commission estimates that “almost all” of these offer some added value compared to individual judicial redress and alternative dispute resolution schemes, such as out-of-court mediation and arbitration proceedings.
- Collective redress mechanisms are least used in Germany where, on average, only four people in ten million participate in such proceedings.
- In the view of the Commission, the effectiveness and efficiency of existing collective redress mechanisms are particularly hindered by the lack of funding and expertise in consumer organisations.
- The Commission sees the “risk of paying high litigation fees”, the absence of regulations for the “fair” distribution of proceeds from actions and the lack of “high” media coverage of collective redress mechanisms as further significant hindrances.

## ► Basic options for action

### Standardised judicial procedures for collective redress

- Within the scope of this option, the Commission considers measures that would lead to a situation in which “every consumer” throughout the EU “would be able to obtain adequate redress in mass cases through representative actions, group actions or test cases”.
- As the Commission wants to reduce the financial risk involved with consumer collective redress mechanisms, it brings up the following for discussion:
  - whether legal fees for such actions should be completely waived or whether legal costs (i.e. court fees, solicitors’ fees and further expenses) should be capped,
  - whether associations should keep “a share of the compensation” when claims are successful,
  - whether representative actions should be made easier through the provision of public loans,
  - whether representative actions should be financed by public means.
- The Commission wants to prevent the abuse of mechanisms through unmeritorious claims and the emergence of a “litigation ‘industry’”. With this in view, it places particular consideration on
  - the certification of those representing consumer interests and
  - introducing an obligation for the losing party to bear the costs of the lawsuit.
- Furthermore, the Commission wants to find measures to protect companies from punitive damages and “excessive” costs from collective redress mechanisms. Contingency fees for solicitors should also be “avoided”.
- Group actions could either require that consumers must actively enter collective redress procedures (“opt-in procedures”), or that those who do not wish to assert a claim must consciously withdraw from the joinder of plaintiffs (“opt-out procedures”).
  - The Commission fears that opt-in procedures could be particularly cost-intensive for consumer organisations. This is because they must identify consumers who have suffered damage and would be willing to claim despite receiving very low individual gain. However, division of the compensation would be easier as the court would only have to distribute it amongst the plaintiffs.
  - According to the Commission, opt-out procedures could “mitigate” some of the difficulties of the opt-in systems. However, situations could arise – particularly with group actions which include consumers from different Member States – where consumers would be bound by a judgement without their knowledge, without having been able to pursue legal remedies.

### Expansion of existing instruments without standardised judicial procedures

The Commission’s considerations within the scope of this option are concentrated on the development of existing legal instruments:

- The Member States could “be encouraged” to expand alternative dispute resolution mechanisms to consumer collective redress mechanisms.
- It would also be conceivable to open up national mechanisms for enforcing small claims, which are characterised by relatively quick processing and low legal costs, to mass claims as well. A Directive or Recommendation could be issued for this purpose.
- The national enforcement authorities could – through an amendment to Regulation (EC) No. 2006/2004 on consumer protection cooperation – receive authorisation to
  - oblige traders to compensate consumers for a statutory infringement,
  - skim off the profits from traders when very low value individual claims are concerned.

### Increased collaboration of Member States

- Within the scope of this option, the Commission considers increased opening up of existing collective mechanisms both for consumers and for associations from other Member States.
- In addition, cooperation networks could be created from institutions which have the right of action in order to safeguard consumer rights, or which serve the collective legal protection of the consumer.

## Statement on Subsidiarity and need for EU action

According to the Commission’s report, 10% of all cases, in which mechanisms for collective redress are used, have a cross-border element. It expects this percentage to increase. However, as the Green Paper does not yet establish which options for action should be pursued further at an EU-level, the Commission does not enter into the question of subsidiarity.

## Political Context

EU-standardised collective redress mechanisms were already introduced by Directive 98/27/EC on injunctions for the protection of consumers’ interests. To date this has only led to two cross-border actions. The Commission attributes this to the unchanged high financial risk to the plaintiff as well as the “complexity and diversity of national injunctive proceedings”.

Regulation (EC) 861/2007 on Small Claims, in force since 1<sup>st</sup> January 2009, should alleviate individual litigation in cross-border disputes with a value of up to EUR 2,000. Directive 2008/52/EC, to be implemented by 2011, provides for the resolution of disputes through mediation as long as both parties are in agreement.

Even though both instruments can in principle also be applied to mass claims, the EU Commission sees these measures as insufficient for providing consumers in the EU with standardised legal protection.

## Options for Influencing the Political Process

Leading Directorate General: DG Health and Consumer Protection  
 Consultation Procedure: All interested persons may comment. The procedure ends on 1<sup>st</sup> March 2009;  
[http://ec.europa.eu/consumers/redress\\_cons/collective\\_redress\\_en.htm](http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm)

## ASSESSMENT

### Economic Impact Assessment

#### Ordoliberal Assessment

Companies eager to have long-term success in the market have a self-interest in acting lawfully and avoiding lawsuits. Lawsuits tie up resources and can cause reputations to be lost if there is negative media coverage.

Regardless of this, consumers should be able to assert meritorious claims against traders. Due to the fact that such disputes typically concern low sums of money, consumers often shy away from the costs and effort involved in pursuing a claim. In view of this, it is understandable that the Commission is giving thought to means of lowering the hurdles for redress mechanisms.

However, representatives of group interests could pursue an individual agenda that is not identical to the interests of those represented. It is therefore extremely important to set the incentives for collective claims in such a way that these individual interests have the smallest possible influence.

**If pursuing consumer claims is made too easy through amending laws on representative action, group action and test case mechanisms, there also exists a danger of over-deterrence.** This is because the more companies have to fear high compensation claims, the more careful they are in their general conduct. They will then only refrain from performing the activities required of them if there is only a low probability of contravening consumer rights. Furthermore, **companies can be led to settle claims even if they are unmeritorious**, in order to avoid damage to their reputation. These problems will gain even more importance if additional privileges are accorded to plaintiffs.

**The state subsidies for representative actions considered** by the Commission **are therefore very questionable.** This similarly applies to the proposal to abolish court fees for collective claims or to introduce a capping limit for legal costs. Indeed the cost risk to the plaintiff would not disappear entirely. But a decrease in the risk of court costs will basically act as an incentive to assert unmeritorious claims. This is because the lower the risk of incurring court costs, the more attractive the initiation of legal disputes which have almost no prospect of success. For this reason, the considered "reversed" regulation which stipulates that associations should bear a considerable proportion of the costs in disputes that are lost is necessary to discipline the conduct of plaintiffs and, as result, to limit the emergence of a "litigation industry".

**The participation of associations in the financial success of collective actions**, as considered by the Commission, is equally questionable. This **creates a huge incentive to turn the defence of consumer interests into a lucrative business.** Success-related fees for solicitors that represent collective claims are also rejected by the Commission. It is, however, not clear how it intends to avert this type of fee arrangement, which is already possible in some Member States.

**Opt-out group actions are to be rejected as they too favour the individual interests of the case representative excessively.** These representatives could put together a large number of groups at little expense and then calculate their fees according to the aggregate compensation totals. Furthermore, distributing the compensation received amongst the group would be difficult as its members would not at first be known.

#### Impact on Efficiency and Individual Freedom of Choice

Collective redress mechanisms could lead to a reduction in legal costs as it would only be necessary to go to court once instead of many times.

Opt-out group actions would, however, limit individual freedom of choice because individual consumers would be assumed, until a contradictory statement has been made, to have joined a group of plaintiffs.

#### Impact on Growth and Employment

EU-wide standardised collective redress mechanisms could trigger growth loss if excessive deterrent effects on the market behaviour of companies occur as a consequence.

#### Impact on Europe as a Business Location

Provided that the measures discussed are valid for all companies offering products and services in Europe, they will have no impact on the quality of the EU as a business location.

## Legal Assessment

### Legislative Competence

The EU may impose measures to encourage the compatibility of regulations in the Member States with the law on civil proceedings (art. 61 para. c in conjunction with art. 65 para. c EC Treaty). **The prerequisite for**

**this is that** any matters for civil courts that are affected display a cross-border element and that **the measures are necessary for the “smooth functioning of the single market”**. According to the court rulings at the European Court of Justice, in order for this to be true, the differences in the law systems of Member States must be noticeable as a distortion of competition in the single market (Case C-376/98). **Whether or not this is the case** if consumer collective redress mechanisms exist in some States and not others, **is very questionable**. Given that, according to art. 16 of Regulation (EC) No. 44/2001, a consumer can always bring a claim at their place of residence, all companies active in a national market are exposed to the redress mechanisms authorised there.

#### Subsidiarity

Measures affecting court law applicable to cross-border cases can only be regulated at an EU level. However, if an EU measure almost only affects domestic facts, it infringes the principle of subsidiarity. If the Commission’s statement is accurate that 10% of collective claims by consumers have a cross-border element, this could justify EU action.

#### Proportionality

It is not possible to assess the proportionality as the actual level of intervention is not yet known. In principle, the EU has to consider the conditions, structure and functioning of the legal systems in Member States. Collective redress mechanisms have a strained relationship with the view prevalent in many Member States that civil action law serves the assertion of subjective individual rights. Before collective redress mechanisms are introduced it should therefore be carefully examined as to whether or not the goals that are being pursued here could be reached by a different route. Regulation (EC) No. 861/2007, which came into force on 1<sup>st</sup> January 2009, thus creates an efficient process for cross-border cases up to a value of EUR 2,000, by introducing a standardised claims form and by allowing obligatory hearings to be dropped.

#### Compatibility with EU law

The introduction of EU-wide collective redress mechanisms could lead to problems with respect to Regulations (EC) No. 593/2008 (“Rome I”) and (EC) No. 864/2007 (“Rome II”). As material law in the country of residence is valid for every consumer (art. 6 Rome I- and art. 5 Rome II - Regulation), a collective redress procedure for consumers from different Member States would be difficult to achieve.

#### Compatibility with German law

In Germany, associations can sue for an injunction for infringements of consumer protection laws or competition law (sections 1 and 2 of the German Injunctions Act (UkLaG) and section 8 para. 3 of the German Law against Unfair Competition (UWG)). They can also enforce assigned consumer claims in their own name (section 79 para. 2 no. 3 German Code of Civil Procedure (ZPO)). Consumers may join together in a joinder of plaintiffs (sections 59 and 60 ZPO). Investors may carry out test case procedures (section 1 Capital Market Model Claims Act (KapMuG)).

Collective procedures lead to conflicts between the extensive binding authority of court decisions and the right to a legal hearing in German law (art. 103 para. 1 German Basic Constitutional Law (GG)): Those who are bound by a court decision must have comprehensive individual participation rights. This detracts from the gain in efficiency achieved with collective redress mechanisms.

Similar problems arise with regard to the Principle of Party Disposition which awards control of the proceedings to the parties. The fact that the individual can no longer determine the scope and conclusion of the proceedings with collective redress mechanisms must be compensated for through extensive participation rights, which will also hamper efficiency. Accordingly, section 8 para. 3 of the KapMuG states that all plaintiffs and defendants bound by the test case procedure are to be summoned to the proceedings.

### Alternative Policy Options

The expansion of possibilities for collective redress mechanisms should only be considered once it has been established that the existing legal instruments are not sufficient to assert meritorious claims.

### Possible Future EU Action

The Commission is expected to propose legislative measures once the consultation period has been completed.

### Conclusion

Collective redress mechanisms increase the likelihood of unmeritorious claims being asserted which can lead to over-deterrence effects in the behaviour of companies. This would have to be expected particularly in cases in which opt-out group actions were introduced or representative actions were encouraged through public financing, reduced legal costs or profit sharing. Whether or not standardised collective redress mechanisms are necessary for the functioning of the EU single market is questionable.