

European Commission – DG SANCO

Evaluation of the effectiveness and efficiency  
of collective redress mechanisms  
in the European Union

Final Report

*Part I: Main Report*

*Submitted by:*

*Civic Consulting (Lead) and Oxford Economics*

European Commission – DG SANCO

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## Key conclusions

The Directorate-General for Health and Consumers of the European Commission has commissioned a study on collective redress mechanisms in the EU, which was conducted by a consortium of Civic Consulting (lead) and Oxford Economics. The objectives of this study are to evaluate the effectiveness and efficiency of existing collective redress mechanisms in the European Union; assess whether consumers suffer a detriment as a result of the unavailability of collective redress mechanisms; and analyse whether the differing approaches to collective redress result in actual or likely obstacles to trade between Member States or in appreciable distortions of competition. The study reaches the following main conclusions:

- ⇒ *For the study period – roughly the last decade – a total of 326 consumer-relevant collective redress cases could be documented for the 13 Member States<sup>1</sup> that so far have introduced collective redress mechanisms.* The highest numbers of cases are reported from France, Spain, Germany and Austria. The main economic sectors in which collective redress mechanisms so far have been used are the financial services and the telecommunications sectors. Cases brought vary significantly concerning the value of the claim, with most of the cases having a total amount of the claim of between 10,000 and 99,000 Euro. Collective redress cases brought under current mechanisms do involve at least some cross-border aspects in close to 10 percent of the documented cases for which relevant information was available.
- ⇒ *By far not all the collective mechanisms fulfil the objectives attached to them by the national legislators, and these objectives vary greatly.* Whilst some of the mechanisms are too recent to be judged, others have clearly failed to achieve much in the area of consumer protection. In fact, some mechanisms are case-management tools rather than collective redress mechanisms.
- ⇒ *The financing of collective actions is a very significant obstacle for their use since the budgets of all potential intermediaries are limited and the risk of severe loss is high due to the “loser pays principle”.* This is even true where representatives are directly paid from the state budget (like the Scandinavian ombudsmen). Third party financing is so far rare in the consumer sector (with the main exception being Austria) and only of interest where the aggregate value of the claims is unusually high. Contingency fees are often prohibited in Member States but even where they are allowed, lawyers are likely to be mainly interested in high value cases or in spectacular cases with extensive media coverage.
- ⇒ *Collective redress mechanisms do not produce disproportionate costs for consumers but may be very costly for representatives.* Whilst court fees are not normally disproportionate, and degressive fee systems usually work in favour of collective

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<sup>1</sup> Collective redress mechanisms relevant for this study have been introduced in Austria, Bulgaria, Denmark, Finland, France, Germany, Greece, Italy, the Netherlands, Portugal, Spain, Sweden, and the UK. The development is highly dynamic. In the last few years, new collective redress mechanisms have been established in Germany (2005), the Netherlands (2005), Bulgaria (2006), Finland (2007), Greece (2007), and Denmark (2008). The most recent mechanism, which is expected to come into force in 2009, is the Italian group action.

claims, lawyers' fees can be very high in Member States where they are freely negotiable, so that mass litigation on small claims is too expensive. Also, the internal costs for the collection of claims, the management of the file etc. can be high, and indeed a barrier to take action, where this is in the responsibility of the representative.

- ⇒ *None of the collective redress mechanisms available in the EU seem to have caused unreasonable costs on businesses.* Through the collective pursuit of claims, litigation costs are likely to decrease (for both sides) rather than increase. Accordingly, there is no evidence pointing to rising costs of legal insurance after collective redress mechanisms were introduced.
- ⇒ *None of the mechanisms available in Europe has an impact on businesses that would be disproportionate to the harm caused.* Where the use of a collective mechanism is unfounded, the loser-pays principle usually protects the business from losses. Otherwise, the payable amounts are by definition limited by the harm caused, due to the principle of compensatory damages only. Settlements always represent a compromise between the parties so that the payable amount is generally less than full compensation.
- ⇒ *None of the collective mechanisms available in the EU has led to the closing down of a reputable business.* From the results of the evaluation it appears that the only instances in which businesses are likely to cease operation after a collective mechanism is used are businesses that are already in significant financial difficulties or businesses engaging in fraudulent practices.
- ⇒ *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.* The added value of different collective mechanisms depends to a significant degree on the type of claim. The use of collective redress mechanisms seems to attract higher media coverage than individual litigation and ADR; which is an incentive to out-of-court settlement and also produces a preventive effect.
- ⇒ *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.* However, taking into account the experience with such mechanisms in the EU so far, this detriment is modest. For consumers as a whole across the 14 countries that do not have collective redress mechanisms, the loss of consumer welfare may be equal to around 2.1 million Euro per annum, though a range of outcomes from 1,352 Euro to 64 million Euro per annum is also possible. These results, however, are based on an extrapolation of available data from Member States that have experience with collective redress mechanisms, which are often limited in scope and effectiveness, as the evaluation has indicated. The introduction of more effective collective redress mechanisms could yield benefits to consumers in countries where collective redress mechanisms have not been introduced yet, as well as to consumers in countries where collective redress mechanisms are already available.

## Executive summary

Almost half (13) of EU Member States currently have some mechanisms of collective redress, while the others do not. In its Consumer Policy Strategy for 2007-2013 the European Commission underlined the importance of effective mechanisms for seeking redress and announced that it would consider action on collective redress mechanisms for consumers. The Directorate-General for Health and Consumers of the European Commission has therefore commissioned a study on collective redress mechanisms in the EU. The objectives of this study are to evaluate the effectiveness and efficiency of existing collective redress mechanisms in the European Union; assess whether consumers suffer a detriment as a result of the unavailability of collective redress mechanisms; and analyse whether the differing approaches to collective redress result in actual or likely obstacles to trade between Member States or in appreciable distortions of competition. The study was conducted by Civic Consulting with support of Oxford Economics (analysis of consumer detriment). The study consists of three parts: Part I: Main report – contains a synthesis of the main results of the evaluation of effectiveness and efficiency of existing collective redress mechanisms in the European Union, and an economic assessment. Part II: Country reports – contains a description of relevant collective mechanisms, cases and detailed evaluation results for the 13 countries that were evaluated. Part III: Detailed description of cases by country – contains the full set of data concerning collective action proceedings filed under relevant existing mechanisms.

### Description of the use of collective redress mechanisms in the EU

Numerous collective redress mechanisms have been introduced in the EU at the national level, and the development is highly dynamic. In the last few years, new collective redress mechanisms have been established in **Germany** (a group action for capital market law cases in 2005), the **Netherlands** (a collective settlement procedure in 2005), **Bulgaria** (an opt-in group action in 2006), **Finland** (an opt-in group action and an opt-out collective ADR in 2007), **Greece** (a declaratory action for damages in 2007), and **Denmark** (an opt-in/opt-out group action in 2008). The most recent instrument, which is expected to come into force in 2009, is the **Italian** group action. Furthermore, existing mechanisms have been improved in order to correct shortcomings that have made them insufficiently effective or are in the process of being evaluated.

The existing types of collective actions can be broadly categorised under the headings of group actions, representative actions, test-case procedures, and (usually representative) procedures for skimming-off profits.

Group actions: In the Member States of the EU, a variety of types of group action can be found. They shall be distinguished as follows: a) group actions, in which individual actions are literally grouped into one procedure, b) actions that are brought by groups of consumers and c) group actions that are brought by one claimant, either an individual consumer, a consumer organisation or a consumer ombudsman, who can seek redress and ask for a decision on behalf of a group with equal or similar problems, giving the members of the group the right to enforce their rights in accordance with the decision. Group actions are the most common collective redress mechanism in the EU

and are available in **Bulgaria, Denmark, Finland, France, Germany, Italy** (expected for 2009), **the Netherlands, Portugal, Spain, Sweden**, and the **United Kingdom**.

*Representative actions:* Representative actions are actions in which the representative obtains a judgment that the representative can enforce (which is the main difference to all forms of group action, where after a decision in favour of the group all members of the group have the right to enforce their rights separately). Distinguished are a) traditional representative actions in which the representative can bring the action on behalf of consumers who will receive the damages themselves and b) collective representative actions in which the representative receives the damages. Representative actions are available in **Austria, Bulgaria, France, Germany, Greece**, and the **United Kingdom**.

*Test case procedures:* Although test cases are of course used in the Member States that form part of this report, only a few of these countries have introduced provisions that give a judgment in a test case effect over and above the parties to the test case itself. Even the **Austrian** test-case procedure, which was made available in order to allow consumer associations to bring test cases, or model cases, has not introduced any further effects of the judgment obtained. The situation is, however, different in **Greece**.

*Procedures for skimming off profits:* A special procedure for skimming off the profits gained from unlawful conduct in the field of the law of unfair competition has so far only been introduced in **Germany**. It does not aim at compensating consumers who have been the victims of such unlawful conduct but instead tries to re-establish fairness in competition by taking illegal profits from the wrong-doers. This procedure can be initiated by consumer associations but the skimmed-off profits will go into the public purse.

#### *Collective action proceedings filed*

The analysis of the cases filed in the study period<sup>2</sup> (roughly the last decade) leads to the following general conclusions:

⇒ *For the study period a total of 326 consumer-relevant collective redress cases could be documented for the 13 Member States that so far have introduced collective redress mechanisms.* The highest numbers of cases are reported from France, Spain, Germany and Austria. The main economic sectors in which collective redress mechanisms so far have been used are the financial services and the telecommunications sectors. Cases brought vary significantly concerning the value of the claim, with most of the cases having a total amount of the claim of between 10,000 and 99,000 Euro. Collective redress cases brought under current mecha-

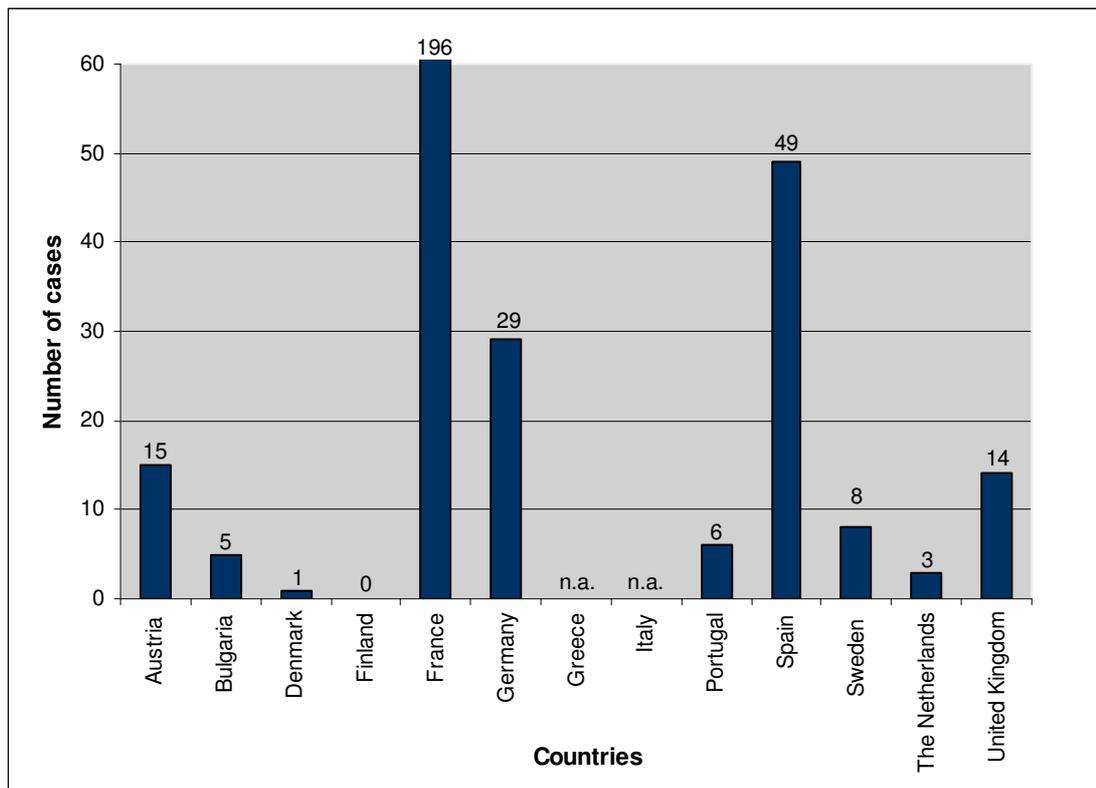
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<sup>2</sup> Publicly available data on consumer-relevant collective redress cases was collected since the introduction of the relevant mechanisms. While Member States differed in the dates of the introduction of collective redress mechanisms, in many cases mechanisms were introduced only after 1999. Austrian cases were collected for 1994-2007. Where a specific country had a significantly higher number of relevant cases than could reasonably be processed (as was the case in France), data was collected concerning the period 1997 to 2007.

nisms do involve at least some cross-border aspects in close to 10 percent of the documented cases for which relevant information was available.

The number of collective redress actions per country is indicated in the figure below.

**Figure 1: Collective redress cases per country**



Note: Total number of consumer-relevant cases filed since the introduction of the respective mechanism. For France, actions for the financial reparation of the consumer collective interest have been included since 1997. One of the Bulgarian cases is brought under two collective redress mechanisms, bringing the total number of cases in Bulgaria to 5.

The number of actions filed in the different Member States varies significantly, and low numbers do not always point at problems with the collective redress mechanisms in place. Reasons for the differences include:

- Only recent introduction of collective redress mechanisms in several Member States;
- Initial uncertainty where the legal prerequisites of legal standing or of the preconditions for a collective action are subject to controversies;
- Availability of alternative dispute resolution mechanisms;
- Lack of incentives for claimants.

### **Effectiveness of available collective redress mechanisms**

The evaluation of the effectiveness of available collective redress mechanisms focuses on the degree to which they fulfil the objectives of the national law which introduced

them, the incentives provided by the mechanisms, their accessibility and the way collective actions are financed. Main results of the evaluation include:

*Degree to which collective redress mechanisms fulfil objectives*

- ⇒ *By far not all the collective mechanisms fulfil the objectives attached to them by the national legislators, and these objectives vary greatly.* Whilst some of the mechanisms are too recent to be judged, others have clearly failed to achieve much in the area of consumer protection. In fact, some mechanisms are case-management tools rather than collective redress mechanisms. The most positive experiences from a consumer viewpoint are reported from Spain, Austria and the Netherlands but even in these countries there is room for improvement. Clearly, potential claimants, their lawyers and the courts need time to get accustomed to newly introduced collective mechanisms, and uncertainty of the law is a significant impediment to their functioning.
- ⇒ *While it is true that in some of the cases that were pursued through collective procedures consumers would certainly not have sued individually and would therefore not have obtained satisfactory redress, the country studies also indicate that there remain cases where the mechanisms were not useful to achieve satisfactory redress, and consumers have therefore not obtained satisfactory redress at all.* The assessment of consumer detriment indicates a relatively limited reduction in consumer detriment resulting from those mechanisms evaluated so far in countries where at least some cases have been decided since the introduction of the mechanism (**Austria, Bulgaria, France, Germany, Spain, Sweden, Portugal** and the **UK**), the notable exception being the **Dutch** mechanism which so far has provided a significantly higher direct benefit to affected consumers. This indicates that there are likely to be more potential benefits for consumers that could be obtained were the collective redress mechanisms more often used and larger groups of consumers involved – to the extent that mass claims/issues do exist in Member States where consumers currently do not obtain satisfactory redress.
- ⇒ *Only in the case of group actions that are pursued by a representative, in the case of traditional representative actions, and in the case of test case procedures have individual consumers directly benefited.* However, in large-scale low-value damage cases, the damage suffered by individual consumers appears to be too low to motivate consumer participation in an opt-in group action. Only Portugal, the Netherlands (after a settlement has been reached) and Denmark (only for low-value claims) make opt-out actions available. Other mechanisms do not aim at obtaining compensation for individual consumers, in particular where diffuse consumer interests are involved.

*Incentives provided by the collective redress mechanisms*

- ⇒ *Although some positive experiences are reported from several Member States, often due to media coverage of collective action, the existing collective redress mechanisms do not generally seem to ensure a change in the behaviour of the defendant.* Reasons for this are: a) Not all defendants are wary of their reputation,

which decreases the deterrent effects caused by media coverage; b) The amount that is payable by the defendant in case of a court decision or settlement may fall far behind the damage caused or the profit gained from unlawful behaviour; c) Collective actions may frequently not be successful because of difficulties to establish liability (e.g. in product liability cases).

- ⇒ *Most of the current collective redress mechanisms in the EU do not seem to constitute a significant deterrent to potential defendants unless collective actions receive particular media coverage in the respective Member State.* The preventive or deterrent effect of the available collective redress mechanisms appears to be closely related to the business climate in a particular Member State and to the public awareness that collective actions receive amongst consumers. The amount of damages obtained so far by consumers through these procedures seems to be a less important factor compared to media coverage, as damages awarded have been relatively modest in absolute terms in most of the countries and cases analysed.
- ⇒ *In most legal systems, out-of-court settlement is possible after a collective action has been filed, and sometimes the attempt to obtain an out-of-court settlement is an explicit part of the procedure.* The incentives for out-of-court settlements depend upon the legal environment, and in particular on the litigation costs involved and the length of the collective procedure. Incentives for out-of-court settlement are absent where the collective instrument provided by the law is unlikely to be used in practice, as is often the case with very low-value claims.
- ⇒ *All collective redress mechanisms analysed for this report discourage unmeritorious claims through some sort of “gatekeeper procedure” and/or the application of the “loser pays principle”.* Whereas true group actions usually require some decision by the court on the grouping together, the mere fact that the “loser pays principle” applies in most Member States constitutes a disincentive to unmeritorious claims. Experience from those systems that have used collective actions for a long time demonstrates that the risk of abuse by intermediaries such as consumer organisations is very low.

#### *Accessibility of the collective redress mechanisms*

- ⇒ *Group actions that are pursued by representatives and traditional representative actions are usually relatively easy to join.* Representatives, such as consumer associations are increasingly effective in organising the process of joining. However, in low- and very low-value cases, even the task of joining (time for signing up, collecting the evidence, etc.) is a barrier to consumers. Mechanisms that merely group individual claims into one collective procedure do not seem to reduce barriers to litigation.

#### *Financing and distribution of proceeds*

- ⇒ *The financing of collective actions is a very significant obstacle for their use since the budgets of all potential intermediaries are limited and the risk of severe loss is high due to the “loser pays principle”.* This is even true where representatives are

directly paid from the state budget (like the Scandinavian ombudsmen). Third party financing is so far rare in the consumer sector (with the main exception being Austria) and only of interest where the aggregate value of the claims is unusually high. Contingency fees are often prohibited in Member States but even where they are allowed, lawyers are likely to be mainly interested in high value cases or in spectacular cases with extensive media coverage.

- ⇒ *As far as group actions are pursued by institutionalised intermediaries, the proceeds are usually distributed amongst the consumers that suffered damage.* Reductions may stem from third party financing (where applicable). A number of mechanisms that are available in the Member States however do not aim at individual redress of consumers through collective mechanisms but have the character of sanctioning the breach of law as such.

### **Efficiency of available collective redress mechanisms**

The evaluation of the efficiency of available collective redress mechanisms addresses the length of collective redress proceedings, the costs for consumers, consumer organisations and public bodies, the costs for businesses, and possible effects on competitiveness and investment flows. Also considered in the study are possible effects of differing collective redress approaches on trade and competition. Main results of the evaluation include:

#### *Length of proceedings*

- ⇒ *The length of the proceedings under the collective redress mechanisms is mostly reasonable, compared to individual redress.* Where collective proceedings are taking very long time, this is attributed either to the complexity of the matter or to the general slowness of the court system (i.e. inefficiencies are then not specifically related to collective redress). Initial difficulties of courts with handling collective mechanisms seem to be reduced over time.

#### *Costs for consumers, consumer organisations and public bodies*

- ⇒ *Collective redress mechanisms do not produce disproportionate costs for consumers but may be very costly for representatives.* Whilst court fees are not normally disproportionate, and degressive fee systems usually work in favour of collective claims, lawyers' fees can be very high in Member States where they are freely negotiable, so that mass litigation on small claims is too expensive. Also, the internal costs for the collection of claims, the management of the file etc. can be high, and indeed a barrier to take action, where this is in the responsibility of the representative.
- ⇒ *Collective redress mechanisms do alleviate the burden of litigation costs on consumers, although to variable extent.* In many cases, the consumer does not participate in the litigation, and the litigation costs are borne by a consumer organisation or an ombudsman. Otherwise, the costs are reduced because the common costs are shared amongst the claimants. Whether, and to what extent, lawyers fees

are increased as compared to individual litigation, cannot be verified since such agreements are not made public.

#### *Costs for businesses*

- ⇒ *The existence of collective redress mechanisms has not increased the businesses' information costs.* None of the country studies could find any evidence of specific information costs related to collective redress mechanisms.
- ⇒ *None of the collective redress mechanisms available in the EU seem to have caused unreasonable costs on businesses.* Through the collective pursuit of claims, litigation costs are likely to decrease (for both sides) rather than increase. Accordingly, there is no evidence pointing to rising costs of legal insurance after collective redress mechanisms were introduced.
- ⇒ *None of the mechanisms available in Europe has an impact on businesses that would be disproportionate to the harm caused.* Where the use of a collective mechanism is unfounded, the loser-pays principle usually protects the business from losses. Otherwise, the payable amounts are by definition limited by the harm caused, due to the principle of compensatory damages only. Settlements always represent a compromise between the parties so that the payable amount is generally less than full compensation.
- ⇒ *None of the collective mechanisms available in the EU has led to the closing down of a reputable business.* From the results of the evaluation it appears that the only instances in which businesses are likely to cease operation after a collective mechanism is used are businesses that are already in significant financial difficulties or businesses engaging in fraudulent practices.

#### *Competitiveness and investment flows, effects on trade and competition*

- ⇒ *There is no evidence indicating an impact of the existing collective redress mechanisms on the competitive position of EU firms in comparison with their non-EU rivals, or indicating that the existing collective redress mechanism in the EU provoked cross-border investment flows.* Also, the economic impact of the current mechanisms is too modest to render such an effect likely.
- ⇒ *The impacts of differing collective redress approaches on trade and competition between Member States appear to have remained very limited so far.* Such an effect would also seem unlikely considering the very recent introduction of collective redress mechanisms in several Member States and the relatively small number of cases brought to court under those mechanisms that already exist for some time.
- ⇒ *The emergence of future obstacles to trade between Member States caused by differing approaches on collective redress appears to depend on the specifics of the mechanisms to be introduced.* The possible increase in liability costs for infringements of consumer protection legislation as such due to future collective redress mechanisms cannot be considered to create an obstacle to trade. Obstacles can be created, however, if collective redress mechanisms do not prevent unmeritorious claims with an effective gatekeeper procedure or vague provisions lead to a long phase of initial legal uncertainty. If even more differing approaches on collective

redress would significantly increase heterogeneity of legal systems and increase transaction costs, this could influence the willingness of entry of firms in other markets in the EU.

### **Added value of available collective redress mechanisms**

Generally speaking, almost all the collective redress mechanisms analysed for this report (except the **French** group action, which is hardly used, and the **German** skimming-off procedure, the usefulness of which has not been demonstrated yet) have some added value compared with individual judicial redress and to ADR schemes, although in different ways and to different extents:

⇒ *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.* The added value of different collective mechanisms depends to a significant degree on the type of claim. Collective representative actions and/or opt-out group actions seem to be most useful where substantive law does not provide for individual claims, or such claims are difficult to prove, or the value of the individual claims is too low to motivate consumers to participate, as is the case in large-scale low- or very low-value claims. Opt-in group actions and traditional representative actions seem to be mainly viable above a certain threshold amount of the individual claim, but are then suitable mechanisms to lower litigation costs for consumers and to reduce financial and psychological barriers to taking action. Importantly, the use of collective redress mechanisms seems to attract much higher media coverage than individual litigation and ADR; which is an incentive to out-of-court settlement and also produces a preventive effect.

### **Assessment of consumer detriment**

The study provides a quantitative assessment of whether consumers in EU Member States without a collective redress mechanism suffer a detriment due to the lack of such a mechanism. By definition, the fact that consumers in such countries do not have access to collective redress (CR) makes it difficult to directly measure any possible detriment they face as a result of its absence. However, an alternative approach is to consider whether the introduction of CR has reduced consumer detriment to consumers in countries which have adopted it as a legal mechanism. It is this approach which has been used for the current study. In brief, the approach followed by this study was therefore as follows:

- ❑ *Data collection* – Data was collected about the operation of CR systems in 13 Member States which have adopted collective redress mechanisms.
- ❑ Of these, four were excluded from the analysis due to a recent introduction of CR (**Denmark, Finland, Greece, Italy**<sup>3</sup>), while one (the **UK**) was excluded due to privacy issues precluding the collection of detailed data.

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<sup>3</sup> In Italy the CR mechanism is expected to be available only in 2009.

- ❑ *Assessment of CR for Member States having a relevant mechanism* – The data gathered through the country studies were collated for each country (i.e. each CR regime). Net benefits of CR were calculated by comparing court outcomes under CR (the option case) to defined individual redress (IR) base cases.
- ❑ *Data mapping* – Results for CR countries were adjusted in terms of population, GDP and GDP per capita to allow for the differing characteristics of countries that do not currently have collective redress mechanisms (the non-CR countries). This allowed for an estimate of the possible consumer detriment in non-CR countries due to the lack of a CR system.

*Results for Member States with collective redress mechanism*

Results for the studied Member States are presented in Table 1 on the next page. This table provides the range of outcomes (i.e. reduced consumer detriment), which have accrued to countries currently using CR as a legal mechanism. Annual average results for both individuals (reduced individual detriment) and consumers as a whole (reduced structural detriment) are given.

The total annual consumer benefit for the eight countries with available data is some 523.0 million Euro. This equates to an average of 2.16 Euro per head of population. Average annual individual benefit is some 910 Euro per consumer represented in litigation. However, these figures are heavily influenced by the results for the Netherlands, where a few major cases distort results. Excluding the Netherlands, consumer benefit is some 10.2 million Euro per annum, while annual individual benefit is some 41 Euro per represented litigant. While there are many caveats associated with these results (particularly that the definition of CR varies), with the exception of the Netherlands, the results indicate that the benefits of CR to consumers are relatively modest in the Member States where it is employed.

**Table 1: Annual benefits of existing collective redress mechanisms (summary)**

Member State	Average Annual Total Benefit (Avoided Structural Detriment) (€)	Average Annual Benefit per Litigant (Avoided Individual Detriment) (€)	Average Annual Benefit (Structural Detriment Avoided) per million national population (€)
<i>Austria</i>	2,314,759	248	<b>278,923</b>
<i>Bulgaria</i> <sup>1</sup>	1,144	n.a.	<b>150</b>
<i>France</i> <sup>1</sup>	86,265	n.a.	<b>1,361</b>
<i>Germany</i>	2,702	89	<b>33</b>
<i>Netherlands</i>	512,793,008	1,573	<b>31,231,683</b>
<i>Portugal</i> <sup>2</sup>	(7,522,356)	(32)	<b>(709,296)</b>
<i>Spain</i>	302,117	332	<b>6,875</b>
<i>Sweden</i>	3,762	38	<b>414</b>
<i>Unweighted total/ average benefit (incl. NL)</i>	<i>523,026,113</i>	<i>910</i>	<b><i>2,160,505</i></b>
<i>Unweighted total/ average benefit (excl. NL)</i>	<i>10,233,105</i>	<i>41</i>	<b><i>45,346</i></b>

Notes: Denmark, Finland, Greece, Italy, excluded due to the fact that no relevant cases have been finally decided under the mechanisms. UK excluded due to lack of consistent data.

<sup>1</sup> Compensation of damages to the collective interest in the French CR system do not benefit individual consumers directly. Likewise, cases to date under the Bulgarian CR system do not benefit the consumer directly. Therefore no litigants are recorded for these countries.

<sup>2</sup> The result in Portugal is largely influenced by one large telecommunications case in Portugal.

#### *Assessment for Member States that do not have a collective redress mechanism*

In the further analysis, the results obtained are adjusted to reflect the different population size of the non-CR countries and the different national income levels of the non-CR countries (as measured by GDP per capita). The non-CR countries would likely have implemented a range of different regimes and thus there are a range of different outcomes which might be possible. For these reasons it is useful to give a range of possible scenarios. The lower limit of this range is set by **Germany**. If the **German** experience is repeated in the non-CR countries, introduction of CR mechanisms will do little to reduce any structural or individual detriment suffered by consumers. Conversely, the upper limit is set by **Portugal**. Table 2 on the next page indicates the results.

**Table 2: Consumer detriment in non-CR Member States (excluding NL data)**

Member State	Annual Structural Detriment (€)	Annual Individual Detriment (€)
<b>Average (from EU 7)</b>	<b>2,144,415</b>	<b>18</b>
<i>Maximum</i>	64,144,175	527
<i>Minimum</i>	1,352	0.01

Note: Data from the Netherlands excluded for the extrapolation to non-CR Member States because it can be considered as an outlier (the few major cases settled in the Netherlands for significant amounts involving major companies are unlikely to have frequent parallels in most non-CR Member States).

It is also possible to give a figure which *includes* the **Netherlands** data, *though once again, this must be highly caveated*. In this case, **Germany** again forms the minimum case, however, the **Netherlands** (with average annual net benefits of 31.2 million Euro, per million population, per annum) is the Member State with the highest structural benefit (see the following table).

**Table 3: Consumer detriment in non-CR Member States (including NL data)**

Member State	Structural Detriment (€)	Individual Detriment (€)
<b>Average (from EU 8)</b>	<b>100,701,916</b>	<b>384</b>
<i>Maximum</i>	1,215,650,443	4,638
<i>Minimum</i>	1,352	0.01

Note: Data from the Netherlands *not* excluded for the extrapolation to non-CR Member States, although it can be considered as an outlier.

The analysis of consumer detriment leads to the following conclusion:

⇒ *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*. However, at this stage this detriment is modest. For consumers as a whole across the 14 countries that do not have collective redress mechanisms, the loss of consumer welfare may be equal to around 2.1 million Euro per annum, though a range of outcomes from 1,352 Euro to 64 million Euro per annum is also possible (see Table 2). These results, however, are based on an extrapolation of available data from Member States that have experience with collective redress mechanisms, which are often limited in scope and effectiveness, as the evaluation has indicated. The introduction of more effective collective redress mechanisms could yield benefits to consumers in countries where collective redress mechanisms have not been introduced yet, as well as to consumers in countries where collective redress mechanisms are already available.

*The following table presents main evaluation results by Member State and collective redress mechanism. It is a shortened version of the table presented in Annex 8.*

**Table 4: Overview of effectiveness and efficiency of consumer-relevant collective redress mechanisms in the EU**

	Mechanism	Type	Cases	Reduction consumer detriment	Objectives	Satisfactory redress	Accessibility	Litigation costs	Length of proceedings	Cost for business	Closing down of business	Comments
	<i>Name of mechanism (Year of introduction)</i>	<i>Type of mechanism</i>	<i>Number of cases*</i>	<i>Annual benefit CR per million population **</i>	<i>Does the mechanism fulfil its objectives?</i>	<i>Did cons. obtain satisfactory redress?</i>	<i>Is it easily accessible to consumers?</i>	<i>What are the litigation costs for consumers?</i>	<i>Is the length of the proceedings reasonable?</i>	<i>Are costs unreasonable?</i>	<i>Closing down of business documented?</i>	
<b>AT</b>	Representative test case action (in use since 1994)	Test-case procedure	5	278,923 €	Yes	Yes	Yes	Consumers have no litigation risk	Yes	Not unreasonable	No	<i>The mechanism has a fairly broad effect.</i>
	Collective redress actions of Austrian type (in use since 2000)	Traditional representative action	10		Yes	Partly	Yes	Consumers have no litigation risk	Yes	Not unreasonable	One case (fraudulent business)	<i>Considered to have a very significant impact on negotiation procedures before an action is filed.</i>
<b>BU</b>	Collective action for damages to collective consumers' Interests (1999)	Representative collective action	3	150 €	Partly	No	Not applicable	Not applicable	Yes	Not unreasonable	No	<i>The mechanism introduced in 1999 was rarely used and the law was amended in 2006.</i>
	Collective action for damages to the collective consumers' interests (2006)	Representative collective action	2		Partly	No	Not applicable	Not applicable	Yes	Not unreasonable	No	
	Collective action for damages suffered by consumers (2006)	Group action	1		Too recent to be judged	Too recent to be judged	Yes	Costs depend upon the value of the claim	No data available yet	Likely to be not unreasonable	Highly unlikely	<i>The effectiveness and efficiency cannot be assessed yet.</i>
<b>DK</b>	Group action according to the Administration of Justice Act (2008)	Group action	1	N/a	Too recent to be judged	Too recent to be judged	Yes, where necessary (opt in)	Limited in opt-in procedure	No data available yet	Likely to be not unreasonable	Highly unlikely	<i>The effectiveness and efficiency cannot be assessed yet.</i>
<b>FI</b>	Group action for compensation in consumer disputes (2007)	Group action	0	N/a	Too recent to be judged	Too recent to be judged	Joining a group initiated rather easy	Consumers have no litigation risk	No data available yet	Likely to be not unreasonable	Highly unlikely	<i>The effectiveness and efficiency cannot be assessed yet.</i>

	Mechanism	Type	Cases	Reduction consumer detriment	Objectives	Satisfactory redress	Accessibility	Litigation costs	Length of proceedings	Cost for business	Closing down of business	Comments
	Name of mechanism (Year of introduction)	Type of mechanism	Number of cases*	Annual benefit CR per million population **	Does the mechanism fulfil its objectives?	Did cons. obtain satisfactory redress?	Is it easily accessible to consumers?	What are the litigation costs for consumers?	Is the length of the proceedings reasonable?	Are costs unreasonable?	Closing down of business documented?	
FR	Actions for the financial reparation of the consumer collective interest	Representative collective action	(190)	1,361 €	Yes	Not the aim of the mechanism	Not applicable	Not applicable	Considered too long by claimant organisation	Not unreasonable	No	Allows consumer org. to refinance activities. However, does not seem to constitute a significant deterrent.
	Joint representative action for consumers (1992)	Group action	6		No	No	Yes	As in individual litigation	Yes	Not unreasonable	No	The mechanism is too difficult to handle for consumer associations.
	Joint representative action for investors (1994)	Group action	0		No	No	Yes	As in individual litigation	Yes	Likely to be not unreasonable	No	The mechanism is too difficult to handle for investor associations.
DE	Recovery of ill-gotten gains (2004)	Skimming-off procedure	7	33 €	No	Not the aim of the mechanism	Not applicable	Not applicable	Yes	Not unreasonable	No	The requirements of the skimming-off procedure are very strict.
	<i>Sammel- or Musterklage</i> (2002)	Traditional representative action	18		Partly	Yes but the effect is limited	Yes	Consumers have no litigation risk	Yes	Not unreasonable	No	After a slow start the mechanism has proved useful.
	Group actions in the capital market (2005)	Group action	4		Not yet, most important case pending	Not yet	Must sue individually before grouped	Only common costs are shared	No data available yet	Not unreasonable	No	The mechanism is a management tool for complex mass litigation.
GR	Collective action for the protection of the general interest of consumers (1994)	Representative collective action	N/a	N/a	Yes	Not the aim of the mechanism	Not applicable	Not applicable	Reasonable compared with other court proceedings	Not unreasonable	No	Allows consumer org. to refinance activities. Does, however, not seem to constitute a strong deterrent.
	Declaratory action for damages (2007)	Test case procedure	0		Too recent to be judged	Only as individual follow-on	Not applicable	Not applicable	No data available yet	Likely to be not unreasonable	No	The effectiveness and efficiency cannot be assessed yet.
IT	Collective action (2009)	Group action	0	N/a	Not yet in force	Not yet in force	Probably yes	Not yet in force	No data available yet	Not yet in force	No	The law is not yet in force. May be difficult to handle for consumer org.

	Mechanism	Type	Cases	Reduction consumer detriment	Objectives	Satisfactory redress	Accessibility	Litigation costs	Length of proceedings	Cost for business	Closing down of business	Comments
	Name of mechanism (Year of introduction)	Type of mechanism	Number of cases*	Annual benefit CR per million population **	Does the mechanism fulfil its objectives?	Did cons. obtain satisfactory redress?	Is it easily accessible to consumers?	What are the litigation costs for consumers?	Is the length of the proceedings reasonable?	Are costs unreasonable?	Closing down of business documented?	
NL	Act on Collective Settlement of Mass Damage (2005)	Group action	3	31,231,683 €	Partly	Yes	Opt-out mechanism	No direct costs but possibly part of the settlement	Yes	Not unreasonable	Closing down seemingly caused by loss of reputation	The mechanism has a broad effect but also limitations. So far highest annual benefit for consumers of all mechanisms evaluated.
PT	Popular action ( <i>Ação popular</i> ) (1995)	Group action	6	709,296 €	Partly	Yes, in some cases.	Opt-out mechanism	No litigation risk, if action is brought by representative	No	Not unreasonable	No	The mechanism has received positive comments but is not used very frequently.
ES	Action in defense of rights and interests of consumers (2000)	Group action	49	6,875 €	Yes	Yes	Yes	Membership fee; otherwise conditional fee agreements	Yes	Not unreasonable	No	Frequently and successfully used in mass claims.
SE	Group proceedings act (2002)	Group action	8	414 €	A careful yes, the mechanism is still fairly recent	Yes	Yes	Consumers who opt in have no or a very limited litigation risk	Yes	Not unreasonable	No	Opt-in process is organised by the court.
UK	Group litigation order (2000)	Group action	13	No data available	Partly	Only in few cases	Individual litigation must be filed first.	High litigation fees	Lengthy proceedings	Not unreasonable	No	Has been used only for some package travel and product liability cases.
	Competition action (1998)	Traditional representative action	1		No	Not yet	Joining an action rather easy	None	Too rarely used to be judged	Not unreasonable	No	Has been used only once. Not suitable for small claims.

Notes: This is a shortened version of the table provided in Annex 8 and should therefore be interpreted with care, as some relevant comments are only included in the extended version. \*Figures refer to all consumer-relevant cases since the introduction of the mechanisms. For France, figures include only consumer-relevant cases for years 1997-2007 inclusive. \*\* Average annual structural consumer detriment avoided (i.e. consumer benefit) per million of national population since the introduction of the mechanism. Assessment is only possible for countries where cases have already been finally decided or settled.

# 1 Introduction

Almost half (13) of EU Member States currently have some mechanisms of collective redress, while the others do not. In its Consumer Policy Strategy for 2007-2013 the European Commission underlined the importance of effective mechanisms for seeking redress and announced that it would consider action on collective redress mechanisms for consumers.

The Directorate-General for Health and Consumers of the European Commission has therefore commissioned a study to evaluate the effectiveness and efficiency of collective redress mechanisms in the EU. The study was conducted by Civic Consulting with support of Oxford Economics. The latter contributed an economic assessment of consumer detriment in Member States where collective redress mechanisms are not available (section 5 of this report) on basis of a conceptual approach developed jointly with Civic Consulting.

## 1.1 Objectives and scope of the study

The objectives of this study are to evaluate the effectiveness and efficiency of existing collective redress mechanisms in the European Union; assess whether consumers suffer a detriment as a result of the unavailability of collective redress mechanisms; and analyse whether the differing approaches to collective redress result in actual or likely obstacles to trade between Member States or in appreciable distortions of competition. The Terms of Reference (TOR) of the study list the following specific tasks:

1. Provision of an overview of the national legal provisions for collective redress mechanisms in Bulgaria.
2. Provision of details on national experiences concerning the use of collective redress mechanisms in those Member States that offer such mechanisms, that is, Austria, Bulgaria, Denmark, Finland, France, Germany, Greece, Italy, the Netherlands, Portugal, Spain, Sweden and the United Kingdom.
3. Evaluation of the effectiveness and efficiency of collective redress mechanisms available in those Member States that offer such mechanisms.
4. Analysis of the results on collective redress in the Eurobarometer survey on Consumer Protection in the Internal Market of September 2006.
5. Provision of an economic assessment of whether consumers suffer a detriment in those Member States where collective redress mechanisms are not available.
6. Analysis of whether the differing approaches on collective redress between the Member States result in actual or likely obstacles to trade between Member States or in appreciable distortions of competition.

The study focuses on the following categories of consumer-relevant collective redress mechanisms in the EU:

- ❑ Group actions, in which individual actions are literally grouped into one procedure (other than through a traditional joinder of plaintiffs in similar cases);
- ❑ Representative actions, in which an individual or an organisation represents a multitude of individuals;
- ❑ Test case procedures, in which a case brought by one or more persons leads to a judgment that forms the basis of other cases brought by persons with the same interest against the same defendant; and
- ❑ Procedures for skimming-off profits, in which a defendant who infringes the rules against unfair competition or unfair commercial practices is held liable to reimburse the illegally generated profits.

Not covered by the study are injunctive actions and procedures based on criminal law.

## 1.2 Structure of the report

This study consists of three parts:

Part I: Main report – contains a synthesis of the main results of the evaluation of effectiveness and efficiency of existing collective redress mechanisms in the European Union, and an economic assessment.

Part II: Country reports – contains a description of relevant collective mechanisms, cases and detailed evaluation results for the 13 countries that were evaluated.

Part III: Detailed description of cases by country – contains the full set of case collection sheets concerning collective action proceedings filed under relevant existing mechanisms.

## 1.3 Acknowledgements

Civic Consulting would like to express its gratitude to all the supporters, without whom this study would not have been possible; we would like to thank the Ministries and consumer protection authorities, consumer organisations and business associations, as well the legal practitioners and academics who provided valuable input through in-depth interviews and an EU-wide survey. Finally, we thank DG SANCO of the European Commission for the support provided throughout the study.

## 2 Methodology

Methodological tools employed for this study include:

- ❑ Desk research;
- ❑ In-depth interviews with stakeholders;
- ❑ A survey of business stakeholders;
- ❑ Collection of data on collective redress cases;
- ❑ Hypothetical example cases;
- ❑ Evaluation of existing collective redress mechanism in 13 EU Member States, and preparation of country reports;
- ❑ Economic assessment, including the assessment of consumer detriment.

The methodological tools are described in more detail below:

### ***Desk research***

The aim of this activity was to collect as much of the information that has been produced on this topic as possible. Documents reviewed include, for example, publications from consumer associations, academic publications, press, and business associations. In addition, the contractor participated in several conferences on collective redress.

### ***Interviews with stakeholders***

In-depth expert and stakeholder interviews were conducted in 10 Member States, namely Austria, Bulgaria, Estonia, France, Germany, the Netherlands, Portugal, Spain, Sweden and the UK. A total of 57 interviews were conducted, partly face-to-face and partly by phone. The number of interviewed stakeholders per country can be found in the following table.

**Table 5: Number of interviewed stakeholders per country**

Country	Number of interviews
Austria	6
Bulgaria	6
Estonia	5
France	6
Germany	4
The Netherlands	5
Portugal	6
Spain	8
Sweden	5
UK	6
<i>Total</i>	<i>57</i>

Stakeholders interviewed include public authorities, such as Ministries of Justice, Ministries of Economic Affairs (consumer protection directorates), consumer protection authorities (consumer protection agencies, ombudsman); consumer associations; business associations; and lawyers and judges involved in collective redress.

### ***Survey***

The interviews for the country studies were conducted on basis of a list of exploratory questions (see Annex 4). Together with the legal assessment and the evaluation of the cases brought so far (see below) they provided a comprehensive basis for the evaluation. In addition, a complementary stakeholder survey was developed, based on the final evaluation indicators. The survey was targeted at relevant stakeholder organisations, including consumer organisations, consumer protection authorities and business stakeholders. The latter were specifically addressed to collect additional evidence concerning possible economic impacts of collective redress mechanisms on business activity, competitiveness and trade.

### ***Collection of data on collective redress cases***

The contractor gathered detailed information on proceedings filed under the different collective redress mechanisms available in each Member State using a case collection sheet (see Annex 3). The case collection sheet was filled in with publicly available information for each case. In Member States where publicly available information on collective redress cases was found to be scarce or too vague in view of the objectives of the evaluation (that is, assessment of consumer detriment), the contractor contacted solicitors and relevant consumer organisations to supplement the data.

Data collected on collective redress cases includes only consumer-relevant cases. Where a specific country had a significantly higher number of relevant cases than could reasonably be processed by the contractor (for example, France), it was agreed with the Commission to concentrate on data concerning the period 1997 to 2007.

### ***Hypothetical example cases***

A set of “hypothetical example cases” was developed to provide an objective picture on the applicability and costs related to the relevant mechanisms, in addition to the legal analysis and the evaluation of the cases brought so far. A hypothetical example case is hereby understood as being a collective action proceeding that is “invented” on the basis of existing cases, and defined through the type of individual damage suffered by a number of consumers, the sector, the category of law, the value of the case, the affected number of consumers etc. In other words, the two main objectives of the hypothetical example case approach are: (a) to provide an objective basis for assessment, and (b) to make possible a comparison across countries for each collective redress mechanism on costs, time involved and relevance of public support, third-party financing etc.

Three “hypothetical example cases” have been developed:

- *Telecommunications*: Due to a technical defect, a telecommunications services provider has miscalculated the duration of all telephone calls made by customers as being 2-3 per cent longer than they were in reality, resulting in extra profits of 1 million Euro in total.
- *Financial services*: A business released a third tranche of shares (230 million shares, at 60 Euro per share). Following this, the value of the shares decreased rapidly over the next three years (to 10 Euro per share), leading to a loss in shareholder value of 11.5 billion Euro. Shareholders claimed that they had been victims of false information.
- *Tourism*: A tour operator advertised on its website a “last-minute package” called “4-star” in which consumers were meant to be offered various hotels in various locations (Greece, Tunisia, etc.) in the 4-star category. However, the hotels were in poor condition and, in spite of consumers’ requests, no alternative accommodation was provided.

#### ***Evaluation of existing collective redress mechanism***

Existing collective redress mechanisms have been evaluated, and country reports have been prepared for 13 Member States, namely Austria, Bulgaria, Denmark, Finland, France, Germany, Greece, Italy, the Netherlands, Portugal, Spain, Sweden, the UK, and are included in the Part II of this report. The relevant ministries (Ministry of Justice and/or ministry/authority responsible for consumer affairs) were given the opportunity to comment on the draft country reports. Comments received were taken into consideration by the evaluation team when finalising the country reports.

#### ***Economic assessment, including the assessment of consumer detriment***

An economic analysis was conducted to examine whether consumers suffer a detriment in those Member States where collective redress mechanisms are not available, and to determine whether the differing approaches on collective redress between the Member States result in actual or likely obstacles to trade between Member States or in appreciable distortions of competition.

### 3 Description of the use of collective redress mechanisms in the EU

#### 3.1 Summary of tasks according to TOR

*For each mechanism for collective redress available in each Member State, if such information is publicly available, the contractor will:*

- *List all collective action proceedings filed under that mechanism since the introduction of that mechanism.*
- *Identify the party which filed the action and specify whether that party is an individual consumer, a group of consumers, a consumer organisation or a public body.*
- *Give the date of the filing of the action.*
- *Specify the amount for which the action was brought.*
- *Specify the duration of the procedure.*
- *Specify the costs related to bringing the action.*
- *Specify how the action was financed.*
- *Specify whether the action had a cross-border element.*
- *State the outcome of the procedure (or that the procedure has not yet been concluded).*
- *Give the total number of collective action proceedings filed under all existing mechanisms and under each mechanism separately since its introduction in that particular Member State.*
- *Give the total number of collective action proceedings per sector (e.g. media, pharmaceuticals, financial services etc.)*
- *Give the total number of collective action proceedings per category of law infringement (e.g. consumer protection law, competition law.)*
- *Specify which parties may bring a collective action proceeding under each mechanism (i.e. individual consumers, groups of consumers, consumer organisations or public bodies).*
- *Specify what number and percentage of collective action proceedings brought under each mechanism, and what number and percentage of the total collective action proceedings brought in each Member State (under all mechanisms available in that Member State) were filed by an individual consumer, a group of consumers, a consumer organisation or a public body.*

*Where the information requested is not publicly available, this should be clearly stated.*

#### 3.2 Background: The discussion on collective redress in the EU

Collective redress mechanisms are an issue that is discussed at various levels in the EU. In the field of EC competition law, the Commission has already tabled a Green

Paper on Damages Actions for breach of the EC antitrust rules<sup>4</sup> in 2005 and, after having analysed the results of the consultation, the White Paper on Damages Actions for breach of the EC antitrust rules in 2008.<sup>5</sup> The outcome of the EC legislative process is still open.

EC legislation is already strong in the collective enforcement of consumer law through injunctions. In this field, a number of Directives, including Directive 84/450/EEC on misleading advertising, the Unfair Contract Terms Directive 93/13/EEC, the Distance Selling Directives 97/7/EC and 2002/65/EC and the Unfair Commercial Practices Directive 2005/29/EC have called on Member States to introduce a procedure in the collective interest aiming at injunctive relief and under the Injunctions Directive 98/27/EC qualified entities in the list can bring actions for injunction in another Member State.<sup>6</sup> The instrument of injunction is, however, limited in its effects. It does not ensure that past damage to the consumers' interests is compensated, and it has only limited deterrent effect.

In recognition of these limitations of injunctive relief, numerous collective redress mechanisms have been introduced at the national level, and the development is highly dynamic. In the last few years, new mechanisms have been established in **Germany** (a group action for capital market law cases in 2005), the **Netherlands** (a collective settlement procedure in 2005), **Bulgaria** (an opt-in group action in 2006), **Finland** (an opt-in group action and an opt-out collective ADR in 2007), **Greece** (a declaratory action for damages in 2007), and **Denmark** (an opt-in/opt-out group action in 2008). The most recent instrument, which is expected to come into force in 2009, is the **Italian** group action.

Furthermore, existing mechanisms have been improved in order to correct shortcomings that have made them insufficiently effective or are in the process of being evaluated. In **Bulgaria**, the representative collective action, that was introduced in 1999, was improved in 2006. At the time of finalising this report, the **Austrian** Verein für Konsumenteninformation (VKI) was preparing a study on the experiences of collective actions in **Austria**, and evaluations of the experiences with the national collective redress mechanism were ongoing or planned in **Sweden**, **Germany** and the **UK**.<sup>7</sup> Interestingly, sometimes collective redress mechanisms have explicitly been introduced as "experimental legislation" and therefore limited in time, to be extended only if the legislator is satisfied with the success. This applies e.g. to the German Capital Market Model Claims Act.

With these different mechanisms in place and first experiences being seen, the discussion on the best model has turned away from the issue of the US and Canadian class

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<sup>4</sup> COM (2005) 672 final.

<sup>5</sup> COM (2008) 165 final.

<sup>6</sup> See, in particular, Micklitz, Rott, Docekal & Kolba, Verbraucherschutz durch Unterlassungsklagen, 2007.

<sup>7</sup> For example, the UK Civil Justice Council (CJC) published in August 2008 a series of recommendations aimed at improving access to justice for consumers and small business bringing collective claims for compensation.

actions and their potential transferability to the European legal systems that was dominant in earlier debates. Whereas some authors would still favour a system that at least draws from Northern American experiences, European legislators have made it clear that they are searching for other solutions. Therefore, the focus is now on an exchange of experience of the success or shortcomings of the models that have been introduced in Europe, and in 2007 and 2008, high-profile conferences on collective redress were held in, among other places, Lisbon and Oxford.

### 3.3 Overview of existing collective redress mechanisms in the EU

A US type of class action has not been introduced until now by any of the EU Member States. However, a great variety of types of collective action has developed in recent years. They can be broadly categorised under the headings of group actions, representative actions, test-case procedures, and (usually representative) procedures for skimming-off profits. Not all types of collective action can be easily placed under one of the headings. More information on the redress mechanisms can be found below, at 3.4, and in the country reports in Part II of this study. In the following sections, an overview of results concerning of the use of collective redress mechanisms in the European Union is provided. This analysis is based on the country studies conducted in **Austria, Bulgaria, Denmark, Finland, France, Germany, Greece, Italy, the Netherlands, Portugal, Spain, Sweden** and the **United Kingdom**.

#### Group actions

In the Member States of the EU, a variety of types of group action can be found. They shall be distinguished as follows: a) group actions, in which individual actions are literally grouped into one procedure, b) actions that are brought by groups of consumers and c) group actions that are brought by one claimant, either an individual consumer, a consumer organisation or a consumer ombudsman, who can seek redress and ask for a decision on behalf of a group with equal or similar problems, giving the members of the group the right to enforce their rights in accordance with the decision.

#### a) Group actions, in which individual actions are grouped into one procedure

Group actions, in which individual actions are literally grouped into one procedure can be found in **Germany** and the **United Kingdom**, and to a certain extent in **Spain** and **Portugal**. Such group actions show distinctive features that go beyond a traditional joinder of plaintiffs in similar cases in that they provide, for example, for special competences of the court, special rules on representation, and the like.

The **German** mechanism of the Capital Market Model Claim Act and the **UK** Group Litigation Order both require individual claims to be brought at the outset. Once a certain

threshold of individual claims has been brought<sup>8</sup>, not necessarily in the same court but with common facts and issues of law, these can be joined together under the Capital Market Model Claim Act or the UK Group Litigation Order respectively. In the **UK** system, it is at the discretion of the court whether it considers it useful to join the individual claims together. Both mechanisms are essentially meant to make the judicial proceedings more efficient. In other words, they are case-management tools that are primarily meant to reduce the burden on courts that can be caused by mass litigation, although the **German** legislator explicitly also wants to improve consumer protection in that consumers benefit from the common costs (in particular, expert evidence) are being shared, and also the defendants may benefit because their litigation costs are bundled into one proceeding. In both cases, consumers can join the proceedings after they have transposed into group actions.

b) Actions brought by groups of victims

Group actions, in the sense of proceedings initiated by a group of victims that has been formed in order to bring proceedings, are available in **Denmark, Spain** and **Portugal**. In all these countries, the group of consumers that sues in court<sup>9</sup> can represent further consumers. In **Portugal** and **Spain** the same type of action can be brought by a consumer association in favour of the victims of infringements of consumer law, and in both countries this has the advantage that the consumers themselves do not have to bear the litigation costs. Because of this advantage group actions initiated by groups of victims have not been brought in **Portugal** until now. In contrast, **Spanish** consumers have already formed large groups in order to bring group actions.

In **Denmark**, the action can also be brought by the Consumer Ombudsman. However, this does not release the represented consumers entirely from the litigation costs. A special regime applies, whereby consumers bear a limited litigation risk that is determined by the court. At the time of finalising this report, only one group action had been brought in **Denmark**.

c) Group actions brought by an ombudsman, a consumer organisation or a lead plaintiff

Group actions in which one representative, be it an ombudsman, a consumer organisation or a lead plaintiff, can obtain a judgment that can be enforced by the members of the group concerned include the group action under Article 189 of the **Bulgarian Law** on Consumer Protection; the **French** collective actions under Article L 422-1 of the *Code de la consommation* and under Article L 452-2 of the Monetary and Financial Code; the **Italian** group action under Article 140bis of the Consumer Code; the **Portuguese** action that can be brought by a consumer association under the Participation and Popular Action Law of 1995; the **Spanish** group action brought by a consumer

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<sup>8</sup> Unlike in some other common law systems, there is no formal threshold of numbers in the UK system.

<sup>9</sup> According to the Danish rules only one group representative is allowed.

association; and the collective mechanisms available in **Denmark, Finland and Sweden**.

The **Dutch** procedure under the Act on Collective Settlement of Mass Damage is not strictly speaking a group action in this sense, but a type of its own, with very distinct features, in particular since its aim is confirmation by the court of a pre-trial settlement reached by the parties. However, this settlement usually includes the right of the consumers as described in the settlement to claim damages from the liable party, or maybe to set up a compensation fund (the system is very flexible in this respect). Therefore, it comes at least close to the group actions, and it shall be discussed in their context.

Only the **Dutch** and the **Portuguese** mechanisms are opt-out mechanisms. **Danish** law provides for a system that allows both opt-in and opt-out actions, with opt-in actions the more prevalent. Opt-out actions are admitted only in cases in which the claims are so small that it is evident that they will not normally be brought by individual consumers because inconvenience and financial risk are disproportionate to the possible gains.

In all the other countries, consumers will be called to sign up to the lawsuit if they wish to be included, and if this is possible at all. The one mechanism that lies somewhere in between an opt-out and an opt-in mechanism is the group action under **Spanish** law, in which even consumers who have not joined in can benefit from a positive judgment if they demonstrate that they are the type of consumer who is entitled to damages under the judgment.<sup>10</sup> They are, however, not bound by a judgment against the representative.

In several Member States, only a consumer protection authority, the consumer ombudsmen or consumer associations can be the representatives of a group of consumers. In **Portugal, Spain and Sweden** only, the group of harmed consumers can be represented by an individual consumer or by a (smaller) group of consumers.<sup>11</sup> In **Denmark**, opt-in group actions can be brought by a consumer association or individual claimants or the Danish Consumer Ombudsman, whereas opt-out actions can be brought only by the Consumer Ombudsman.

### **Representative actions**

Representative actions are actions in which the representative obtains a judgment that the representative can enforce (which is the main difference to all forms of group action, where after a decision in favour of the group all members of the group have the right to enforce their rights separately). The Glossary of the Consumer Law Enforce-

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<sup>10</sup> This is, however, still a controversial issue under Spanish Law. Section 221 LEC states some rules formally only for proceedings that have been brought by consumers associations, and not for those brought by groups of consumers. Nevertheless, some commentators argue that Section 221 LEC would also be applicable by analogy to the latter proceedings.

<sup>11</sup> Under Spanish law, the group of harmed consumers cannot be represented by an individual consumer and the representative group has to be a relevant portion of all affected consumers.

ment Forum (CLEF)<sup>12</sup> distinguishes a) traditional representative actions in which the representative can bring the action on behalf of consumers who will receive the damages themselves and b) collective representative actions in which the representative receives the damages.

a) Traditional representative actions

Most representative actions aim at achieving compensation for individual consumers who have suffered damage from the same behaviour or product, in a collective procedure. This is the case for the **German** representative action under the Legal Advice Act and also for the representative action that can be brought by *Which?* under the **UK Competition Act 1998**. In the case of the German representative action, the money has to be paid to the representative, although in practice, the representative and the trader may agree that the money be paid directly to the consumers concerned. For the representative action under the UK Competition Act 1998, s. 47B (6) provides that any damages or other sum (not being costs or expenses) awarded in respect of a consumer claim included in proceedings under this section must be awarded to the individual concerned; but the Tribunal may, with the consent of the specified body and the individual, order that the sum awarded must be paid to the specified body (acting on behalf of the individual).

The representative action under s. 47B of the UK Competition Act 1998 is a follow-on procedure, under which the Office of Fair Trading, the European Commission or the Competition Appeal Tribunal must have first ruled that an infringement of competition law has taken place, while the **German** representative action under the Legal Advice Act is a stand-alone procedure.

b) Compensation for damage to the collective interest (collective representative actions)

In contrast, the representative actions under Article 188 of the Bulgarian Law on Consumer Protection, under Article L. 421-1 of the French Consumer Code, and under Article 10 par. 16 of the Greek Consumer Protection Act (moral damages) aim at compensation of damage done to the *collective* interests of consumers, and therefore do not require the proof of any individual damage. The consumer association can claim damages to its own purse, and damages will be estimated by the court. The damages that can be obtained do not correspond with the aggregated damages to victims; they are much lower. In **Greece**, they are regarded as being of a punitive nature but not in the sense that they would be added to compensatory damages.

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<sup>12</sup> See <http://www.clef-project.eu/cms/project.php>.

### **Test case procedures**

Although test cases are of course used in the Member States that form part of this report, only a few of these countries have introduced provisions that give a judgment in a test case effect over and above the parties to the test case itself. Even the **Austrian** test-case procedure, which was made available in order to allow consumer associations to bring test cases, or model cases, has not introduced any further effects of the judgment obtained. Its predominant achievement is that the way to the Supreme Court is opened even where the value of the claim would not normally allow for a Supreme Court judgment, and although a Supreme Court judgment does not constitute a binding precedent in **Austria**, it would normally be highly persuasive for the lower courts. It can also provide consumer associations with a stronger role in negotiation procedures before an action is filed. However, the prescription of the same type of claims by other consumers is not suspended during the test-case procedure. Broader effects can be achieved only by (voluntary) pre-trial contracts between the parties, but this is not relevant to this study.

An exception is **Greece**. In the **Greek** system, the new procedure of Art. 10 par. 16 lit. d) of the Consumer Protection Act allows consumer associations to seek a declaratory judgment on the defendant's liability for damages. Such a judgment has a *res judicata* effect in favour of individual consumers who can, in a follow-on procedure, rely on the judgment and claim payment in accordance with their individual losses. In contrast, the judgment has no *res judicata* effect against consumers. This means, consumers can still sue for damages in individual litigation.

### **Procedures for skimming off profits**

A special procedure for skimming off the profits gained from unlawful conduct in the field of the law of unfair competition has been introduced in **Germany**. It does not aim at compensating consumers who have been the victims of such unlawful conduct but instead tries to re-establish fairness in competition by taking illegal profits from the wrong-doers. This procedure can be initiated by consumer associations but the skimmed-off profits will go into the public purse.

## **3.4 Collective redress mechanisms in the EU by country**

This part briefly characterises the redress mechanisms in **Austria, Bulgaria, Denmark, Finland, France, Germany, Greece, Italy, the Netherlands, Portugal, Spain, Sweden** and the **United Kingdom** (see also table below). More details are available in the country reports in Part II of this study.

## **Austria**

**Austria** has made a test-case procedure and a traditional representative action available.

a) A number of procedural rules refer to sec. 29 of the Consumer Protection Act that lists certain institutions (the **Austrian** Economic Chamber, the Federal Chamber of Labour, the Council of **Austrian** Chambers of Agricultural Labour, the Presidential Conference of **Austrian** Chambers of Agriculture, the **Austrian** Trade Union Federation, the *Verein für Konsumenteninformation* (Consumer Information Association) and the **Austrian** Council of Senior Citizens) to bring cases. Among these institutions, the *Verein für Konsumenteninformation* (VKI) is the one of the highest practical relevance; The VKI can represent a consumer who assigns his or her claims to the VKI. If such a procedure is brought by one of these institutions (e.g. a representative test case procedure according to sec. 502 para 5 in connection with sec. 29 KSchG) the consumer does not participate in the court proceedings. Whatever procedure was filed, the final judgment has no legal effect beyond the consumer who suffered the respective damage. The main purpose of most of the collective procedures is to open the way to the Supreme Court, thereby achieving a broader effect than with litigation in the lower courts.

b) Through a combination of sec. 227, 502 para 5 of the Civil Procedural Act (*Zivilprozessordnung*), the above-mentioned institutions, including the VKI, can also act as a representative for more than one consumer and therefore bring a traditional representative action. The action aims at obtaining damages in one single court procedure, which are then distributed among the consumers who have assigned their claims. The consumers themselves do not participate in the court proceedings. The judgment has no legal effect beyond those consumer(s) who suffered the respective damage.

## **Bulgaria**

**Bulgarian** law provides for two types of collective action: a group action aiming at compensation for individual damage in a collective procedure, and a representative action aiming at compensation for damage to the collective interests of consumers.

a) The group action under Art. 189 of the Law on Consumer Protection aims at compensation for individual damage in a collective procedure. The representative is a consumer association. This is an opt-in procedure since consumers have to sign up in order to be included in the proceedings.

b) The representative action under Art. 188 of the Law on Consumer Protection aims at compensation of damage done to the collective interests of consumers. It does not require proof of any individual damage, and it has no effect on individual claims that consumers may wish to bring. Instead, the consumer association can claim damages for its own purse, and damages will be estimated by the court in accordance with the principle of fairness.

### **Denmark**

**Denmark** introduced a group action in 2008 that entails a variety of sub-types of group action. Normally this is an opt-in group action that can be brought by individual claimants, by a private consumer association or institution (such as the Danish Consumer Council) or by the Consumer Ombudsman. Only in cases where the claims are so small that it is evident that they will not normally be brought by individual consumers because inconvenience and financial risk are disproportionate to the possible gains can an opt-out group action be admitted by the court, and the only possible group representative in an opt-out action is the Consumer Ombudsman. It is estimated that opt-out group actions are allowed only when the individual claims do not exceed DKK 2,000 (approx 264 Euro).

### **Finland**

**Finland** has introduced a group action under the Group Action Act of 2007 that can be brought only by the Consumer Ombudsman. According to this Act, the **Finnish** Consumer Ombudsman may, in a mass consumer dispute, initiate legal action in a general court and represent a specified group of consumers without the express permission of the group members. The court will then decide whether or not to admit the action as a group action, and fix a period of time in which the group members, who have to be notified individually by the Consumer Ombudsman or by public announcement, can opt in. The judgment is binding only on those members of the group who have signed up to the procedure.

### **France**

**France** offers two types of collective action.

a) Under Article L. 421-1 of the Code de la consommation (Consumer Code), a registered consumer association can bring an action to recover the damage done to the collective interest of consumers. This is a collective representative action. It does not require the proof of any individual damage, and it has no effect on individual claims that consumers may wish to bring. Instead, the consumer association can claim damages for its own purse. The damages that can be obtained do not correspond with the aggregated damages to victims; they are much lower.

b) Under Article L. 422-1 of the Consumer Code, registered consumer associations can bring an action as representative of a group of individuals who have suffered personal detriments that originate from the activities of a given person. The same legal standing is granted to investor associations under Article L. 452-2 of the Monetary and Financial Code. These collective mechanisms are group actions, in which only those consumers who opt in participate in the proceedings. They have no effect on other consumers or investors affected by the same activity. The consumer / investor association can initiate such a group action only if it has been mandated to do so by at least two consumers.

### Germany

In **Germany**, three different types of collective actions are available.

a) The most clear-cut representative action is the action under the Act on Legal Advice (*Rechtsberatungsgesetz*), which has been replaced by the Act on Legal Services (*Rechtsdienstleistungsgesetz*) with effect from 1 July 2008. Under this Act, a consumer association can represent consumers who assign their claims to the consumer association. The action aims at obtaining damages in one single court procedure, which are then distributed among the consumers who have assigned their claims. The consumers themselves do not participate in the court proceedings. The judgment has no legal effect beyond those consumers who have assigned their claims.

b) The procedure under the Capital Market Model Claims Act (*Kapitalmusterklagen-gesetz*; KapMuG) is of an entirely different character. Essentially, this is a tool to handle mass claims in the field of investments more efficiently. The procedure is an interim procedure. It addresses common problems of individual claims filed in the same court or in different courts, in particular the issue of the defendant's general liability, for example, arising from misleading information on the capital market. The decision can be appealed but will otherwise be binding on those courts in which the original individual claims were filed. Those latter courts then have to decide on the individual claims, that is, on whether the defendant is responsible for the damage and on the calculation of damages.

c) The Law of Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) provides for a representative action that does not aim at compensating the victims of unfair competition but instead at skimming off the profits from the unfair trader. It can be initiated by a consumer association, and it has no effect on individual claims by consumers against the unfair trader. Instead, the profits go to the state budget, and the law does not specify any particular purpose for which they should be used. This was also meant to prevent abuse.

### Greece

**Greece** offers two types of collective action.

a) Since 1994 the **Greek Consumer Protection Act** has made a collective representative action available, under which recognised consumer associations can sue not only for injunctions but also for “moral damages”. According to the **Greek** Supreme Court, these moral damages have a punitive character, they are not meant to compensate the consumers' losses, and they are not distributed to the consumers who have suffered damage. Instead, 35% of the awarded damages go to the purse of the consumer association, 35% to a second consumer association, and the rest to the State budget, where it is used for the purposes of consumer protection. Individual consumers do not take part in the litigation and do not benefit directly from the litigation.

b) In 2007, a declaratory action for damages was introduced to complement the representative action. With this declaratory action, a consumer association can seek a

declaratory judgment on the grounds of damages. Once this judgment has become final, it has *res judicata* effect on individual consumers, that is, consumers can, in a follow-on procedure, rely on the judgment and claim payment in accordance with their individual losses. The procedure is therefore characterised as a test-case procedure. In contrast, the judgment has no *res judicata* effect against consumers: consumers can still sue for damages in individual litigation.

### **Italy**

The **Italian** legislator has introduced a group action in December 2007 that was supposed to come into effect in mid-2008 but has been postponed until January 2009. The group action can be brought only by a representative – users’ and consumers’ associations, the professionals’ associations or the chambers of commerce, industry, craftsmanship and agriculture. It is an opt-in action that has *res judicata* effect only on those consumers who have opted in. It is available in the fields of contract law, tort law, unfair competition law and cartel law.

### **The Netherlands**

The **Netherlands** has introduced a collective settlement procedure under the Act on Collective Settlement of Mass Damage (*Wet collectieve afwikkeling massaschade; WCAM*). The procedure is a group action, conducted by a foundation or association that, according to its by-laws, represents the interests of parties on whose behalf the settlement agreement was concluded. It aims at reaching the court’s approval of a settlement negotiated between the representative and the liable party with a view to payments to be made to all those that were harmed by one event or multiple similar events. No previous judgment on the merits of the claims is required, although it is easier to clarify the issue of liability first, for example with a test case,<sup>13</sup> before negotiating the settlement. The petition initiating the procedure must be filed by the representative as well as by those potentially liable. It is an opt-out procedure in that the settlement is binding on the liable party and on all injured persons, unless they opt out. If injured persons opt out, they can pursue their own individual claims in court.

### **Portugal**

**Portugal** has a group action that can be brought by either a group of consumers or by a consumer association, though the latter is far more important in practice.

a) Under the Participation and Popular Action Law of 1995, a consumer association can bring a collective action for damages. Strictly speaking, the instrument is not limited to

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<sup>13</sup> The notion of test case does not indicate any special test case procedure but simply one case in which the position of the court is tested.

infringements of consumer law but includes public health, the quality of life and the preservation of the cultural and environmental heritage. The collective action is an opt-out procedure. Importantly, consumers are not liable for any fees if the action is brought by a consumer association. Instead, the consumer association bears the risk of litigation but the consumers receive the awarded damages.

b) In the same way, the action can be brought by individual consumers that are then, of course, liable for the fees arising. In practice, consumers choose to be represented by a consumer association for precisely this reason.

### Spain

**Spanish** law includes group actions brought by a group of consumers or by a consumer association. The ambit of both is the whole body of consumer law. They both typically apply in cases affecting a significant number of consumers.

a) In cases in which the victims are identifiable, they can form a group and bring an action as a group. Prior to starting the proceedings, the group needs to show that all potentially interested consumers have been notified of the group's intention to bring suit. Once the proceedings are filed, additionally, the consumers of the product or users of the service that caused the harm will be granted another opportunity to join in, by being summoned to the proceedings to claim their personal or individual interests. Summoning will be carried out by publishing the filing of the claim in media that reaches all the territorial areas where the damage of rights or interests has taken place. Thus, they can join and actively participate in the proceedings. However, even if they do not participate in the proceedings, they can benefit from the judgment,<sup>14</sup> since the judgment will spell out which consumers can benefit from it.

b) The same type of proceedings can be brought by a consumer association, as a representative action. Also in this case, the consumers of the product or users of the service that caused the harm (if they are identifiable) will be summoned to the proceedings and join them; again, they can benefit from the judgment even if they do not join.

c) Finally, **Spanish** law allows for a representative action to be brought by a consumer association in cases in which the people affected by the harmful event are not specified or are hard to identify. In such a case, the proceedings will be suspended for a maximum of two months, during which time the court will try to identify the affected people. The proceedings will then continue with those who have joined in within this period, and again, those who have not can benefit from the judgment that will specify which consumers can benefit from it.

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<sup>14</sup> This is, however, still a controversial issue under Spanish Law. See footnote 10 above.

### Sweden

**Swedish** law provides for collective action under the Group Proceedings Act of 2002. The mechanism introduced is a group action in which an individual member of a group, an association of consumers or wage-earners, or the Consumer Ombudsman can bring an action. The Act has established an opt-in procedure, so that the judgment has no effect on members of the group that have not joined the group.

### UK

The **UK** provides for three different types of collective action, of which two are relevant for this study.

a) English law has long known the so-called “representative action”. These rules are now found in Part 19 II of the Civil Procedure Rules. The procedure allows that where more than one person has the same interest, a claim can be begun or continued by one or more persons who have the *same interest* as representatives of any other persons who have that interest. The representative can even represent parties who are not before the court. However, orders for or against non-parties can be enforced only with the leave of the court. Associations with no legal interest themselves cannot, however, act as representatives, thus a consumer association is not a suitable claimant. Normal costs rules and remedies apply. Although there are indications that the interpretation of this procedure is being liberalised, the requirement of a *same interest* has restricted the availability of this procedure in contract and tort cases, and it is not normally appropriate for consumer cases.

b) The mechanism under Part 19 III of the Civil Procedural Rules is the Group Litigation Order (GLO). This is a tool to handle mass claims or several claims with common features more efficiently, and it can be initiated not only by the claimants but also by the court. Thus, it requires a number of claims to be brought as individual claims before a GLO can be made. Other claimants can then join in. The procedure is not restricted to the field of consumer law, and in fact consumer law cases make up only a small share of the GLOs. In the ambit of consumer law, it has been mainly used in package travel and product liability cases.

c) Under s. 47 B of the Competition Act 1998, representative action is possible in cases of violations of competition law. The only representative that has been granted legal standing to date is the consumer association *Which?* The procedure is a follow-on procedure since it requires a decision by the Office of Fair Trading, by the Competition Appeal Tribunal, or by the European Commission that has established a breach of competition law. It aims at compensating the victims of the unlawful behaviour. It is an opt-in procedure since consumers have to sign up in order to be included in the proceedings. The judgment has no legal effect beyond those consumers who have signed up.

A summary table listing all consumer-relevant collective redress mechanisms in the EU is provided below:

**Table 6: Overview of consumer-relevant collective redress mechanisms in the EU**

Country	Collective redress mechanism	Legal basis	Type of mechanism	Year of introduction
Austria	Representative test case action	Sec. 502 para 5 ZPO in connection with sec. 29 KSchG	Test case procedure	In use since 1994
	Collective redress actions of Austrian type	Sec. 227, 502 para 5 ZPO in connection with sec. 29 KSchG	Traditional representative action	In use since 2000
Bulgaria	Collective action for damages to collective consumers' interests	Art. 54 of the Law on Consumer Protection and Trade Rules 1999 (came into force on 06.04.1999, abrogated on 09.06.2006)	Collective representative action	1999
	Collective action for damages to the collective consumers' interests	Art. 188 of the Law on Consumer Protection 2006	Collective representative action	2006
	Collective action for damages suffered by consumers	Art. 189 of the Law on Consumer Protection 2006.	Group action	2006
Denmark	Group action according to the Administration of Justice Act	Chapter 23a (§§ 254a-254k) of the Administration of Justice Act	Group action (opt-in / opt-out)	2008
Finland	Group action for compensation in consumer disputes ( <i>Ryhmäkannelaki</i> )	Finnish Group Action Act ( <i>Ryhmäkannelaki</i> ) (444/2007)	Group action	2007
France	Actions for the financial reparation of the consumer collective interest under Article L. 421 of the Consumer Code	Article L. 421 of the Consumer Code	Collective representative action	1973
	Joint representative action for consumers	Articles L. 422-1 to L. 422-3 of the Consumer Code	Group action	1992
	Joint representative action for investors	Articles L. 452-2 to L. 452-3 of the Monetary and Financial Code	Group action	1994
Germany	<i>Gewinnabschöpfungsklage</i> – recovery of ill-gotten gains	§ 10 UWG	Skimming-off procedure	2004
	<i>Sammel- or Musterklage</i>	Article 1 § 3 No. 8 RBerG (Legal Advice Act)	Traditional representative action	2002
	Group actions in the capital market	<i>Kapitalanleger-Musterverfahrensgesetz (KapMuG)</i>	Group action, interim procedure	2005
Greece	Collective action for the protection of the general interest of consumers	Art. 10 par. 16 of Law 2251/1994 regarding Consumer Protection which has most recently been altered by art. 13 of Law 3587/2007.	Collective representative action	1994

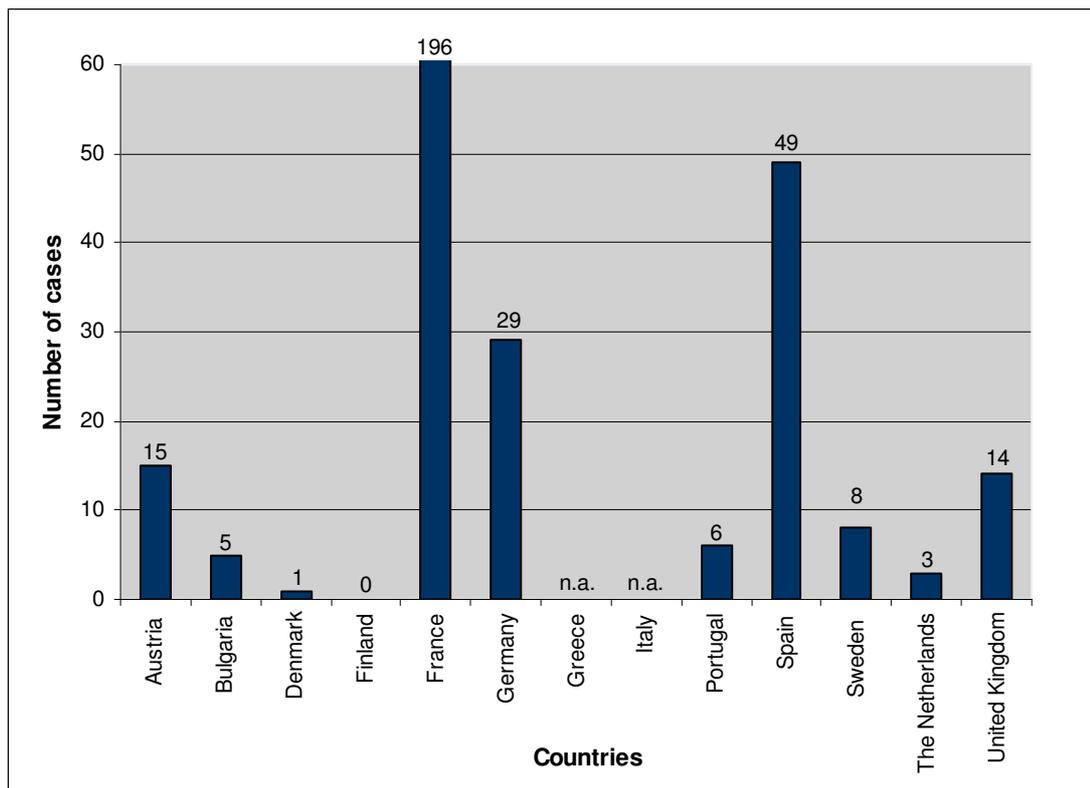
Country	Collective redress mechanism	Legal basis	Type of mechanism	Year of introduction
	Declaratory action for damages	The declaratory action for damages is based on art. 10 par. 16 of Law 2251/1994 No d regarding Consumer Protection which has most recently been introduced by art. 13 of Law 3587/2007.	Test case procedure	2007
<b>Italy</b>	Collective action ( <i>Azione collettiva risarcitoria</i> )	Art. 140-bis of the Consumer Code	Group action	2009
<b>The Netherlands</b>	Act on collective settlement of mass damage ( <i>Wet collectieve afwikkeling massaschade; WCAM</i> )	The act implemented articles 7:907-910 in title 15 of book 7 of the Dutch Civil Code (CC), which title concerns agreements determining the legal relationship between parties ( <i>vaststellingsovereenkomst</i> ). Furthermore, articles 1013-1018 were added to the Code of Civil Procedure (CCP).	Group action	2005
<b>Portugal</b>	Popular action ( <i>Acção popular</i> )	Art. 1 (2) of Law 83/95	Group action	1995
<b>Spain</b>	Action in defense of rights and interests of consumers	<p><i>a. Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil; Ley 26/1984, de 19 de julio, General para la defensa de los consumidores y usuarios, codified by the Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el Texto Refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias</i></p> <p><i>b. Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil; Ley 7/1995, de 23 de marzo, de Crédito al consumo</i></p> <p><i>c. Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil; Ley 22/1994, de 6 de julio, de Responsabilidad civil por daños causados por productos defectuosos, codified by the Real Decreto Legislativo 1/2007, de 16 de noviembre, por el que se aprueba el Texto Refundido de la Ley General para la Defensa de los Consumidores y Usuarios y otras leyes complementarias</i></p> <p><i>d. Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil, Ley 7/1998, de 13 de abril, sobre condiciones generales de la contratación</i></p>	Group action	2000
<b>Sweden</b>	Group proceedings act	Group Proceedings Act of 2002 ( <i>Lag 2002:599 om grupprättegång, GrL</i> ). The Legislative Commission Report (SOU 1994:151) Government Bill (Prop. 2001/02:107).	Group action	2003
<b>United Kingdom</b>	Group litigation order	Civil Procedure Rules Part 19 III - and in relation to costs Part 48 - and Practice Directions	Group action	2000
	Competition action	S. 47 B Competition Act 1998	Traditional representative action	2003

### 3.5 Collective action proceedings filed

#### 3.5.1 Number and characteristics of collective actions filed

The number of collective redress actions filed in the study period<sup>15</sup> (roughly the last decade) differs greatly from one Member State to the other. The total number of cases per country is indicated below in Figure 2.

**Figure 2: Total number of collective redress cases per country**



Note: Total number of consumer-relevant cases filed since the introduction of the respective mechanism (see Annex 8). For France, actions for the financial reparation of the consumer collective interest under Article L. 421 of the Consumer Code have been included since 1997. One of the Bulgarian cases is brought under two collective redress mechanisms, bringing the total number of cases in Bulgaria to 5.

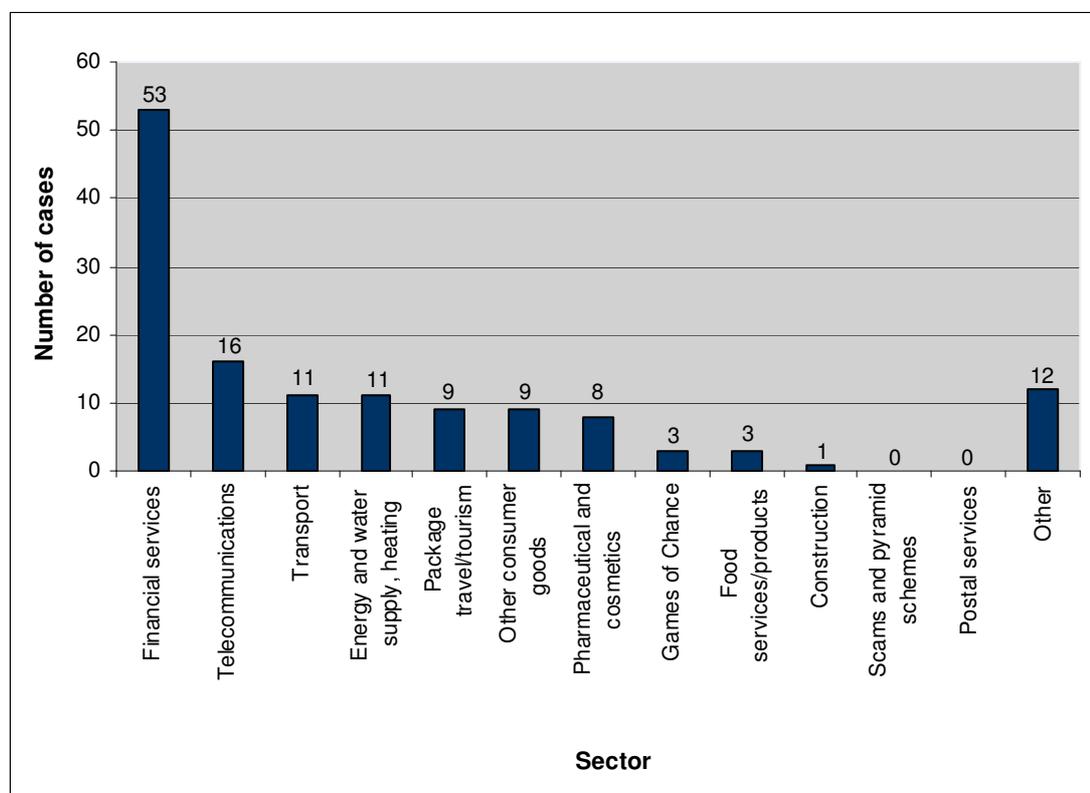
Collective redress mechanisms are relatively frequently used in only a few European countries (although still much less often than in other, non-EU jurisdictions that have such mechanisms). The most frequently used mechanism appears to be the **French** collective representative action under Article L. 421-1 of the Consumer Code, with

<sup>15</sup> Publicly available data on consumer-relevant collective redress cases was collected since the introduction of the relevant mechanisms. While Member States differed in the dates of the introduction of collective redress mechanisms, in many cases mechanisms were introduced only after 1999. Austrian cases were collected for 1994-2007. Where a specific country had a significantly higher number of relevant cases than could reasonably be processed (as was the case in France), data was collected concerning the period 1997 to 2007.

close to 20 cases per year (in total 190 cases). Other mechanisms relatively often used are to be found in **Spain** (49 cases filed in roughly ten years), **Germany** (18 group actions under the **German Legal Advice Act** since 2002), and **Austria** (15 collective redress cases filed in more than 10 years, mainly under the Collective redress actions of Austrian type. Under the **UK Group Litigation Order**, 13 group actions have been counted that can be considered to be consumer-relevant. A lower number of actions filed can be found with regard to the **French** group action (6), the **German** skimming-off procedure (7), the group action in **Portugal** (6) and **Sweden** (8), the **Bulgarian** action for the compensation of damage to the collective interest (5), the **German Capital Market Model Act** (4, none of them finally decided), the **Dutch Act on Collective Settlement of Mass Damage** (3), as well as with regard to the **Bulgarian** collective action for the compensation of individual damages, the **Danish** group action and the **UK** follow-on action in competition law cases (1 case each).

Collective redress cases documented by this study are presented in detail in Part II (Country reports) and Part III (Detailed description of cases by country). From the documented cases the following picture emerges concerning the characteristics of the actions filed: The main economic sectors in which collective redress mechanisms so far have been used are the financial services and the telecommunications sectors. This is shown in the figure below.

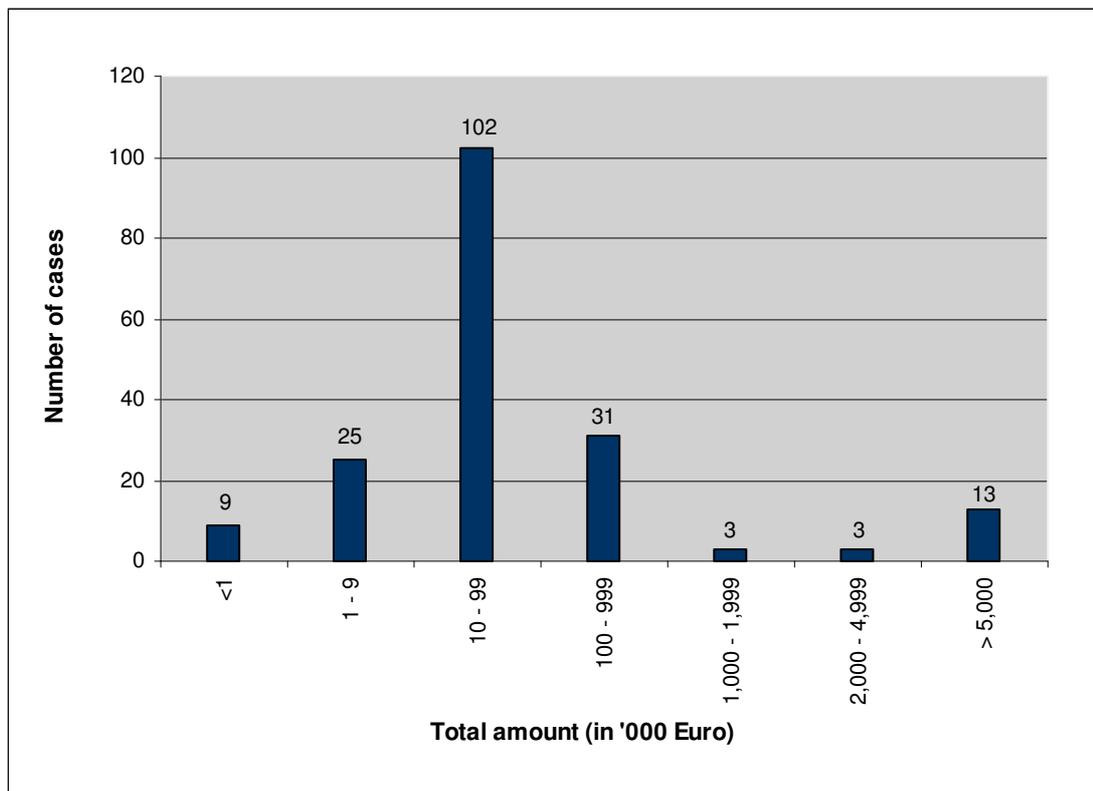
**Figure 3: Number of collective redress cases per sector**



Note: Figure does not include the French actions for the financial reparation of the consumer collective interest under Article L. 421 of the Consumer Code for reasons of consistency. These cases are analysed in more depth in CPEC (2008): Problem study.

For those cases for which relevant data could be obtained, the total amount of the claims brought under the mechanisms is presented in the following figure:

**Figure 4: Total amount for which the collective redress cases were brought**



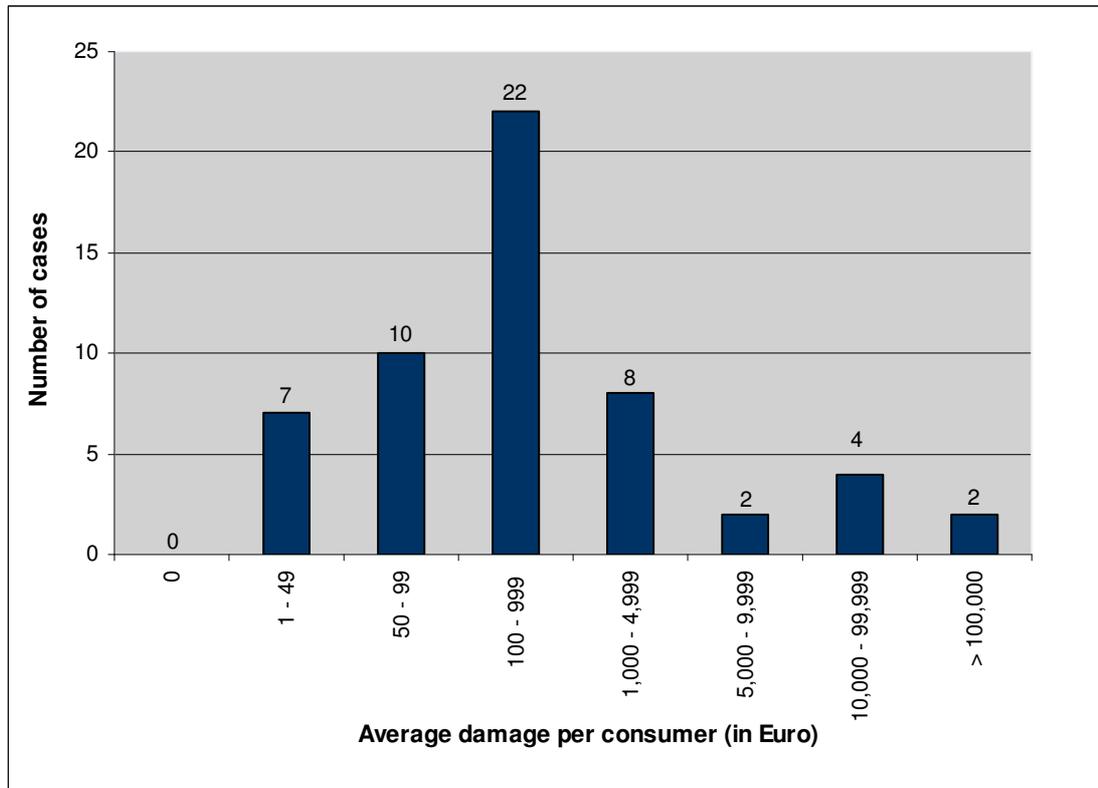
Note: Relevant data available for 14 Austrian cases, all 5 Bulgarian cases, all 3 Dutch cases, 1 French representative action, 121 French actions for the financial reparation of the consumer collective interest, for 25 German cases, for all 6 Portuguese cases, 6 Spanish cases, 5 Swedish cases, and 1 UK case.

From the figure above it appears that collective redress cases vary significantly concerning the value of the claim, with most of the cases having a total amount of the claim of between 10,000 and 99,000 Euro. Only in **Austria, Bulgaria, Germany, the Netherlands, Portugal and Sweden** were cases documented that involved total claims of more than 5 million Euro.<sup>16</sup>

Concerning the average amount that was claimed per consumer in the documented collective redress cases, the following picture emerges:

<sup>16</sup> In spite of a direct contact to the solicitors involved, no data concerning the value of the claims could be obtained concerning UK Group Litigation Orders.

**Figure 5: Average amount of the alleged damage/loss of each individual consumer affected**

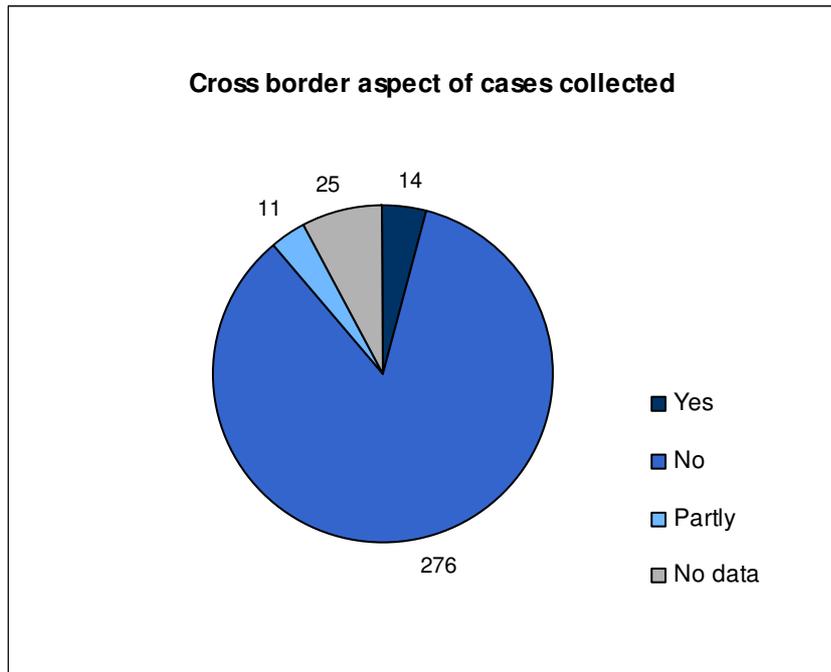


Note: Data available for 13 Austrian cases, 4 Bulgarian cases, 2 Dutch cases, 1 French representative action, 5 French actions for the financial reparation of the consumer collective, 15 German cases, 4 Portuguese cases, 6 Spanish cases, 3 Swedish cases, and 2 UK cases.. No data available for Denmark and Greece.

As the above graph illustrates, most frequently the cases brought involved average claims per consumer represented of between 100 and 999 Euro.

Collective redress cases brought under current mechanisms do involve at least some cross-border aspects in close to 10 percent of the documented cases for which relevant information was available. This is illustrated in the graph below.

**Figure 6: Cross-border aspect of collective redress cases collected**



More characteristics of the collective redress cases documented are presented in Annex 7 of this report.

The analysis presented above leads to the following conclusion:

1. ***For the study period (roughly the last decade) a total of 326 consumer-relevant collective redress cases could be documented for the 13 Member States that so far have introduced collective redress mechanisms.*** The highest numbers of cases are reported from France, Spain, Germany and Austria. The main economic sectors in which collective redress mechanisms so far have been used are the financial services and the telecommunications sectors. Cases brought vary significantly concerning the value of the claim, with most of the cases having a total amount of the claim of between 10,000 and 99,000 Euro. Collective redress cases brought under current mechanisms do involve at least some cross-border aspects in close to 10 percent of the documented cases for which relevant information was available.

### 3.5.2 *Reasons for variations in the numbers of collective actions filed*

The reasons for the number of actions filed in the different Member States vary as greatly as the numbers themselves, and they do not always identify problems with the mechanisms in place. Reasons include:

#### a) Only recent introduction of collective redress mechanisms

To start with, some of the collective mechanisms are fairly new, for example the new **Bulgarian** collective action for the compensation of individual damages, which was introduced only in 2006; the **Finnish** group action based on the **Finnish Group Action Act**, which came into effect in October 2007; the **Greek** test-case procedure, which was introduced in 2007; and the **Danish** group action, which was introduced in 2008. The **Italian** group action had not even come into effect at the time of finalising this report.

#### b) Initial uncertainty

Moreover, experience in a number of countries shows that in the beginning, the potential claimants are cautious about going down the new and unknown route. This is particularly true where the legal prerequisites of legal standing or of the preconditions for a collective action are subject to controversies, and therefore the filing of an action is a risk – and even more so if that risk causes the claimant/representative to have to bear his own and the other party's litigation costs. This is, for example, the case with the **German Capital Market Model Act** procedure, and the **UK** follow-on procedure under the **Competition Act 1998**, and it was also reported from **Portugal** that it has taken years to firmly establish the legal standing of consumer associations in the popular action procedure. The **Greek** collective representative action seems to be another example where it took some time for the consumer associations to begin to use this instrument more frequently.

#### c) Availability of alternative dispute resolution mechanisms

Another reason for low numbers may lie in the availability of alternative dispute resolution (ADR) procedures, or even a business culture that is favourable to the avoidance of disputes in the first place. The issue of ADR is discussed in depth in section 4.6.2 of this report.

#### d) Lack of incentives

Finally, there are also those types of collective action that are so unattractive to claimants that they are very rarely used. One example would be the **German** skimming-off procedure under **§ 10 UWG** that requires the claimant to prove the trader's intention to breach the law of unfair competition. Another example is – again – the **German Capital Market Model Act** procedure that, according to the general opinion of academics and practising lawyers, is suitable only in extreme cases, because it makes lawsuits rather

more complicated and lengthy in most other cases. Also, the **French** consumer group action is highly unattractive and has been used only a few times since 1992 because it is considered far too complicated and poses a high risk to the claimant consumer organisation.

At the other end of the scale, one reason for the higher number of collective claims in **Spain** is certainly the favourable legislation on litigation fees, under which consumers can sign up free of charge to a collective action brought by a consumer association, and the consumer association is often not liable for court fees.<sup>17</sup> With respect to the lawyer's fees, the use of contingency fees, although prohibited by law, appears to be accepted and tolerated in practice. The active use of the collective representative action under Article 10 par. 16 of the **Greek** Consumer Protection Act is also supported by the fact that the consumer association receives 35% of the "moral damages" awarded.

This leads to the following conclusion:

2. ***The number of actions filed in the different Member States varies significantly, and low numbers do not always point at problems with the collective redress mechanisms in place.*** Reasons for the differences include:

- Only recent introduction of collective redress mechanisms in several MS;
- Initial uncertainty where the legal prerequisites of legal standing or of the preconditions for a collective action are subject to controversies;
- Availability of alternative dispute resolution mechanisms;
- Lack of incentives for claimants.

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<sup>17</sup> Justice will be free of charge for consumer associations with insufficient monetary resources to bring legal actions (Second Additional Provision of the Law 1/1996 on Legal Aid). Nevertheless, this does not cover all costs (for example, advertisements in mass media required by Section 15 LEC). In other cases, court fees will be paid by consumer associations with the periodic membership fees, subsidies granted by public administrations or their own resources.

## 4 Effectiveness and efficiency of collective redress mechanisms

### 4.1 Summary of tasks according to TOR

*For each mechanism for collective redress available in each Member State, the contractor will analyse in detail:*

- *The extent to which the mechanism is effective and efficient.*
- *If the mechanism is/ is not effective, the reasons why it is/ is not effective.*
- *If the mechanism is/ is not efficient, the reasons why it is/ is not efficient.*

*The contractor will develop a methodology to evaluate the effectiveness and efficiency of each collective redress mechanism. The evaluation should be based on concrete evidence, and primarily on quantitative data. Where such data is unavailable or is insufficient to draw conclusions, this should be clearly stated. In such cases, conclusions may be based mainly on qualitative data.*

### 4.2 Introduction

This analysis is based on the country studies conducted in **Austria, Bulgaria, Denmark, Finland, France, Germany, Greece, Italy**, the **Netherlands, Portugal, Spain, Sweden** and the **United Kingdom** (England and Wales). More detailed information on the individual legal systems and the collective mechanisms can be found in the country reports in Part II of this study, where the questions below are separately answered for each mechanism.

### 4.3 Effectiveness of available collective redress mechanisms

#### 4.3.1 Objectives

**Evaluation Question (EQ) 1: Do the collective redress mechanisms fulfil the objectives of the national law which introduced them?**

The answer to this question is necessarily ambiguous. Generally speaking, some of the collective mechanisms do fulfil the objectives that national legislators have pursued. However, these objectives are sometimes severely limited, and they do not always have consumer protection as their main focus, in particular the enforcement of large-scale low-value claims. In that respect, they sometimes meet the expectations of the legislator but not the expectations of consumers or consumer organisations who expected them to provide an effective redress mechanism. Some mechanisms do not seem to fulfil their purpose at all, unless one considers their purpose is to be used only in extreme cases.

The **Bulgarian** group action under Article 189 of the Law on Consumer Protection, the **Danish** group action that was introduced in 2008, the **Finnish** group action under the Group Action Act of 2007, and the **Greek** test-case procedure are too recent to be evaluated here. The **Italian** group action is expected to be available from 2009.

For the purposes of this question, the following types of collective procedures must be distinguished:

a) Group actions in which individual actions are grouped into one procedure

The group actions in which individual actions are grouped into one procedure are predominantly case-management tools. They offer the courts the opportunity to solve issues that are common to a multitude of cases in one go. Their use is therefore to some extent at the discretion of the courts. In that respect, the **UK Group Litigation Order** has certainly served its purpose, and also the **German Capital Market Model Claims Act** is said to be useful in the sort of cases it has been designed for, in particular the Telekom case with some 17,000 claimants. However, it is also obvious that those two procedures are very rarely used, and they are not meant to be tools for easy redress of mass damages. In particular, both procedures are unsuitable for large-scale low-value claims since the normal court fees apply. In that respect, some expectations may have been disappointed.

b) Other group actions

The other types of group action that are available in the Member States also appear to have different objectives. They are more likely to be meant to cover not only high-value claims, for example in the field of pharmaceuticals, but also lower-value claims, such as claims in the field of package travel. Nevertheless, it is clear that the opt-in procedures that have been established in most Member States do not attract consumers with truly low-value claims. The only country among those analysed so far where a significant number of actions regarding large-scale low-value claims have taken place is **Spain**, although the situation might develop in a similar way in **Bulgaria**.

The objectives that legislators pursue appear to be related to the perceived gaps in effective enforcement mechanisms. Where strong ADR systems or easily accessible and cheap small claim procedures exist, the legislators may not have perceived a particular need for group actions in which large-scale low-value claims can be brought (however, see also discussion of low-value claims, section 0). This is the case in **Sweden** and also in **Portugal** but, for example, not in **Bulgaria**. Also, relatively easy access to justice through individual litigation as is commonly thought to exist in **Germany**, limits the perceived gaps to specific areas – in the case of **Germany**, the area of unfair competition law.

The effects of group actions are also limited by the fact that only in **Spain** have the litigation fees been relaxed for group actions (and, to a certain extent, in **Portugal**). In the other countries the normal fees apply, and lawsuits are risky because of the “loser-pays principle”. Therefore, the activities of the main players – ombudsmen or consumer associations – are severely limited, even if those players receive public funding, as the **German** consumer organisation *vzbv*, the **Greek** consumer associations or the **Swedish** Ombudsman do. Again, however, this is of course not a surprising development, and national legislators sometimes explicitly intend to limit the number of collective

actions through the application of the normal principles of litigation and, in particular, the "loser-pays principle",<sup>18</sup> so that it can be said in these cases to have been the objective of national legislation to focus group actions on a few big cases per year.

One group action that has certainly not met any objectives connected to it is the **French** group action, which has hardly ever been used since its introduction in 1992 because it is considered far too complicated and risky.

#### c) Traditional representative actions

After a shaky start where some courts have interpreted the preconditions of the representative under the **German Legal Advice Act** narrowly, this type of action has become more widely used, and also more efficiently, with increased experience of the consumer organisations. However, until now the proportion of consumers who assigned their claims to the suing consumer association has been fairly low, and the claim is too difficult to handle to cover real mass damages.

In contrast, the representative action under the UK Competition Act 1998 has not achieved much yet. One reason is that the procedure is very expensive, despite being a follow-on procedure since the suing consumer association (*Which?*) has to determine the damage that occurred due to the breach of competition law, which is possible only some way into the trial. The typical case for such a follow-on action is one of large-scale low-value claims but, again, since this is an opt-in procedure, people are not likely to sign up unless their damages are significant, as the only action filed so far has demonstrated.

#### d) Collective representative actions

Collective representative actions necessarily have objectives that are different from the objectives of group actions. They do not aim at compensating the victims but rather at stopping unlawful behaviour in a more effective way than collective claims for injunctions do. They also serve as a means to enable consumer associations to finance their activities, at the expense of those traders who breach consumer law and therefore create the need for consumer associations to be active in order to protect consumers.

In this respect, the collective representative action under Article L. 421-1 of the French Consumer Code appears to be a success story, given the number of cases brought in recent decades. Also, the **Greek** collective representative action under Article 10 par. 16 of the Consumer Protection Act has received positive comments and is well used. Nevertheless, these procedures do not as such offer strong incentives to businesses to comply with the law because the collective damages that can be recovered are far

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<sup>18</sup> In the context of injunctions, the British Department of Trade and Industry realised that litigation costs can have a deterrent effect on consumer associations but regarded this as advantageous since it could prevent consumer associations from "pursuing frivolous or ill-considered proceedings." See DTI, Injunctions Directive: Implementation in the UK, 2000, at 4.8.

below the profits that can be made from a breach of consumer law. They can, however, attract public attention and derive a deterrent effect there from.

The collective representative action under Article 188 of the **Bulgarian Law on Consumer Protection** has been tested in only a few cases, despite being in force since 1999. Apparently, it has not yet achieved what it was meant to, and it was therefore supplemented in 2006 by the group action under Article 189 of the **Bulgarian Law on Consumer Protection**.

#### e) Skimming-off procedures

One procedure that has certainly not had much effect is the **German** skimming-off procedure under § 10 of the Unfair Competition Act, simply because it is extremely difficult to prove the trader's intention to breach the law. This, however, was predictable from the outset, and therefore one may conclude that it was possibly the legislator's intention to make this procedure applicable only in extreme cases – which then could be said to have worked well. Expectations on the consumers' side connected with the announcement to introduce a skimming-off procedure have not been met so far.

#### f) Test-case procedures

The **Austrian** test-case procedure is well used in practice, and the consumer organisation VKI has managed a number of successful claims. It does, however, have its limitations, in particular if the defendant is unwilling to agree to extend the result of the lawsuit to those consumers who have not assigned their claims to the plaintiff institution. Moreover, financial constraints prevent test cases from being brought where litigation financing companies are not interested and the government does not provide support.

The newly introduced **Greek** test-case procedure cannot be evaluated yet. The prognosis is that it will be of limited use for the recovery of *low-value claims* since the individual consumer still has to initiate legal proceedings if the defendant does not pay compensation voluntarily. Although such follow-on legislation is faster, cheaper and also comes under a simpler procedure,<sup>19</sup> it is still connected with costs and of course time that the individual consumer has to spend, and with the psychological barrier of having to deal with an opponent that is still unwilling to pay, despite the declaratory judgment, so that consumers are expected not to use the follow-on procedure in the case of low-value claims.

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<sup>19</sup> See country section 1.6.2., question 11, country report Greece (Part II of this report).

This leads to the following conclusion:

3. ***By far not all the collective mechanisms fulfil the objectives attached to them by the national legislators, and these objectives vary greatly.*** Whilst some of the mechanisms are too recent to be judged, others have clearly failed to achieve much in the area of consumer protection. In fact, some mechanisms are case-management tools rather than collective redress mechanisms. The most positive experiences from a consumer viewpoint are reported from Spain, Austria and the Netherlands but even in these countries there is room for improvement. Clearly, potential claimants, their lawyers and the courts need time to get accustomed to newly introduced collective mechanisms, and uncertainty of the law is a significant impediment to their functioning.

**EQ 2: Have the mechanisms enabled consumers to obtain satisfactory redress in cases, which they would not otherwise have been able to adequately pursue on an individual basis?**

Again, the results from the country studies are ambiguous. While it is true that in some of the cases that were pursued through collective procedures consumers would certainly not have sued individually and would therefore not have obtained satisfactory redress, the country studies also indicate that there remain cases where the mechanisms were not useful to achieve satisfactory redress, and consumers have therefore not obtained satisfactory redress at all. The assessment of consumer detriment (see section 5) indicates a relatively limited reduction in consumer detriment resulting from the collective redress mechanisms in those countries where at least some cases have been decided so far (**Austria, Bulgaria, France, Germany, Spain, Sweden, Portugal** and the **UK**). The notable exception is the **Dutch** mechanism, which so far has provided a significantly higher direct benefit to affected consumers/investors. This indicates that there are likely to be more potential benefits for consumers that could be obtained were the collective redress mechanisms more often used and larger groups of consumers involved – to the extent that mass claims/issues do exist in Member States where consumers currently do not obtain satisfactory redress.<sup>20</sup>

a) Group actions, where individual actions are grouped into one procedure

First of all, the question of whether or not mechanisms enabled consumers to obtain satisfactory redress in cases which they would not otherwise have been able to adequately pursue on an individual basis logically does not apply to those group actions in which individual actions are grouped together after having been filed since, in

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<sup>20</sup> The issue of the extent to which mass claims/issues do exist in Member States where consumers currently do not obtain satisfactory redress is subject of a separate study, see: CPEC (2008): Study regarding the problems faced by consumers in obtaining redress for infringements of consumer protection legislation, and the economic consequences of such problems, Final Report, hereafter referred to as CPEC (2008): Problem study.

these cases, the consumers have already started to pursue their claims on an individual basis without being sure that there will be any collective action at all.

At best, one could argue that once the grouping together has taken place, that is, the procedure under the **German Capital Market Model Act** has been accepted by the court or the **Group Litigation Order** has been made by the court, individuals may have an incentive to join the group action. However, they still have to bring individual claims (instead of being able to simply sign up), including the upfront court fees, and they face the risk that their claim is not accepted as part of the group action. Thus, this type of group action may at best make a change to the consumers' incentive to sue if, on the basis of their prognosis, the potential advantage of sharing the common costs, taking into account the uncertainty whether or not this will happen, makes a real difference to individual litigation.

#### b) Other group actions

Where other types of group action work, they certainly enable consumers to obtain redress where they would otherwise not sue or obtain anything.

This is particularly striking in those Member States in which group actions can be brought and are brought by institutionalised representatives, such as ombudsmen, consumer protection authorities or consumer associations, which incur the risk of having to cover the litigation costs if the case is lost. The country studies on **Spain** and **Sweden**<sup>21</sup> indicate that very few consumers, and indeed less than 10% of the consumers, would likely have brought individual cases where group actions were brought by representatives, due to the usual barriers to individual litigation, in particular the time and money to be spent and the psychological barriers involved. One could argue, however, that many more group actions might have been brought, and many more consumers might have obtained redress where they have not (because they did not take individual action) if the legal environment for group actions in these countries were more favourable, and in particular, if the litigation risk were smaller and the available resources for group actions were higher.

The counter-example is **Spain**, where mass litigation has taken place in a number of cases, and the reason appears to be the reduced risk for the representative in the litigation.

#### c) Traditional representative actions

In the same way, the **UK** country study has revealed for example that none of the consumers who signed up to the litigation brought by *Which?* in the football shirts case would have brought an individual action so that none of these consumers would have obtained redress.<sup>22</sup> The estimates for the **German** traditional representative action

<sup>21</sup> See section 1.6.3., question 19 of the respective country reports (Part II of this study).

<sup>22</sup> See section 1.6.9., question 6 of country study United Kingdom (Part II of this study).

under the Legal Services Act are similar, with a maximum of 10% of the consumers who have assigned their claims to the consumer associations being likely to have sued individually. Equally striking, however, is the proportion of consumers who have not signed up to the representative actions and therefore have not obtained redress, although the representative action was brought.<sup>23</sup>

d) Collective representative actions and skimming-off procedures

In contrast, the question has no relevance for the collective representative actions under Article 188 of the Bulgarian Law on Consumer Protection, under Article L. 421-1 of the French Consumer Code and under Article 10 par. 16 of the Greek Consumer Protection Act as well as for the skimming-off procedure under **German** law since the objective of these procedures is not to compensate the consumer for individual damage.

e) Test-case procedures

Finally, test-case procedures should, in principle, make it easier for consumers to obtain individual redress, in particular where the test case judgment has a *res judicata* effect, as is the case in **Greece**. Obviously, follow-on litigation will be cheaper and faster and therefore more easily accessible to consumers. However, no practical experience can yet be reported from **Greece**.

In **Austria**, the VKI has achieved positive judgments that could be used to compensate a high number of consumers, and also produced settlements. It is assumed that most of these consumers would not have entered into individual litigation.

This leads to the following conclusion:

4. ***Only in the case of group actions that are pursued by a representative, in the case of traditional representative actions, and in the case of test case procedures have individual consumers directly benefited.*** However, in large-scale low-value damage cases, the damage suffered by individual consumers appears to be too low to motivate consumer participation in an opt-in group action. Only Portugal, the Netherlands (after a settlement has been reached) and Denmark (only for low-value claims) make opt-out actions available. Other mechanisms do not aim at obtaining compensation for individual consumers, in particular where diffuse consumer interests are involved.

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<sup>23</sup> The reluctance of consumers to sign up to a representative action may depend on a variety of factors, including the administrative burden, lack of information, lack of evidence, etc. For a detailed discussion, please also refer to: CPEC (2008): Problem study.

### 4.3.2 *Incentives provided*

It is likely that any potential behavioural changes of defendants and potential offenders are a result of successful collective redress cases under a given mechanism, and therefore the incentives provided by a collective redress mechanism can be assessed only on the basis of the cases that have been decided by court under the mechanisms, or that have been settled. Some of the collective mechanisms analysed for this report are therefore too recent to provide any insight in this respect, as no cases have so far been decided or settled. This applies, for example, to **Denmark, Finland and Italy**, and to the **Greek** test-case procedure.

#### **EQ 3a: Do the mechanisms ensure a change in the behaviour of the defendant, which results in the reduction of future harm to all consumers?**

Positive experiences are reported from **Bulgaria, Portugal**, and also the **Swedish and Spanish** country studies indicate that a change in the behaviour of the defendant seems to be likely.<sup>24</sup> The main reason is the high public awareness that is attracted by collective procedures that induces the defendant to ensure that the same violation of (consumer) law does not occur again. In the case of Sweden, it is also the powers of the ombudsman which generally have a deterrent effect on traders not to repeat a particular breach of consumer law.<sup>25</sup> In **Austria**, it is the fact that test-case procedures are frequently decided by the Supreme Court that gives them more weight, and results in some preventive effect.

However, as has been indicated by the **UK** experience, such an effect will of course depend on the success of collective actions. Where, as in the **UK** product liability cases under the Group Litigation Order, collective actions were unsuccessful in the majority of cases, a deterrent effect or a change of behaviour of the defendant is unlikely. The same can be said with regard to the procedure under the **UK Competition Act 1998**. The notoriously weak procedure under the § 10 of the German Unfair Competition Act and also the **French** group actions, which have been used so rarely, do not produce any deterrent either and would therefore not seem to contribute much to a change in the defendant's behaviour. The same has been predicted for **Italy**, where the procedures in the civil courts are reported to be too slow to provide relevant incentives.

Moreover, a change of behaviour is unlikely where the potential damages far from match the benefits reaped from the unlawful behaviour, as is the case with the **French** collective representative action. A special case is the **Dutch** system, in which the liable party may not only have learned from the necessary negotiation process, but where the settlement agreement may well be used to include obligations concerning the future activity of the liable party.

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<sup>24</sup> See section 1.6.1., question 3. a) of the respective country reports (Part II of this study).

<sup>25</sup> In Sweden, 98% of the complaints of consumers are solved through negotiations by the ombudsman and the consumer agency. See Micklitz, Länderbericht Schweden, in: Micklitz, Rott, Docekal and Kolba, Verbraucherschutz durch Unterlassungsklagen, pp. 165 ff., in particular pp. 171 ff.

This leads to the following conclusion:

5. ***Although some positive experiences are reported from several Member States, often due to media coverage of collective actions, the existing collective redress mechanisms do not generally seem to ensure a change in the behaviour of the defendant.*** Reasons for this are: a) Not all defendants are wary of their reputation, which decreases the deterrent effects caused by media coverage; b) The amount that is payable by the defendant in case of a court decision or settlement may fall far behind the damage caused or the profit gained from unlawful behaviour; c) Collective actions may frequently not be successful because of difficulties to establish liability (e.g. in product liability cases).

**EQ 3b: Do the mechanisms have a preventive effect and deter potential offenders, for instance by skimming off the profit gained from the incriminated conduct?**

This question does not apply to the **Dutch** system in which the settlement between the representative and the liable party is precondition for the collective procedure.

Otherwise, the preventive or deterrent effect of the available collective redress mechanism appears to be closely related to the business climate in a particular Member State and to the public awareness of collective actions.

For example, the **Bulgarian** country study<sup>26</sup> indicates public awareness of collective action, and stakeholders report a readiness of businesses to change their behaviour once the intention to file a collective action is announced by representatives of a consumer association. Also, in a recent **Portuguese** case a settlement was reached after the filing of a group action was announced. Potential negative media coverage also seems to be an important deterrent in some cases, as has been reported in **Austria** and **Sweden**.

In contrast, the risk of collective action does not appear to be perceived as a major threat to businesses in **Germany**, and the collective remedies available do not seem to be an incentive for out-of-court settlement before an action is filed.

However, the country studies indicate that the deterrent effect depends on the competitiveness of the market sector and the degree to which a particular company involved cares about its reputation. For example, it was pointed out that the only case brought under the **UK Competition Act 1998** to date was brought only because the defendant seemingly had little interest in an early settlement and in appearing responsive to consumer (organisations') demands. The relevance of the degree to which a company cares about its reputation was also confirmed by business stakeholders.

It has to be emphasised that it is very likely that possible deterrent effects of the collective redress mechanisms currently existing in EU Member States are more likely to be related to effects such as media coverage than to the amount of damages obtained so

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<sup>26</sup> See section 1.6.1., question 3. b) of country study Bulgaria (Part II of this study).

far by consumers through these procedures, as these are relatively modest in absolute terms in most of the countries analysed (see assessment of reduction of consumer detriment through the existing mechanisms, section 5).

This leads to the following conclusion:

6. ***Most of the current collective redress mechanisms in the EU do not seem to constitute a significant deterrent to potential defendants unless collective actions receive particular media coverage in the respective Member State.*** The preventive or deterrent effect of the available collective redress mechanisms appears to be closely related to the business climate in a particular Member State and to the public awareness that collective actions receive amongst consumers. The amount of damages obtained so far by consumers through these procedures seems to be a less important factor compared to media coverage, as damages awarded have been relatively modest in absolute terms in most of the countries and cases analysed.

**EQ 3c: Do the mechanism provide incentives and sufficient opportunity for out-of-court settlement?**

Almost all the collective procedures analysed for this report allow for a settlement to be reached after initiating the collective procedure. However, restrictions apply in some cases. The most striking example is probably the **German Capital Market Model Claims Act**: once the two-week period, in which the claimants that have filed individual actions can decide on whether they want to opt-out of the collective procedure, has expired, a settlement can be reached only if all the claimants within the collective procedure agree.<sup>27</sup> This makes a settlement extremely difficult, if not impossible. In **Greece**, the settlement procedure in front of the Consumer Ombudsman is not available once a case is pending in a court. However, a settlement can still be tried in front of the commission of out-of-court amicable settlement of disputes.

In contrast, the legislation of some of the Member States explicitly requires the court to try to mediate out-of-court settlements, which is the case in **Bulgaria, Sweden** and the **UK**. **Italy** has formally integrated settlement procedures into the group action procedure under Article 140bis of the Consumer Code. After the judgment on the grounds of liability, the defendant must make an offer to the consumers concerned with details on the amount to be paid out. If it fails to do so, a conciliation committee is established to work out the terms, methods and amounts to be paid to the consumers in compensation. The parties can also ask the court during the court procedure to refer the case to out-of-court settlement before a conciliation body that operates in the same municipality as the municipality of the court.

In practical terms, a settlement with the defendant is easiest in case of representative actions in which only a consumer association or an ombudsman acts as a formal participant to the lawsuit, in particular in collective representative actions such as the **Bul-**

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<sup>27</sup> § 14 par. 3 s. 2 KapMuG.

**garian** action under Article 188 of the Bulgarian Law on Consumer Protection, or the **French** action under Article L. 421-1 of the Consumer Code. In traditional representative actions, however, in practice the consumer association will have to communicate with the consumers who have assigned their claims before concluding a settlement agreement, which can be difficult and time-consuming. Here, incongruent interests of the representative and the represented consumers can cause difficulties. While consumers might be interested in full compensation for their damages, the representative may wish to avoid the risk of excessive litigation costs and therefore be more willing to settle.

Generally speaking, collective actions have, in practice, frequently led to a settlement although the settlement may be reached at different stages in the procedure. Reasons beyond the negative publicity connected with being the defendant in a collective action are, in particular, the litigation costs involved and the possible length of collective procedures (and more so if the sheer length increases the litigation costs). The tendency to settle is a strong element of the **UK** legal system in which most Group Litigation Order cases have indeed been settled, and this has also been the conclusion from the **Austrian, Portuguese** and **Spanish** country studies.<sup>28</sup> For example, in **Austria**, negotiations by the VKI for the non-filing of a collective action are often successful in reaching out-of-court-settlements.

However, the country studies have also demonstrated that the incentives for out-of-court settlement are absent where the collective instrument provided by the law is unlikely to be used in practice. For example, under the **Dutch** legal system there is no collective instrument available to bring large-scale low- or very low-value claims. Thus, in a case of large-scale low-value claims, it is unlikely that the settlement procedure under the Dutch Act on Collective Settlement of Mass Damage would be used because there would be no incentive for the liable party to settle. The same would apply to the **German Unfair Competition Act**, and to the **French** group action.

This leads to the following conclusion:

7. ***In most legal systems, out-of-court settlement is possible after a collective action has been filed, and sometimes the attempt to obtain an out-of-court settlement is an explicit part of the procedure.*** The incentives for out-of-court settlements depend upon the legal environment, and in particular on the litigation costs involved and the length of the collective procedure. Incentives for out-of-court settlement are absent where the collective instrument provided by the law is unlikely to be used in practice, as is often the case with very low-value claims.

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<sup>28</sup> See section 1.6.1., question 3 c) of the respective country reports (Part II of this study).

**EQ 4: Do the mechanisms discourage the introduction of unmeritorious claims? Are there “gatekeeper procedures” to certify whether a collective action is admissible to the court or not. If yes, how do they work?**

Most collective procedures that are subject to this report provide for some form of gatekeeper procedure or other mechanism that discourages the introduction of unmeritorious claims.

The most obvious gatekeeper procedures are those present in the group actions in which individual claims are grouped together, namely the **UK** Group Litigation Order and the **German** Capital Market Model Claims Act. Under the UK Group Litigation Order, it is at the discretion of the court whether or not the individual actions are grouped together, and the courts will do so only if this serves the efficiency of the case management. As a second step the confirmation by the Lord Chief Justice, the Vice-Chancellor or the Head of Civil Justice of the Group Litigation Order is required. The **German** Capital Market Model Claims Act requires at least ten individual cases to be brought with common questions of law. Also, in the **Danish**, **Italian** and **Swedish** systems the court will first consider, among other matters, whether the commonality requirement is satisfied, whether a group action is not inappropriate due to the divergence of the claim, and whether the cases cannot be handled better separately. In deciding on these matters, the courts have considerable discretion, and in **Sweden** a number of filed group actions have been dismissed on these grounds. Little experience exists in **Denmark** to date, where only one group action has been filed and was admitted by the court. In **Italy**, the group action is not yet available.

In the case of the follow-on action of the **UK** Competition Act 1998, the mere fact that the breach of consumer or competition law must have already been established by the competent authority serves as a safeguard that the collective redress action is justified.

Under the **Dutch** system, the will of the parties to subject themselves to the collective procedure by applying jointly for the procedure prevents abuse. In addition to this, the court will consider, *inter alia*, whether the consumer organisation involved is representative for the class of consumers concerned, and it will review the content of the agreement.

The rules in **Portugal** appear to be less strict. The court has the discretion to dismiss a claim after initial investigations but it is expected that this would happen only in cases of clear abuse, and apparently it has not happened yet. The same prohibition of abuse exists in the **German** Unfair Competition Act. Usually, a consumer association would sue for an injunction first, and have the breach of the law of unfair competition confirmed in that way before it sues for skimming-off profits.

An additional criterion, alongside the expected responsible behaviour of the consumer association, has just been introduced with effect from 1 March 2008 in **Bulgaria**: the claimant consumer association must have the financial means to bear the litigation costs. In fact, **Bulgarian** consumer associations, which are notoriously short of money, fear that this criterion might be used against them.

The only countries of those considered for this report where no gatekeeper procedure for collective actions is present seem to be **Spain** and **Austria**.

In addition to formal gatekeeper procedures, the application of the "loser-pays principle" in all the collective procedures scrutinised so far (see below, at 6. to 8.) is a strong incentive to not bring unmeritorious claims, as has been established by the country studies. In **Greece**, the winning defendant may file an action for material and/or "moral damages" against the losing consumer association. The only system in which this argument is fairly weak seems to be the **Spanish** system, where the litigation fees on the claimant are rather low.

Finally, in many of the collective redress systems legal standing for collective actions is granted only to public authorities or ombudsmen who are neutral by their very positions and therefore are required, by the general principles of public law that they have to adhere to, not to bring unmeritorious claims, and the same applies to consumer associations that are responsible either to their members or, like the **German** regional consumer centres, to the *Bundesland* (state), which partially finances them. In **Austria** only those associations mentioned in sec. 29 KSchG may bring collective actions, which is considered to be a safeguard for institutional quality. In addition, as for example the **Bulgarian** country study<sup>29</sup> emphasises, consumer associations are likely to be careful in choosing relevant cases for collective action to prevent spoiling their reputation with consumers. In **Greece**, there is the explicit threat for a consumer association to be dissolved if it acts maliciously or grossly negligently.

This leads to the following conclusion:

8. ***All collective redress mechanisms analysed for this report discourage unmeritorious claims through some sort of "gatekeeper procedure" and/or the application of the "loser pays principle".*** Whereas true group actions usually require some decision by the court on the grouping together, the mere fact that the "loser pays principle" applies in most Member States constitutes a disincentive to unmeritorious claims. Experience from those systems that have used collective actions for a long time demonstrates that the risk of abuse by intermediaries such as consumer organisations seems to be very low.

#### 4.3.3 **Accessibility**

For the purposes of the question of accessibility, the various types of collective procedure must be distinguished. Collective representative actions, such as the action under Article 188 of the **Bulgarian** Consumer Protection Act, under Article 421-1 of the **French** Consumer Code, and under Article 10 par. 16 of the **Greek** Consumer Protection Act, and also the skimming-off procedure under § 10 of the **German** Unfair Competition Act, are procedures that do not involve individual consumers at all, and also consumers do not benefit directly from the result since the successful claim will benefit only the consumer association or the state budget. Equally, consumers do not participate in the **Austrian** and **Greek** test-case procedures. Interestingly, Art. 10 par. 25 of

<sup>29</sup> See section 1.6.1., question 4 of country study Bulgaria (Part II of this study).

the Greek Consumer Protection Act explicitly prohibits consumer associations from recovering litigation costs from their members. Thus, these types of collective redress mechanism are not considered here.

**EQ 5: Are the mechanisms easily accessible to consumers?** [Costs, rules of standing, length of proceedings and other factors hindering or facilitating access for consumers to the mechanism should be considered]

a) The process of joining the procedure

Obviously, joining the procedure (where this is necessary) is easiest with opt-out procedures where consumers simply have to do nothing but to enforce a decision once it has been made in order to obtain payment.

Where consumers opt in to a collective procedure that has already been established, this is usually relatively easy once a consumer is informed about the possibility of joining a case, which is often facilitated with model forms made available by the representatives. In some countries, the court will set a time limit within which the consumer must notify his or her opting in, while in **Italy**, this can be effected at any stage of the procedure until the final hearing of the parties before the Court of Appeal. Nevertheless, this limited task appears to be a disincentive in cases in which low-value claims are at stake, as the football shirts case brought by *Which?* under the **UK Competition Act 1998** demonstrates.<sup>30</sup> This is the very reason why **Denmark** has introduced the split system of a normal opt-in group action that is complemented by an opt-out group action in which the individual claims are below a certain threshold that is estimated to be 2,000 DKK (264 Euro).

b) Costs

ba) Representative actions and group actions where consumers have to sign up

In the case of representative actions, test-case procedures and in most group actions in which consumers have to sign up to a lawsuit that a representative has brought, costs for signing up (that is, costs other than litigation costs) do not arise in most of the legal systems analysed.

An exception here is **Denmark**, where claimants that opt in to a group action bear a certain litigation risk that is determined in advance by the court. For example, the court can ask all claimants that opt in to provide security, unless they have legal insurance or can claim legal aid. This will be done if the litigation risk is high, but the court can refrain from asking for security if the representative is manifestly capable of bearing the litigation costs, which can, in particular, be the case with group actions brought by the Consumer Ombudsman. The litigation risk of individual consumers is limited by the amount of security that is determined by the court. Furthermore, the consumer may be

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<sup>30</sup> Other factors may also be of relevance for the limited willingness of consumers to join a low-value case, such as the lack of evidence concerning their damage suffered (see section e) below, and CPEC (2008): Problem study.

asked to pay a certain amount to cover the representative's expenses. This may occur not only in cases where the group action is lost but also if the group action is successful since the loser-pays principle in **Denmark** is not without exceptions, and in exceptional cases the representative's litigation costs will not be covered by the losing defendant. In such a case, the litigation risk is limited to the amount of security as determined by the court, plus the amount awarded to the claimant in the judgment. Finally, in an opt-out group action no security can be asked for but still – in exceptional cases – the person who benefits from a successful opt-out group action may need to contribute to the representative's expenses from the amount awarded in the judgment.

#### bb) True group actions

This is different in true group actions where individual actions are grouped. In some cases they result in high costs upfront, and these costs act as a deterrent from initiating such proceedings in the first place. In **Germany** claimants (or their lawyers) have decided to avoid the procedure under the **German Capital Market Model Claims Act** for a variety of reasons, and to pursue individual claims instead. One of the reasons is that the lead plaintiff's lawyer has to do all the work, and bear the related internal costs of the proceedings, but does not receive a higher remuneration than the other claimants' lawyers, who do not play an active role in the collective procedure.<sup>31</sup>

#### c) Legal standing

In several Member States, only a consumer protection authority, the consumer ombudsmen or consumer associations can be the representatives of a group of consumers. Only in the **Danish** opt-in group action and in **Portugal, Spain and Sweden** can the group of harmed consumers be represented by an individual consumer or by a (smaller) group of consumers.<sup>32</sup>

Obviously, the use of group actions or traditional representative actions by institutionalised representatives cannot be enforced by individual consumers or groups of consumers, and therefore consumers themselves have no collective enforcement mechanisms available where consumer associations decide not to take action. In this context, it is important to remember that all public authorities, consumer ombudsmen and, in particular, all consumer associations have limited resources available for the collective enforcement of consumer rights. The **Portuguese** country study considers that it is

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<sup>31</sup> Due to the freedom of contract with a view to lawyer's fees, the parties can of course agree upon a higher fee. These higher fees will, however, not be covered by the losing party, see § 91 ff. of the German Civil Procedural Code. Also, the lead plaintiff's lawyer can, in principle, make arrangements with other claimants or their lawyers. Whether or not this actually happens is not clear. There is evidence that lawyers tend to pursue the claim in individual litigation. See section 1.6.6., question 10 of country study Germany (Part II of this study).

<sup>32</sup> In Denmark only one group representative is allowed, which can also be a permanent or ad hoc consumer association. Under Spanish law, the group of harmed consumers cannot be represented by an individual consumer and the group has to be a relevant portion of the affected consumers.

sometimes difficult to bring a problem to the attention of a consumer association. The **Bulgarian** country study has mentioned explicitly the problem of financing litigation, but also the **Swedish** Ombudsman and the **UK** consumer association, *Which?*, which has the legal competence to bring actions under the **UK Competition Act 1998**, choose the claims they bring very carefully. The **Spanish** system is an exception here since litigation is often free of charge for consumer associations.<sup>33</sup>

#### d) Length of proceedings

It seems that the initial inexperience of all the players – claimants, defendants and also the courts – with new types of collective action has increased the length of the procedures to initiate group actions significantly, and that it takes a certain number of procedures until litigation is managed more smoothly and more effectively. For example, in **Portugal** the first collective actions brought by consumer associations centred around the question of legal standing, which is now clarified and not an issue anymore. The **Swedish** country study emphasises that the long time that courts have taken to decide in some of the first group actions brought on whether or not the group action was admissible has constituted a deterrent to claimants. Once the group action is admitted, or where the admissibility is not an issue, the court usually sets a signing-up period which does not delay the further procedure much.

#### e) Evidence

One further problem with collective procedures in which individual damages are claimed, as well as for individual procedures, is that consumers have to provide evidence concerning their damage suffered. This is particularly difficult when the event took place long before the problem becomes apparent, a problem that is salient in competition law. Years after the purchase of the overpriced shirts or beverages, most consumers would no longer have relevant proof of purchase.

This leads to the following conclusion:

9. ***Group actions that are pursued by representatives and traditional representative actions are usually relatively easy to join.*** Representatives, such as consumer associations are increasingly effective in organising the process of joining. However, in low- and very low-value cases, even the task of joining (time for signing up, collecting the evidence, etc.) is a barrier to consumers. Mechanisms that merely group individual claims into one collective procedure do not seem to reduce barriers to litigation.

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<sup>33</sup> See footnote 17.

**EQ 6: What are the litigation costs of collective redress for consumers compared to individual redress? What is the risk of the consumer if case is lost?**

Table 7 below illustrates that collective redress mechanisms in the EU for which detailed data was available concerning three hypothetical example cases<sup>34</sup> seem to significantly reduce total litigation costs (i.e. the sum of litigation costs for consumers and intermediary is pro rata lower than the costs for individual redress in ordinary courts). However, the table has to be interpreted with care, as for several countries no costs could be calculated (e.g. because lawyers' fees are freely negotiable). Also, the data given only concerns the hypothetical example cases, and costs savings of the collective redress mechanisms are derived on the assumption that a number of affected consumers/investors (as defined in the example cases) would actually agree to be represented in the collective case.

**Table 7: Comparison of estimated litigation costs of the claimant for collective and individual redress in courts based on hypothetical example cases**

Country	Collective redress mechanism used	Total litigation cost per consumer (in Euro)		Cost saving of collective redress	Comments
		Individual redress in ordinary courts (per consumer)	Collective redress (per consumer represented <sup>1)</sup> )		
<p><b>Case 1 – telecommunication:</b> <i>Due to a technical defect, the telecommunications services provider T has miscalculated the duration of all telephone calls made by customers as being 2-3 percent longer than they were in reality, resulting in extra profits of 1 million Euro. 100,000 customers suffered damages; with certain differences as to the individual case. The consumer organisation or other intermediary preparing the claim estimates the average damage per consumer to be 1 Euro per month. The service provider claims to have repaired the defect after 10 months. Therefore the average damage per consumer could be estimated at 10 Euro.</i></p> <ul style="list-style-type: none"> <li>▪ <i>If the relevant mechanism is an opt-out system: consumer organisation or other intermediary represents all consumers (combined value of claims 1 million Euro)</i></li> <li>▪ <i>If the relevant mechanism is an opt-in system: consumer organisation or other intermediary could mobilise 1,000 consumers (combined value of claims 10,000 Euro)</i></li> </ul>					
Bulgaria	Collective action for damages suffered by consumers (opt-in)	420	14	97%	Costs of CR fully borne by represented consumers
Germany	Sammel or Musterklage – Legal Advice Act (opt-in)	164	7 – 12	93 – 96%	Costs of CR fully borne by intermediary
Portugal	Acção popular – Popular action (opt-out)	250	0.1 <sup>2)</sup>	>99%	Costs of CR fully borne by intermediary

<sup>34</sup> A hypothetical example case is hereby understood as being a collective action proceeding that is "invented" on the basis of real cases, and defined through the type of individual damage suffered by a number of consumers, the sector, the category of law, the value of the case, the affected number of consumers etc.

Country	Collective redress mechanism used	Total litigation cost per consumer (in Euro)		Cost saving of collective redress	Comments
		Individual redress in ordinary courts (per consumer)	Collective redress (per consumer represented <sup>1)</sup> )		
<p><b>Case 2 – financial services:</b> <i>Enterprise E released a third tranche of shares (230 million shares, 60 Euro per share). Following this, the value of the shares decreased rapidly during the next three years (to 10 Euro per share), leading to a loss in shareholder value of 11.5 billion Euro. Shareholders claimed that they had been victims of false information (considerably overestimated property; concealment of the burdensome acquisition of a foreign competitor) contained in the company's prospectus when the shares were put on the market. 15,000 investors bring their claims to the court, with an average value of the claim being 7,000 Euro each. The combined value of the claims is therefore 105 million Euro.</i></p>					
Bulgaria	Collective action for damages suffered by consumers (opt-in)	1,301	699	<b>46%</b>	Costs of CR fully borne by represented investors
Germany	Capital Market Model Claims Act (individual cases joined)	(1,592)	(151 <sup>3)</sup> )	<b>(91%)</b>	Costs of CR fully borne by investors. Not including expert evidence, which can be very costly
Portugal	Acção popular – Popular action (opt-out)	575	1 <sup>4)</sup>	<b>&gt;99%</b>	Costs of CR fully borne by intermediary
<p><b>Case 3 – tourism:</b> <i>The tour operator T advertised on its website a “last-minute package” called “4-star” in which the consumers were supposed to be offered services in various hotels on various locations (Greece, Tunisia, etc.) in the 4-star category. However, the hotels were in very bad shape and in spite of the request of consumers no other accommodation was provided. The tour operator also categorically rejected all written claims of consumers for compensation. The only argument of the trader for rejection was that last-minute arrangements meant lower quality of services. About 500 tourists are affected, of which 200 tourists claim a refund of 250 Euro each (which is 10% of the total price of the package). The combined value of the claims is therefore 50,000 Euro.</i></p>					
Austria	Collective redress actions of Austrian type (opt-in)	1,000 – 1,500	325	<b>68 – 78%</b>	Lawyers' costs hard to estimate. Costs of CR fully borne by intermediary
Bulgaria	Collective action for damages suffered by consumers (opt-in)	525	30	<b>94%</b>	Costs of CR fully borne by represented consumers
Germany	Sammel or Musterklage - Legal Advice Act (opt-in)	164	28	<b>83%</b>	Costs of CR fully borne by intermediary
Portugal	Acção popular – Popular action (opt-out)	280	5 <sup>2)</sup>	<b>98%</b>	Costs of CR fully borne by intermediary

Note: Estimates provided in the country studies concerning three hypothetical example cases (see Part II - section 1.5 of country reports). In all cases it is assumed that claims are brought at the same court. The consumers are not in a state of poverty and are not eligible for legal aid targeted exclusively at the poor. All cases are decided after appeal. Calculation includes court costs, lawyer costs and other external costs.

<sup>1)</sup> Including the share of costs of the intermediary, even if not borne by the consumer (however, staff costs of intermediary for preparation of the case not included).

<sup>2)</sup> Opt-out system, therefore calculated on basis of all consumers affected.

<sup>3)</sup> This has been calculated a pro rata costs from litigation over the whole amount of 105 million Euro which would not happen in practice.

<sup>4)</sup> Calculated on basis of 15,000 investors affected.

For further analysis, the various types of collective procedures must be distinguished.

a) Representative actions and test case procedures

Representative actions, such as the actions under the **German Legal Advice Act** and the **UK Competition Act**, and also the **Austrian, German** and **Greek** test-case procedures, are procedures that do not involve any litigation costs for consumers at all. The Austrian and Greek test case procedures, however, do not produce any *res judicata* effect on other claimants that come under the normal rules on individual litigation if they sue, relying on the test case judgment, because the defendant of the test case procedure does not satisfy their claims voluntarily. Even in the Greek system where the test case procedure produces such *res judicata* effect, individual follow-on litigation to obtain a payment order triggers litigation costs.

b) Group actions brought by representatives

Where group actions are brought by representatives, consumers usually face no risk of being charged with litigation fees. This is the case in **Finland, Italy, the Netherlands, Portugal, Sweden** and **Spain**. In **Spain**, group actions are therefore usually not brought by consumers but by consumer associations. However, there may be some indirect effects in the way that consumer associations that are financed through membership fees have to use the consumers' member fees for litigation and cannot spend them otherwise if they lose the case.

In **Denmark**, there is a limited risk to the consumer to be ordered to pay litigation fees, as explained above at 5. b), even if the group action is brought by a representative. Still, there is the advantage of the explained limitation and predictability of the litigation risk, and also the advantage that the "common costs" are shared between the claimants, as explained in the following sub-section.

c) Individual litigation joined to a group action and group actions brought by groups

Otherwise, group actions generally have the advantage that the "common costs" are shared between the claimants. Common costs are those costs that arise in the context of issues that are common to all the claims of the group, in particular, expert evidence on liability issues. This is said to be the advantage, for example, in the case of the **UK Group Litigation Order**, the **German Capital Market Model Claims Act**, the group action under **Article 189 of the Bulgarian Law on Consumer Protection**, and the **Spanish** group action. The amount of these "common costs" may vary greatly from case to case. In the German **Telekom case**, it is expected that expert evidence on the value of the property of Deutsche Telekom might cost around 17 million Euro. If the case is lost, they would be shared amongst all claimants proportionate to the amount of their claims.

However, it should also be mentioned that group actions can trigger so-called satellite litigation. This is litigation that deals with issues that are relevant to one or more individual claims but not to the total group of claims, and it may generate additional costs.

The cost orders will single out the costs for such satellite issues, and only the individuals concerned will have to pay them. Under the **German Capital Market Claims Act**, only the common issues are dealt with in collective procedures, and afterwards the matter will be returned to the courts where the litigation started to decide upon the individual cases.

A specific feature of the **English** legal system is that the grouping together of claims under a **Group Litigation Order** may take the individual claims out of the jurisdiction of the county courts (with their minimal costs) and into the jurisdiction of the High Court of London, thereby increasing litigation costs significantly.

Sometimes the cost risk of group actions can be reduced by special arrangements with law firms or through third-party financing – see below at evaluation question 7. Otherwise, claimants may instead turn to alternative dispute resolution where available (see below, at evaluation question 18.).

This leads to the following conclusion:

10. ***Most collective redress mechanisms do not expose participating consumers to litigation risk; instead the risk is on the representative.*** Where this is not the case, the only advantage for consumers that join an action is the sharing of the common costs.

#### 4.3.4 ***Financing and distribution of proceeds***

**EQ 7: Are actions under the mechanisms financed in a way which ensures that consumers are able to obtain effective legal representation? Are there mechanisms of public support for the parties that bring forward a collective action (the intermediary<sup>35</sup>), are contingency fees/conditional fees<sup>36</sup> allowed? What is the risk of the intermediary if a case is lost?**

##### a) Fees

Contingency fees are often prohibited in Member States. One exception is **Finland**, and the **Spanish** country study<sup>37</sup> indicates that contingency fees are tolerated in **Spain** to a certain extent. In addition, a new **German** law has introduced with effect from 1 July 2008 the possibility of contingency fees in specific but rather limited situations.

<sup>35</sup> A collective action is usually brought forward by an intermediary that organises the action on behalf of consumers. This can be a public intermediary (for example, an ombudsman), a representative organisation acting as intermediary (for example, a consumer organisation), or a private intermediary (for example, a private law firm or an individual consumer taking the lead in an action). Intermediaries may also engage a private lawyer, who is not considered to be an intermediary in this context, as long as he or she is not responsible for organising the action.

<sup>36</sup> Contingency fees are lawyer's fees that consist of a percentage of the damages awarded. Conditional fees are (possibly additional) fees that are paid in case of success, but not related to the damages awarded.

<sup>37</sup> See section 1.6.1., question 7 of country study Spain (Part II of this study).

Conditional fees are allowed in the **UK**, and a conditional fee arrangement has in fact been used in the only case under the **UK Competition Act 1998**. They are also used in the **Netherlands**.

**Sweden** has introduced a special rule in the Group Proceedings Act of 2002 under which the representative in a group action can enter into a so-called risk agreement with a lawyer. In this case, the lawyer gets reduced fees if the case is lost, but increased fees if the case is won. While this does not seem a strong incentive for bringing group actions, it might overcome the reluctance of lawyers to engage in group actions that are inherently more complex than normal litigation.

In most Member States, the lawyer's fees are freely negotiable, with indicative lists available from the bar associations in **Spain** and in the **Netherlands**.

**Germany** rather strictly applies a cost table that forms part of the Lawyer's Fees Act (*Rechtsanwaltsvergütungsgesetz*). The fees depend on the value of the claim, but the fees rise more slowly than the value of the claim. Generally speaking, the individual claimant's share of the lawyer's fees in a collective action is lower than the fees of individual legal action. With a view to the traditional representative action under the **German Legal Advice Act**, the cost tables for court fees and lawyer's fees are applied to the total amount of the claims brought, so that collective action is far cheaper than the aggregated fees for individual legal action by the represented consumers would be. A comparable situation exists in **Austria** (see Table 7 above).

It should be mentioned that there seems to be at least some protection in Member States insofar as under the "loser-pays principle" the losing claimant will not be liable for excessive legal fees charged by the defendant's lawyer. **Italian** courts are reported to sometimes not apply the "loser-pays principle" where the consumer association has not acted unreasonably and the defendant has "deep pockets".

#### b) Legal aid and public support for individuals

Legal aid is available to the poor in the Member States but this obviously plays a role only where individual claims are joined in group actions under the **German Capital Market Model Claims Act** or the **UK Group Litigation Order**, or where individuals bring or participate in group actions, which is possible only in **Bulgaria, Denmark, Portugal, Spain** and **Sweden**.

Public support for individuals exists, to a limited extent, in the **UK**, and is likely to be available in pharmaceutical product liability cases. However, the budget of the Legal Services Commission is quite limited considering the high litigation costs of the **English** legal system. In **Italy**, legal aid is not available in most civil law matters.

#### c) Legal insurance

Legal expense insurance exists in many Member States but, again, can play a role only where individual claims are joined in group actions or where individuals bring or participate in group actions. In Sweden, insurance companies are inclined to exclude or limit

legal insurance with respect to collective actions.<sup>38</sup> The role of legal expense insurance remains limited in the EU. Even if the legal expense insurance market, according to industry data, has been expanding in Europe during the last decade in terms of premium incomes,<sup>39</sup> the legal expenses class represents only 0.6% of the total insurance activity and around 1.5% of non-life business. In 2005, the German market represented more than 50% of the total European legal expenses premium income. This share, however, has been decreasing since 1996, showing that other national markets are gaining significance.

#### d) Third-party financing

Third-party financing apparently has not played a role in the past in consumer law cases in any of the Member States subject to this report. The exception is **Austria**, where third-party financing is used in cases with a value of over 100,000 Euro. The financing company bears the litigation risk but receives approx. 30% in the case of success.

In Germany, litigation financing companies have recently expressed interest in this kind of activity, and the Consumer Centre of Hamburg has now made a first arrangement with a company that is financing lawsuits in order to be able to sue a telecommunication services provider.

#### e) Public support for intermediaries

Obviously, litigation is paid from the state budget where the representative is part of the State administration. This is the case with the **Danish, Finnish** and **Swedish** ombudsmen, but the budget for litigation of the ombudsmen is limited.<sup>40</sup>

In **Austria**, the VKI and the responsible ministry have concluded a "service contract" in 1992, under which the VKI receives funding for the preparation of cases, in co-operation with the ministry.<sup>41</sup> In theory, all litigation is subject to this funding, in practice, due

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<sup>38</sup> See section 1.6.1., question 7 of country study Sweden (Part II of this study).

<sup>39</sup> The premium income in Europe has followed a steady increase of about 5-6% on a year to year basis since 1995, to reach almost 5.9 billion Euro in 2005.

<sup>40</sup> In Denmark, there is no separate budget for the Consumer Ombudsman's litigation activities. Cases are conducted by lawyers employed on a permanent basis as members of the Consumer Ombudsman's ordinary staff. Thus, the financial risk of litigation involved for the Consumer Ombudsman (in terms of costs imposed by the individual case) is mainly limited to the legal costs that the Consumer Ombudsman may be ordered to pay to the opposing party under the general "loser pays principle". In Finland, according to the proposal for the next state budget (Valtion talousarvioesitys 2009 (HE 116/2008) p. 548.), the Consumer Ombudsman may use 20,000 Euro for group actions for compensation for the year 2009. In Sweden, the ombudsman does not have a fixed amount of money to its disposal in order to start collective redress actions. The ombudsman starts a collective redress action if it is necessary from a consumer viewpoint.

<sup>41</sup> A practice where the monetary support for the preparation of cases is directly dependent on the approval of a ministry or other governmental agency may cause tensions between the government and the intermediary regarding

to the possibility of financing claims through a litigation company only claims of a value less than 100,000 Euro or risky but nonetheless important procedures of a higher value may be paid out of this budget.

In countries such as **Bulgaria, Germany, Greece and Italy**, some consumer associations receive public support, although this is in most cases not related to specific litigation but to their activities in general.<sup>42</sup> Only in rare cases, consumer organisations receive public funding to pursue a particular claim. Thus, they normally have to finance litigation out of the overall budget and have to be careful not to lose their cases. In most countries, public support for consumer organisations is considered to be too low by them to be able to conduct these tasks. In **France** and **Greece**, successful collective representative actions offer a mechanism for refinancing to a certain extent.

In the **Netherlands**, public support is available only to an established consumer organisation (that is, not to special interest groups formed with a view to a specific case) and only if the consumer organisation cannot otherwise be expected to be able to bear the litigation costs. With this latter requirement, the main consumer organisation, the *Consumentenbond*, is in practice excluded from public support because it is most likely to have the necessary resources to bear the litigation costs. Also, the **French** and the **UK** consumer associations do not receive public support but are financed through membership fees and through their activities.

#### f) Risk of intermediaries

Where the intermediary is the claimant, as in the representative actions and in group actions brought by an ombudsman, a public authority or a consumer association, the representative faces the risk of having to bear the full litigation fees, including the defendant's lawyer's fees under the "loser-pays principle". In **France**, the court can decide that the suing consumer association has to bear only part of the defendant's lawyer's fees, according to the "loser-pays" rule, which is at the judge's discretion. Italian courts are reported to sometimes not apply the "loser-pays principle" where the consumer association has not acted unreasonably and the defendant has "deep pockets". In **Austria**, the "loser-pays" principle applies to the VKI, which, as has been described above, covers the risk either with the help of a litigation financing company, through its own budget assigned by the ministry or with money gained from other successful settlement procedures. Only in **Spain** does a consumer association with insufficient monetary re-

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the selection of cases.

<sup>42</sup> In Bulgaria, according to information from stakeholders, public financial support is provided only for general activities of some consumer associations, but not for a specific litigation initiated by them. In Italy, there is no specific support for consumers and consumer associations acting as "named plaintiffs" on behalf of consumers. Public funding is granted to the associations in order to fund a series of activities for the benefit of consumers. There is no specific funding for consumer litigation and it is up to the association to decide the amount of such resources to be spent for litigation. In Greece, the financial support received by the consumer organisation does not relate to specific litigation; financial support is related to the activities of the consumer organisation in general.

sources at least not have to pay the court fees.<sup>43</sup> However, in all Member States these are the less significant part of the litigation costs.<sup>44</sup>

This leads to the following conclusion:

11. *The financing of collective actions is a very significant obstacle for their use since the budgets of all potential intermediaries are limited and the risk of severe loss is high due to the “loser pays principle”.* This is even true where representatives are directly paid from the state budget (like the Scandinavian ombudsmen). Third party financing is so far rare in the consumer sector (with the main exception being Austria) and only of interest where the aggregate value of the claims is unusually high. Contingency fees are prohibited in most Member States but even where they are allowed, lawyers are likely to be mainly interested in high value cases or in spectacular cases with extensive media coverage.

**EQ 8: Are proceeds of collective redress actions distributed in an appropriate manner amongst plaintiffs and their representatives?**

a) Collective representative actions, skimming-off procedures and test-case procedures

Collective representative actions, such as the action under Article 188 of the Bulgarian Consumer Protection Act, under Article 421-1 of the French Consumer Code, and under Article 10 par. 16 of the Greek Consumer Protection Act, and also the skimming-off procedure under § 10 of the German Unfair Competition Act, are procedures that do not involve individual consumers at all, and consumers do not benefit directly from the result since the successful claim will benefit only the consumer association or the state budget. In the case of the **Bulgarian** and **Greek** collective representative actions, the awarded compensation has to be used for the purpose of consumer protection.

The **Greek** test-case procedure aims at a declaratory judgment so that there are no proceeds that could be distributed. Following the judgment, a consumer can obtain redress by making his or her claim in writing to the supplier. If the supplier does not voluntarily meet the claim within 30 days, the petitioning consumer can proceed to the court on the basis of the declaratory judgment.<sup>45</sup>

b) Group actions and traditional representative actions

In the case of group actions and traditional representative actions, the awarded damages go to the consumers' purses, their proportion of the total damage awarded being

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<sup>43</sup> See footnote 17.

<sup>44</sup> This was confirmed by the hypothetical example cases, see section 1.5. in country reports (Part II of this study).

<sup>45</sup> See country report Greece, section 1.1.2 (Part II of this study).

determined by their individual damage suffered. Since contingency fees are not allowed in most EU Member States, no reductions apply. The exception is again **Austria**, where approximately 30% of the successful claim will be paid to the litigation financing company if one is involved.

All the mechanisms analysed for this report apply the "loser-pays principle" in favour of consumers so that the consumers in a successful claim will not be liable for any litigation costs, unless of course the defendant goes bankrupt. Also, the litigation costs of the representative have to be borne by the losing defendant so that they do not reduce the amount that the consumers receive. An exception is possible in **Denmark**, where the losing defendant – in exceptional cases – may not be ordered to pay the representative's expenses, and the claimants that have opted in or that benefit from an opt-out group action may be ordered to cover the representative's expenses, but limited to the amount of security (provided by group members opting in) and to the maximum of what they gained from the group action.<sup>46</sup>

Problems with the distribution of proceeds have been indicated only by interviewees in the case of **Portugal** and **Spain**.<sup>47</sup> A potential danger exists where the representative decides to settle with the defendant. In such a case, a potential collision of interests arises between the wish to reach full compensation for the representative's litigation costs (not least because of the representative's responsibility vis-à-vis its members if it is a membership-based consumer association) and the aim of achieving a good deal for the group of consumers that suffered damage. No reliable data is available because settlement agreements are usually not accessible. The **Dutch Act on Collective Settlement of Mass Damages** explicitly aims to ensure the objectivity of the representative by providing that the representative may not be a party to the settlement. Among other matters, the court reviews the intended distribution of the proceeds. Also in the **Danish** system, a settlement in a group action becomes valid only if it is approved by the court.

This leads to the following conclusion:

12. ***As far as group actions are pursued by institutionalised intermediaries, the proceeds are usually distributed amongst the consumers that suffered damage.*** Reductions may stem from third party financing (where applicable). A number of mechanisms that are available in the Member States however do not aim at individual redress of consumers through collective mechanisms but have the character of sanctioning the breach of law as such.

<sup>46</sup> For details see the Danish country report, section 1.1.1.

<sup>47</sup> In Spain, when the claim is for monetary compensation, the judgment has to determine which consumers has to benefit from it and, when such determination is impossible because affected consumers are undetermined or hardly determinable, it has to specify the details, characteristics and requirements of consumers that are necessary to demand payment. As courts do not have sufficient information to fix such details, characteristics and requirements when they pass their decisions, it is possible that some affected consumers do not fulfill the established requirements and therefore they cannot benefit from the decisions. In Portugal, there are suggestions of difficulties in identifying the intended recipients as well as in ensuring that court awards are enforced.

#### 4.4 Efficiency of available collective redress mechanisms

##### 4.4.1 Length of proceedings

###### **EQ 9: Is the length of the proceedings under the mechanisms reasonable for consumers, consumer organisations, public bodies, and the defendants?**

The country studies have almost unequivocally concluded that collective redress procedures are sometimes very lengthy, but that this often seems to be justified due to the nature of the procedures. This applies, for example, to the situation in the **UK** and **Sweden**. In other countries, for example in **Bulgaria** and **Portugal**, the reportedly long time needed for a judgment is seemingly a feature of the national court system in general. In real mass procedures, such as the **German Telekom case**, with 17,000 claimants, the procedure under the Capital Market Model Act is certainly longer for the individual claimant than an individual lawsuit would be. However, it is expected to save the court much time over the total of 17,000 claimants. Only in **France**, the (rare) group action is said to take no longer than normal court procedures, but this may be due to the fact that very few consumers participate in these actions.

In the few cases that have been finalised to date, the collective settlement procedure under the **Dutch Act on Collective Settlement of Mass Damages** has proved to be rather fast but obviously it requires a settlement agreement between the parties first, and these negotiations are in themselves lengthy.<sup>48</sup>

One additional factor that is relevant to the length of the proceedings appears to be that collective litigation tends not to be finally decided in the court of first instance. At least this has often been the case once a new type of collective procedure has been introduced and the preconditions for its admissibility have not yet been clarified. This has been the case with the **Portuguese** group action and with the representative action under the **German Legal Service Act**, and many questions of law have also been raised in relation to the **German Capital Market Model Claims Act**.<sup>49</sup> In **Germany**, only the Higher Regional Courts are competent to deal with the collective procedure under the Capital Market Model Claims Act. In contrast, in **Spain** the duration of collective actions differs significantly from one court to another.

Test-case procedures, such as the **Austrian** model, are in fact meant to be taken to the highest courts in order to achieve a broad (factual) effect and therefore may go through a number of court instances.

What seems to be more important is the length of the proceedings compared with the length of alternative dispute settlement. Both the **Portuguese** and the **Spanish** country studies conclude that the length of the proceedings represent a deterrent to both claim-

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<sup>48</sup> Data on time needed to reach a settlement under this mechanism is not publicly available due to confidentiality concerns.

<sup>49</sup> The first and only case where the Higher Regional Court of Stuttgart decided on the issues that were subject to the interim procedure has been appealed to the Bundesgerichtshof which rejected the judgment of the Higher Regional Court and referred the case back for a new decision to be made.

ants and defendants, and provide an incentive for out-of-court settlement, and the same has been predicted for the Italian group action.<sup>50</sup>

This leads to the following conclusion:

13. ***The length of the proceedings under the collective redress mechanisms is mostly reasonable, compared to individual redress.*** Where collective proceedings are taking very long time, this is attributed either to the complexity of the matter or to the general slowness of the court system (i.e. inefficiencies are then not specifically related to collective redress). Initial difficulties of courts with handling collective mechanisms seem to be reduced over time.

#### 4.4.2 **Costs for consumers, consumer organisations and public bodies**

**EQ 10: Are the costs related to bringing an action under the mechanisms for consumers, consumer organisations and public bodies proportionate to the amount in dispute?**

In answering this question, one needs to distinguish between the litigation costs and other costs. Again, the number of instances that the litigation goes through until the final judgment is made (see above, at question 9) plays a role.

Proportionality is understood here in terms of the relationship between the amount in dispute and the costs of litigation.

##### a) Litigation costs

This question cannot be answered fully in the positive. Court fees are usually proportionate to the amount in dispute because they generally depend upon the value of the claims brought. In **Greece**, the court fees of a declaratory action are fixed and include only the costs of document stamping.

However, the same does not necessarily apply to the lawyer's fees. Whereas lawyer's fees are regulated by law in **Bulgaria** and **Germany** and are proportionate to the amount in dispute, this may be different where the lawyer's fees are freely negotiable. One should also mention that where the litigation costs are regulated by law (and thereby restricted to a level that is proportionate to the potentially low value of the collective action), it may be difficult to find a lawyer who engages in a procedure that is much more complex and time-consuming than an individual action over the same value. This has, for example, been reported from claims under the **German Capital Market Model Claims Act**.

Some sort of cost saving can be expected to occur in the follow-on action under the **UK Competition Act 1998** insofar as the breach of law has already been established before

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<sup>50</sup> There is no quantitative data available in this respect. See, for example, section 1.6.1, question 3 c) of the respective country studies (Part II of this study)

the follow-on action can even be brought. However, in the *football shirts* case brought under the Act a major problem has been found to be the calculation of the individual damages, that is, the amount by which the football shirts were overpriced, which had not been established by the Competition Appeal Tribunal.

#### b) Other costs

Other costs are the estimated time involved for getting information about the case, preparation of files, coordination, court hearings etc. required from the intermediary. Here, the country studies show that opt-in mass litigation can be extremely time-consuming to organise and carry through, which means that it involves weeks or even months of staff time.<sup>51</sup> This has been reported from the group action under the **German Capital Market Model Claims Act**, the representative action under the **German Legal Advice Act**, the **UK Competition Act 1998**.<sup>52</sup> Importantly, these costs incurred by the representative are not recoverable under the "loser-pays principle". Only when a settlement is reached can some compensation be negotiated by the representative. For example, in the **Dutch Dexia case**, *Dexia* paid the costs of notifying the interested parties.

The variables differ from one system to another, and the costs involved depend on which tasks have to be fulfilled by the consumers and which by the representatives, and in which way. For example, in the traditional representative actions under the **German Legal Advice Act** and under the **UK Competition Act 1998**, the claims to be brought have to be collected and checked by the staff of the consumer organisation before the file can be prepared. After this, strictly speaking there should be no unusual costs until the end of the litigation since the consumer organisation is the only claimant participating in the lawsuit. Nevertheless, the consumer organisation may have to communicate with the claimants during the lawsuit if aspects of the case turn out to be unclear.

In an opt-in group action, the cost burden on the representative depends on who is responsible for checking the validity of the claims of those who sign up to the litigation, and who is responsible for the communication with the group. For example, under the **German Capital Market Model Claims Act**, the lead plaintiff is responsible for all communication between the defendant and the court on one side and the other claimants on the other side. This means that, with 17,000 claimants represented by some 300 law firms in the litigation, all relevant documents have to be copied and sent by the lead plaintiff to these 300-plus law firms, which amounts to an enormous and time-consuming workload.<sup>53</sup> The **Italian** group action also requires the consumer associations to ad-

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<sup>51</sup> For example in Germany the average staff time per case amounts to 32 days. In the UK, the only case brought under the Competition Act required the work of one person full time for 1 year and at least 2 persons 2 days per week for 6 months. (See Part III of this study).

<sup>52</sup> This has also been reported from the French action for the financial reparation of the consumer collective interest. See for example Annex 5, case C: Telecommunication sector (France) in CPEC (2008): Problem study.

<sup>53</sup> See also footnote 31.

vertise the group action, to collect the mandates, to manage the file and to negotiate in the conciliation procedure after a judgment on the ground of liability has been made.

A special case is again the collective settlement procedure under the **Dutch Act on Collective Settlement of Mass Damages**, where most of the work has to be done before the court procedure starts. The negotiation of the settlement can be very expensive and an actual deterrent to this procedure because of the uncertainty as to whether the expenses for the negotiations can ever be recovered or whether they are lost because no settlement can be reached.

This leads to the following conclusion:

14. ***Collective redress mechanisms do not produce disproportionate costs for consumers but may be very costly for representatives.*** Whilst court fees are not normally disproportionate, and degressive fee systems usually work in favour of collective claims, lawyers' fees can be very high in Member States where they are freely negotiable, so that mass litigation on small claims is too expensive. Also, the internal costs for the collection of claims, the management of the file etc. can be high, and indeed a barrier to take action, where this is in the responsibility of the representative.

#### **EQ 11: Do the mechanisms minimise litigation costs for consumers?**

In answering this question, it is again needed to distinguish between actions brought by representatives and those legal actions in which consumers participate (and therefore incur litigation costs).

##### a) Actions brought by representatives

Representative actions such as the actions under the **German Legal Advice Act** and under the **UK Competition Act** are procedures that do not involve any litigation costs for consumers at all.<sup>54</sup> Similarly, where group actions are brought by representatives, consumers usually face no risk of being charged with litigation fees. This is the case in **Finland, Italy, the Netherlands, Portugal, Sweden and Spain**. In **Portugal** group actions are therefore usually not brought by consumers but by consumer associations.

Only in **Denmark** do the claimants incur limited liability for litigation costs, but liability is at least predictable since it is limited to the security that must be paid in advance, and – if, as an exception, the losing defendant does not have to pay the representative's litigation expenses – the gains received from the group action.<sup>55</sup>

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<sup>54</sup> Litigation costs for representatives depend on the case, the availability of contingency fees and third party financing. See section 4.3.4.

<sup>55</sup> See above, evaluation question 8 b).

In **Austria**, consumers may have to pay a part of 30% of their gains to a third party financing the lawsuit.

b) Collective actions in which individuals participate

Generally speaking, all Member States apply the normal principles of litigation costs to collective redress procedures. In collective actions in which individuals participate, cost savings usually stem from the fact that the common costs of the litigation, in particular, trial costs and the costs of expert evidence, are shared (see above, question 6). Furthermore, combining individual claims in one legal action results in some countries in reduced litigation fees faced by each of the claimants. This is particularly striking in the highly formalised **Bulgarian** and **German** systems of court fees and lawyer's fees, as can be seen from the hypothetical cases analysed in the country studies,<sup>56</sup> but it has also been concluded by the country studies on Spain and the UK<sup>57</sup> that the individual share of the lawyer's fees will be lower in group actions than in individual actions. To what extent lawyers increase their fees with a view to the fact that they represent a multitude of consumers could not be verified since such agreements are usually not accessible.

c) Test-case procedures

Test-case procedures have the main purpose of minimising litigation costs for consumers who rely on the test judgment in follow-on actions. This has been said to be the most important effect of the **Greek** test-case procedure.

d) Benefits for representatives

Finally, although this is slightly outside the scope of this question, it should also be pointed out that consumer associations that bring representative actions may also benefit from the lower collective litigation fees, compared with the aggregated fees of individual litigation, if those individual actions would have been brought by the consumer association.

e) Minimising vs. reducing

Nevertheless, it should be mentioned that even the reduced litigation costs can be extreme, where lawyer's fees are high anyway. The best example is the **UK**, as can be seen from the related country study.<sup>58</sup>

This leads to the following conclusion:

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<sup>56</sup> See section 1.5 of the respective country studies (Part II of this study).

<sup>57</sup> See section 1.6.1, question 6 of the respective country reports (Part II of this study).

<sup>58</sup> See section 1.6.5., question 11 (Part II of this study).

15. ***Collective redress mechanisms do alleviate the burden of litigation costs on consumers, although to variable extent.*** In many cases, the consumer does not participate in the litigation, and the litigation costs are borne by a consumer organisation or an ombudsman. Otherwise, the costs are reduced because the common costs are shared amongst the claimants. Whether, and to what extent, lawyers fees are increased as compared to individual litigation, cannot be verified since such agreements are not made public.

#### 4.4.3 **Costs for businesses**

**EQ 12: *Information costs:*** Do the mechanisms impose requirements on businesses (in terms of being informed about the existing collective redress mechanisms and providing related information to public authorities) that lead to additional costs? Do these costs weigh in heavily on Small and Medium Enterprises (SMEs)?

None of the country studies could find any evidence of specific information costs related to collective redress mechanisms. Where reasons are provided, the reports argue that businesses either have their own legal departments or work with law firms, either on an occasional basis or on a flat-rate contract, so that no additional costs arise.

This leads to the following conclusion:

16. ***The existence of collective redress mechanisms has not increased the businesses' information costs.*** None of the country studies could find any evidence of specific information costs related to collective redress mechanisms.

**EQ 13: *Litigation costs and related insurance costs:*** Are cost for businesses for (legal) insurance (for litigation and for damages) and the litigation costs under the existing collective redress mechanisms unreasonable?

##### a) Litigation costs

Generally speaking, the country studies conclude that the existing collective redress mechanisms may decrease rather than increase litigation costs for businesses, in that a multitude of separate litigations, potentially in different courts, is replaced by one collective procedure. In fact, this is the explicit goal of a number of collective redress mechanisms and – in the case of the **Dutch** model – the incentive for businesses to engage voluntarily in the settlement procedure.

In none of the Member States that form part of this report could it be identified that litigation costs are unreasonable<sup>59</sup> compared with the general level of litigation costs in the respective Member State.<sup>60</sup>

b) Insurance costs

Business representatives have expressed their fear that a US-style class action would lead to an increase in legal insurance costs. As to the status quo, the country studies have not provided any evidence of unreasonable costs<sup>61</sup> for legal insurance for litigation or damages under the existing collective redress mechanisms, and there is no evidence pointing to rising costs of legal insurance after collective redress mechanisms were introduced.

This leads to the following conclusion:

17. ***None of the collective redress mechanisms available in the EU seem to have caused unreasonable costs on businesses.*** Through the collective pursuit of claims, litigation costs are likely to decrease (for both sides) rather than increase. Accordingly, there is no evidence pointing to rising costs of legal insurance after collective redress mechanisms were introduced.

**EQ 14: Is the *economic impact* on traders against whom actions have been brought under the mechanisms proportionate to the alleged harm caused by the trader's conduct?**

The country studies could not find any indication of an economic impact on traders that would be disproportionate to the alleged harm caused by the trader. This is due to the fact that in none of the Member States punitive damages, or exemplary damages, apply in cases of the breach of consumer law. Thus, at most the trader can be liable to compensate the consumers for actual damage, which is precisely the goal of collective redress mechanisms.

Also, the litigation costs are not out of proportion in this respect since collective procedures have also the advantage for traders to have all law-suits combined in one action and dealt with by one law-firm, instead of having to deal with multiple litigation.

Finally, in almost all Member States, except of Spain, the “loser-pays principle” applies, so the innocent defendant business’ lawyers’ fees would be recoverable in the case of an unjustified claim. A further exception is **Italy**, where courts sometimes do not order consumer associations to pay the defendant’s lawyer’s fees.

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<sup>59</sup> The notion of unreasonableness is used here in such a way that the amount of costs of collective litigation is not justified by the additional burdens on courts and/or lawyers, taking into consideration the advantages that the collectiveness of the procedure brings for those who benefit from the procedure and the fact that the litigation costs are, in group actions, shared between the group members.

<sup>60</sup> This was also mentioned in the responses of the business stakeholders to the survey and to the country interviews.

<sup>61</sup> This was confirmed by the country interviews with stakeholders. No quantitative data is available on this aspect.

In **Bulgaria**, one case occurred in which the public awareness of a collective action against an energy supplier who was alleged to have miscalculated the bills led to customers stopping their payments. This, however, cannot be directly attributed to the collective redress mechanism as such.

The assessment of the reduction of consumer detriment through the existing collective redress mechanisms confirms that significant adverse economic impacts on businesses are so far highly unlikely (see section 5 below) due to the relatively modest amounts of damages (in absolute terms) awarded (regarding those cases where such information was available). In the very few cases that resulted in a settlement of several hundred million Euro (in the **Netherlands**), the amounts involved cannot be considered disproportionate to the harm caused since, as mentioned above, they only include compensatory damages. In fact, settlements, as in the Dutch system, always represent a compromise between the parties so that the payable amount is generally less than full compensation, and the Dutch country study has revealed that in the Dexia case some of the individual claimants who have opted out from the settlement (and have continued individual litigation) are most likely to obtain better compensation than those victims who have decided not to opt out.<sup>62</sup>

This leads to the following conclusion:

18. ***None of the mechanisms available in Europe has an impact on businesses that would be disproportionate to the harm caused.*** Where the use of a collective mechanism is unfounded, the loser-pays principle usually protects the business from losses. Otherwise, the payable amounts are by definition limited by the harm caused, due to the principle of compensatory damages only. Settlements always represent a compromise between the parties so that the payable amount is generally less than full compensation.

#### **EQ 15: Does the mechanisms lead to the *closing down* of businesses?**

In none of the Member States do the collective redress mechanisms seem to have led to the closing down of a reputable business to date. Of course, a business that operated on the basis of fraud may be closed down after a collective action, as has happened in **Austria**.<sup>63</sup> Also, a business may already be in financial difficulties and close to filing bankruptcy when the problem that might lead to collective action becomes known to the potential claimants, as happened with English-language schools in **Spain**.

The most spectacular case in which a business has actually closed down in the affected Member State was certainly the Dexia case, after which the **Belgian** company *Dexia* closed its operation in the **Netherlands**. The reason for the closing down, how-

<sup>62</sup> See also section 1.6.1., question 2, of country study the Netherlands (Part II of this study).

<sup>63</sup> It appears that one company had to close in Austria because of misleading business practices (misleading promises of prizes). In Germany and Switzerland, however, the same company is reportedly still active and is generating a vast number of complaints.

ever, was not the collective action as such, but the loss of reputation that *Dexia* sustained. In fact, the country study indicates that an early engagement with the settlement procedure under the **Dutch Act on Collective Settlement of Mass Damage** could have been beneficial for *Dexia*, and could have prevented the loss of reputation that finally caused *Dexia* to leave the **Netherlands**.<sup>64</sup>

This leads to the following conclusion:

19. ***None of the collective mechanisms available in the EU has led to the closing down of a reputable business.*** From the results of the evaluation it appears that the only instances in which businesses are likely to cease operation after a collective mechanism is used are businesses that are already in significant financial difficulties or businesses engaging in fraudulent practices.

#### 4.4.4 **Competitiveness and investment flows**

**EQ 16: Do the mechanisms have an impact on the competitive position of EU firms in comparison with their non-EU rivals?**

In the interviews conducted for the country studies, representatives of the business community could not provide any evidence that EU firms have already experienced disadvantages in comparison with their non-EU competitors caused by collective redress mechanisms. The vast majority of the interviewees thought that such disadvantages are highly unlikely. No other data was available pointing to any impact of the existing collective redress mechanisms on competitiveness. Again, this is supported by the overall relatively modest economic impact of the existing collective redress mechanisms (see section 5), which makes any effects on competitiveness highly unlikely.

This leads to the following conclusion:

20. ***There is no evidence indicating an impact of the existing collective redress mechanisms on the competitive position of EU firms in comparison with their non-EU rivals.*** Also, the economic impact of the current mechanisms is too modest to render such an effect likely.

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<sup>64</sup> There is no empirical research available to analyse the reasons for the loss of reputation of *Dexia* in the Netherlands. However, the general impression in the Netherlands is, according to the country rapporteur, that the way that *Dexia* responded to the initial complaints, and the way it collected outstanding debts (that resulted from the investments gone sour) impacted negatively on the reputation of the firm to such an extent that consumers and companies were reluctant to use the services of the firm. Had *Dexia*, once the uproar in the media started, reacted differently, it is believed that the case may not have had such a negative impact on the position of *Dexia* in the Netherlands. See section 1.6.2., question 15 of country study The Netherlands (Part II of this study).

**EQ 17: Do the mechanisms provoke cross-border investment flows (including relocation of economic activity in Member States which do not have any collective redress mechanisms?)**

There is no evidence that this has ever happened in the EU, and most interviewees were of the opinion that such cross-border investment flows were highly unlikely.

On the contrary, it has occasionally been pointed out that an efficient collective redress mechanism could be beneficial to businesses in such a way that claimants may be prevented from using the US class action instead. As background, there is evidence that increasingly, although not yet very frequently, European consumers join US class actions against European businesses. In fact, the **Dutch Shell case** is a case where this could have happened, but *Shell* negotiated a settlement instead under the **Dutch Act on Collective Settlement of Mass Damage**.

This leads to the following conclusion:

21. ***There is no evidence indicating that the existing collective redress mechanisms in the EU provoked cross-border investment flows. Also, the economic impact of the current mechanisms is too modest to render such an effect likely.***

## 4.5 Effectiveness and efficiency of specific mechanisms

### Austria

a) The **Austrian** test-case procedure has been used frequently<sup>65</sup> by the VKI even though the law provides no *res judicata* effects beyond the test case, and the only *legal* advantage is that the way to the Supreme Court is opened regardless the value of the claim. The main reasons for the success of the test-case procedure are, according to stakeholders, the political and financial support received by VKI from the responsible ministry and the high media presence of the VKI. The mechanism does not entail any litigation costs for the consumer whose case is brought as a test-case. However, as a test-case procedure, the mechanism requires follow-on litigation if the trader refuses to compensate the victims despite of the test-case judgment; with individual follow-on litigation being unlikely in the case of low-value claims. One further limitation of test case procedures in general is that they do not suspend the prescription of the individual claims that are not pending in court, which is a danger in cases that are taken through all three court instances. Given the very purpose of the test-case procedure of paving the way to the Supreme Court this danger is real.

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<sup>65</sup> The procedure is in most cases used by the VKI to obtain Supreme Court decisions on controversial issues in consumer law. The number of test-cases where the procedure was used to directly claim damages for an affected group of consumers is significantly lower, see country report Austria, section 1.4 (Part II of this study).

b) The traditional representative action, in which the VKI can represent several or a multitude of consumers who have assigned their claims, has partly been used to fill the mentioned gap of the test-case procedure. Consumers benefit from a successful claim without being party to the law-suit.

However, the loser-pays principle applies, and the litigation risk of the VKI is much higher than in the test-case procedure since the aggregate value of the claims is much higher. At the same time, the administrative burden on the VKI for collecting the claims and managing the file is also higher. Therefore, this type of collective procedure proved suitable for the VKI to bring where the claims are not too low and the number of consumers concerned is not high.

Where the aggregate value of the claims exceeds 100,000 Euro, the litigation risk is so high that third-party financing is needed, which is, however, better established in **Austria** than in the other Member States. In this case, however, consumers will have to pay approx. 30% of their gains to the financing company, that is, they are not fully compensated for their losses.

### **Bulgaria**

a) The opt-in group action under Art. 189 of the Law on Consumer Protection is too recent to be judged properly. Only one case has been brought until now.

The group action clearly has a smoothening effect on litigation costs, due to the degressive Bulgarian fee system where both court fees and lawyers' fees are calculated on the basis of the (aggregate) value of the claim. Litigation fees are relatively low in Bulgaria so that even large-scale low-value claims are reasonable to be brought. Still, there is the risk of having to pay the defendant's lawyers' fees since the loser-pays principle applies.

The system suffers severely from the poor resources available to the consumer associations who are the sole players in collective redress. A new law that has come into effect on 1 March 2008 aggravates this problem since it makes it a requirement for the admission of a law-suit that the consumer organisation has the financial means available for the court procedure. In addition, Bulgarian court procedures are generally lengthy, which is an additional barrier. No special treatment is afforded to collective redress mechanism for damages. This partly explains the low number of court cases.

Leaving aside the mentioned disincentives, the very small number of claims can also be attributed to the lack of experience of consumer organisations and courts alike that has been the reason for a slow start in other Member States as well. Stakeholders have however reported that the group action constituted some deterrent to those who have breached the law, and that it acted as an incentive for out-of-court settlement. The reason is high public awareness due to media coverage, as was evidenced in the case of an energy supplier.

b) The representative action under Art. 188 of the Law on Consumer Protection aims at compensation of damage done to the collective interests of consumers. Consumers can therefore not receive individual compensation by this mechanism.

In its first version of 1999 it was clearly ineffective, as the low number of cases demonstrates. This was the reason for the introduction of the above-mentioned group action. Now that both mechanisms are available, the role of the representative action under Art. 188 of the Law on Consumer Protection is likely to be limited to those situation where individual damage is low or cannot be quantified (and a group action is therefore not viable). As a representative action, it does not have a deterrent effect as such, since the damages awarded do not reach the amount of the harm done to consumers or the profits made by the defendant from the breach of consumer law. It does, however, have a deterrent effect through media coverage.

The above-mentioned barriers in terms of poor financial resources and general length of court procedures limit further the effectiveness of this mechanism.

### Denmark

The **Danish** group action mechanism is too recent to be judged. Conclusions on its impact can only be derived from the legal rules.

As with all group actions, the major advantage is that the common costs are shared amongst those who opt in. Unlike in all other Member States, consumers do even incur some litigation risk if the action is brought by a consumer organisation or by the Consumer Ombudsman, but this risk is limited, and it is predictable. Whether or not this limited litigation risk has a deterrent effect cannot be established yet. However, the opt-in group action is most likely used for at least medium-value claims of several hundred Euros per consumer.

An important feature of the Danish system is that the opt-in action is complemented by an opt-out action that is designed to catch those cases in which an opt-in action is evidently unreasonable to be brought. The safeguard against abuse is that the Consumer Ombudsman is the sole possible representative. Until now, no opt-out group action has been brought by the Consumer Ombudsman for lower-value claims.

### Finland

The **Finnish** group action mechanism is too recent to be judged. Since no case has been brought by the Consumer Ombudsman (who is the sole possible claimant) until now, conclusions on its impact can only be derived from the legal rules.

As an opt-in procedure, the group action is unlikely to be used for large-scale low-value claims. Rather, it can be predicted to work for at least medium-value claims of several hundred Euros per consumer. Also, the mechanism is an additional negotiation tool for the Consumer Ombudsman in cases in which the defendant is unwilling to react positively to “softer” mechanisms, including ADR.

### France

a) The collective representative action under Article L. 421-1 of the Code de la consommation does not serve to compensate the losses of individual consumers. Instead it is an instrument through which **French** consumer associations that do not receive public support are able to refinance their activities to protect the consumers.

To this end, it has been well used in the past (which has to be seen in the light of the absence of any *effective* collective mechanism aiming at the compensation of the losses of individual consumers, see b) below). Its impact is nevertheless limited. Since the awarded damages are far lower than the aggregate damage done to consumers and the unlawful profits made, it does not constitute a deterrent to traders. It is through publicity that a deterrent effect can be reached but court practice with a view to making the losing defendant pay for the publication of judgments varies.

b) The group actions under Article L. 422-1 of the Consumer Code and Article L. 452-2 of the Monetary and Financial Code have proved to be ineffective and inefficient since they are considered by potential claimants to be far too complicated. Although introduced in 1992 and 1994 respectively, they have hardly ever been used. Discussions on a new instrument are under way.

### Germany

a) The representative action under the Act on Legal Advice (*Rechtsberatungsgesetz*), and now (since 1 July 2008) under the Act on Legal Services (*Rechtsdienstleistungsgesetz*) has developed reasonably well, after initial legal uncertainty, and the number of cases is increasing.

In practice, the representative action works for cases of medium-value claims of a limited number of consumers, for example, in air travel cases and in gas price cases, although the staff resources of the consumer associations allow for only a limited number of cases per year. The procedure does not work for low-value claims where the amounts at stake do not justify the effort of collecting the (individual) evidence, managing the file etc., and for mass claims since they cannot be handled effectively by the consumer associations who are responsible for managing the file.

The mechanism has a smoothening effect on litigation costs, due to the degressive German fee system where both court fees and lawyers' fees are calculated on the basis of the (aggregate) value of the claim. Litigation fees are moderate in Germany. Still, there is the risk of having to pay the defendant's lawyers' fees since the loser-pays principle applies, and the litigation risk acts as a disincentive for bringing high-value claims.

In cases of mass damage (beyond the manageable number of claims), one major limitation of the mechanism is that the *res judicata* effect is not extended to those claims

that are not pending in court. Given the usual prescription period of three years, there is a real danger of prescription if the first and second instance judgments are appealed against.

b) The procedure under the Capital Market Model Claims Act (*Kapitalmusterklagen-gesetz*; KapMuG) is a tool for handling mass claims in the field of investments more efficiently. It is highly complicated and suitable only for extreme cases, such as the Telekom case with 17,000 claimants.

The main advantage of the procedure is that the common costs of the interim procedure are shared by all claimants, and they can be very high. In contrast, the procedure does not provide for advantages with a view to court fees or lawyers' fees since the individual claims are decided upon separately after the interim procedure, and they are kept separate for the calculation of fees.

The overall court procedure can be very lengthy. First of all, the interim procedure at the Higher Regional Court whose judgment can be appealed against at the Supreme Court increases the number of possible court instances from three to five. Secondly, the defendant can delay the procedure by raising new defences during the procedure. Thirdly, in-court settlement is almost impossible under the Capital Market Model Claims Act.

The procedure places heavy burdens on the model plaintiff's lawyer who is not rewarded for them through the regular lawyers' fees. Thus, from the lawyer's perspective, the procedure is only attractive with a fee agreement. Such an agreement is possible under German law but if the claim is successful, only the regular fees have to be borne by the losing defendant so that part of the consumer's compensation is lost.

Finally, the Act applies to investment firms who sell a certain investment product, giving incorrect information, but does not apply to intermediaries who, for example, gave incorrect advice on an investment product. Thus, connected issues are split into different procedures.

In practice, "normal" investment law cases are still preferably brought as individual cases. The number of cases in which the interim procedure has been applied for has remained low until now.

c) The skimming-off action under the Law of Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*) does not aim at individual compensation but is meant to be an enforcement tool to make the breach of unfair competition law less attractive. Its effect is extremely limited since the consumer association has to prove the trader's intention to breach the law. The courts have not yet developed a clear line on this criterion, which has created uncertainty, and reluctance on part of the consumer organisations.

The consumer organisation also has to determine the unlawful profits. To this end, it must sue the defendant, in a first step, for disclosure of the profits, and then calculate

the unlawful part of the profits, which is not difficult in the case of fraud (where all profits are unlawful) but very difficult, for example, in cases of misleading advertisement.

The consumer association bears the litigation risk, under the loser-pays principle, and does not gain anything from a successful claim since the skimmed-off profits go to the public purse, which is a disincentive.

In reaction to this latter issue, the German legislator has recently established a way in which the consumer organisation can avoid the litigation risk through third party financing. Through this, the Verbraucherzentrale Hamburg was able to take the risk of suing a telecommunications service provider in a high value case. Whether or not this will be the breakthrough for the skimming-off action will depend on the success of this claim.

### **Greece**

a) The collective representative action under the **Greek Consumer Protection Act** does not serve to compensate the losses of individual consumers. Instead, it should be seen as an instrument through which the goal of consumer protection is pursued at a general level.

The amounts at stake are meant to have a punitive effect. They are higher than, for example, in France and have proved to be an incentive to take action. The instrument is now well used, after a somewhat slow start, in particular since 2007 when the rules on the distribution of the damages were changed because the consumer associations now directly participate in the awards. Nevertheless, the instrument does not as such act as a strong deterrent to traders since the damages still fall behind the profits made from the breach of law.<sup>66</sup>

b) The declaratory action for damages was introduced in only 2007 and is too recent to be judged properly.

The mechanism does not entail any litigation costs for consumers since it is brought on behalf of an indeterminate number of consumers, as a kind of test-case. It offers the benefit that the declaratory judgment has a *res judicata* effect on individual consumers, as far as the grounds of liability are concerned.

However, as a test-case procedure, the mechanism requires follow-on litigation if the trader refuses to compensate the victims despite of the test-case judgment; with individual follow-on litigation being unlikely in the case of low-value claims, even though success is guaranteed. One further limitation of test case procedures in general is that they do not suspend the prescription of the individual claims that are not pending in court, which is a danger in cases that are taken through all three court instances.

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<sup>66</sup> See also H. Beuchler, Länderbericht Griechenland, in: H.-W. Micklitz and A. Stadler, Das Verbandsklagerecht in der Informations- und Dienstleistungsgesellschaft, Münster 2005, 169, at 224 f.

### Italy

The introduction of the **Italian** group action has been postponed and is expected for January 2009. Its effectiveness and efficiency cannot therefore be judged. Conclusions can only be based on the law, and on experience in other countries.

First of all, the country study reveals some legal uncertainty about the rules to follow. Legal uncertainty has often been an impediment to the effective use of a collective mechanism. Secondly, the admission of the group action is in the discretion of the court. Thus, the determination of a collective interest may trigger up-front cost that act as a deterrent. Thirdly, as an opt-in action the mechanism is unlikely to be used in cases of low-value claims. Also, the well-known length of judicial procedures in **Italy** is suspected to act as a disincentive to use this mechanism. No specific rules have been introduced to accelerate the procedure.

### The Netherlands

The **Dutch** collective settlement procedure under the Act on Collective Settlement of Mass Damage (*Wet collectieve afwikkeling massaschade; WCAM*) is a useful instrument due to its broad effect as an opt-out procedure. It has been used to settle some very big cases. The assessment of consumer detriment indicates that the **Dutch** mechanism so far has provided a significantly higher direct benefit to affected consumers/investors than all other evaluated collective redress mechanisms (see section 5, below).

A potential clash of interests between the representative and the victims of the harmful behaviour are dealt with through the requirement of court approval of the settlement reached. Importantly, the procedure also has a preventive effect since the settlement agreement may well be used to include obligations concerning the future activity of the liable party.

The procedure does, however, have clear limitations. It works only in cases where a settlement has previously been reached, which requires the business' consent. This consent may not be given if there is no incentive to settle, that is, where there is no threat of litigation. Thus, in large-scale low-value cases where individuals would not sue in court, a settlement may not be reached, and the collective settlement procedure not be available.

### Portugal

a) The collective action for damages that can be brought by a consumer association under the Participation and Popular Action Law of 1995 has been successful, but only in a limited number of cases. Initial legal uncertainty, in particular on the issue of legal standing of consumer associations, has been a barrier to litigation but is no longer a problem.

Limitations stem from the litigation risk on the consumer association, limited resources of consumer associations and the general length of court procedures in **Portugal**.

At the same time, the threat of bringing a group action has proven to be an incentive to settle cases through alternative dispute resolution. This is fostered by the high media coverage that group actions have in Portugal.

b) Groups of consumers do not normally bring group actions in **Portugal** (although they could), due to the litigation risk. They prefer to have a consumer association act on their behalf. Alternative methods of financing litigation do not seem to be available.

### Spain

The **Spanish** group action has been used most often and most successfully of all group actions in the Member States, and it has allowed consumers in mass cases to obtain satisfactory redress.

Its most important advantages are that the burden to collect the claims does not lie with a representative but that the opt-in process is organised by the court,<sup>67</sup> and that litigation fees are low. Also, there appear to be flexible solutions regarding the lawyers' fees.

### Sweden

The **Swedish** group action under the Group Proceedings Act of 2002 was established a couple of years ago. It was used in 8 cases until now.

However, interviewed stakeholder representatives<sup>68</sup> are careful to draw final conclusions on its effectiveness and efficiency. (Nevertheless, they conclude that the mechanism is effective in achieving satisfactory redress for consumers who would not otherwise have entered into litigation, and also that it is efficient in terms of improving access to justice).

An important feature is that the opt-in process is organised by the court so that the financial burden of collecting the claims and communicating with the individual victims does not lie with the representative. Consumers who opt-in have no or a very limited litigation risk.

The availability of the group action has a deterrent effect on businesses (not least because of the media coverage). It has also fostered ADR, in particular group ADR,

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<sup>67</sup> However, when affected consumers are identified or easily identifiable, the claimant has to show communication to the potentially interested consumers of the intention to bring suit, prior to the opt-in procedure that takes place before the court.

<sup>68</sup> These include representatives from the Swedish Ministry of Justice, the Swedish Consumer Agency, the Confederation of Swedish Enterprise as well as a Lawyer and a Judge of Appeal who have experience with collective redress.

which has decreased the necessity of using the group action under the Group Proceedings Act of 2002 for lower-value claims.

## UK

a) The long established “representative action” that is now regulated in Part 19 II of the Civil Procedure Rules does not play a major role in consumer law.

b) The Group Litigation Order (GLO) under Part 19 III of the Civil Procedural Rules (CPR) is a tool to handle mass claims, or several claims, with common features more efficiently. In the area of consumer law, it has been used only for package travel and product liability cases. Its main advantage is that the common costs are shared between the claimants.

The procedure involves high litigation fees and is therefore unsuitable for low-value claims. Also, the use of the GLO is at the discretion of the court. Thus, a number of claimants have to start court proceedings first, without any certainty whether or not the court will actually make a GLO, and hence whether the common costs sharing rules will apply. Once the court has decided to use the mechanism, claimants can still sign up to the procedure until a cut-off date set by the court. For these latter claimants, the issue of legal uncertainty does not arise.

c) The representative action, which is available to the consumer association *Which?* under s. 47 B of the Competition Act 1998 covers only cases where a violation of competition law has already been established. The procedure has only been used in one case, the football shirts case, but this case has revealed a number of issues that make the procedure ineffective. First of all, the violations in question normally have occurred years before the action commences, and many of the consumers harmed will not have evidence, such as bills, available anymore. Secondly, although the mechanism is based on a breach of competition law that has been established, the amount of damage, that is, the difference between the competitive price and the anti-competitive price, still has to be established. Thirdly, as an opt-in procedure it has turned out to be of limited value for low-value claims (20 pounds sterling in the *football shirts* case) where the possible gain is not worth the effort. Moreover, mass claims cannot always be handled effectively by the consumer association that is responsible for managing the case due to lack of resources. And finally, the litigation risk under the loser-pays principle acts as an additional disincentive, in particular since the amount of money claimed will normally be disputed and costs be to payable if the amount awarded is less than offered to settle the litigation.

*Main evaluation results by Member State and collective redress mechanism are also presented in the summary table in Annex 8.*

#### 4.6 **Added value of available mechanisms**

Generally speaking, almost all the collective redress mechanisms analysed for this report (except the **French** group action, which is hardly used, and the **German** skimming-off procedure, the usefulness of which has not been demonstrated yet) have some added value compared with individual judicial redress and to ADR schemes, although in different ways and to different extents. Whereas individual redress is available in all Member States, ADR schemes are not available across the board but sometimes only for particular business sectors.

##### 4.6.1 **Added value compared to individual judicial redress**

Generally speaking, consumers who seek individual redress through the court system have to overcome certain barriers in all Member States, although to a variable extent. These barriers are of an economic and psychological nature, as the country studies have confirmed. First, litigation triggers litigation fees (court fees and lawyers' fees), which can be recovered only in successful litigation (and even then the defendant may be bankrupt and unable to pay the claimant's litigation fees). In addition to this, through the "loser-pays principle", there is the risk of having to pay the defendant's litigation costs. These costs alone result in certain threshold amounts under which litigation in court is not feasible. Low litigation fees and legal insurance appear to lower the thresholds significantly, and this may explain the high number of individual litigation cases for relatively low claims in **Germany**. Nevertheless, a certain threshold remains. Apart from the economic reasonableness of litigation, psychological barriers may prevent individual litigation.<sup>69</sup>

This appears to correspond with the findings from reports from those countries where individual claims have been brought in collective procedures, in particular, group actions pursued by a representative and traditional representative actions. These reports unequivocally concluded that only a very small number of the consumers represented, and in most cases no more than 10%, would have initiated individual litigation.

The following paragraphs summarise the added value of collective redress mechanisms over individual litigation. They focus on added value for the protection of consumers. Further added value has been found in the alleviation of the burden of mass individual litigation on the court system, which was, for example, the prime reason for the introduction of the **German Capital Market Model Claims Act**.

##### a) Situations in which no individual claims are possible

First of all, there are situations in which no individual claims exist. This is the case with breaches of **German** unfair competition law, where the Unfair Competition Act provides no remedies. In such a situation, a collective procedure, such as the skimming-off pro-

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<sup>69</sup> For a detailed discussion of obstacles to obtaining redress and resulting threshold amounts, see: CPEC (2008): Problem study.

cedure under § 10 of the Unfair Competition Act, is generally suitable to provide "added value". In this particular case, however, the legal requirements for skimming-off the profits are defined too narrowly so that the added value has been extremely limited so far.

Also, collective representative actions, such as the one under Article 188 of the Bulgarian Law on Consumer Protection and the one under Article L 421-1 of the French Consumer Code, are useful in situations where individual claims may exist but cannot be proven, where it is too cumbersome to find the individual claimants or where alternative routes, namely individual litigation and group actions, are unattractive.

#### b) Low-value claims

Low-value claims tend not to be brought as individual actions before the ordinary courts. The threshold amounts under which consumers are not prepared to take individual court action may differ between the countries and also between the types of issue. A typical threshold appears to be in the area of several hundred to one thousand Euro but the amount will be higher in Member States where litigation costs are high. One example for the latter is **Finland**, where litigation fees are said to be an effective barrier to consumer litigation, and the **UK** is also well known for its high litigation fees.

One factor that needs to be taken into account is therefore the availability of small claims procedures that exist in some countries but not in others. In the **UK**, where small claims procedures are available, the threshold for claims to be viably brought before the small claims courts still has been estimated to be 300 Euro (which is far below the value which would make litigation in the High Court advisable). In **Denmark**, small claims procedures are available for claims of up to DKK 50,000 (approximately 6,600 Euro). Still, as a rule of thumb, the legislator estimated the value below which individual litigation is unreasonable at DKK 2,000 (264 Euro). Simplified procedures for claims of up to 3,000 Euro are also available in **Spain**. Conversely, the lack of small claims courts in **Germany** may also be one reason for the increasing use of the representative action under the Legal Advice Act.

In contrast, a complicated matter, such as liability for a misleading capital market prospectus, where litigation may be expected to cause high expenses for expert evidence and to go through three instances, may trigger much higher thresholds. Stakeholders in **Germany** have argued that the risk of such litigation resulting in expenses of at least 17,000 Euro if the case is lost in the end makes it unreasonable to sue in the case of damages below that threshold. The **Austrian** report estimates the equivalent **Austrian** threshold to be about 10,000 Euro. The **Dutch** report also indicates that the readiness to sue depends on the complexity of the matter, which may well render claims of less than 10,000 Euro inadvisable.

Beyond the economic advantages, collective redress mechanisms also have the potential to let consumers overcome their psychological barriers if they do not have to engage with courts and lawyers themselves, and also to overcome the shame of having

been ripped off if they see that a large number of consumers have been affected by the same unlawful behaviour.<sup>70</sup>

In contrast, some of the collective mechanisms in place are entirely unsuitable for low-value claims, namely those that trigger high litigation costs, the best example being the group action under the **UK Group Litigation Order**. A group action under the **UK Group Litigation Order** even poses the risk to consumers that their procedure leaves the scope of application of the small claims procedure and is allocated into the much more expensive ordinary procedure.

Moreover, individual litigation must be put into context with public enforcement of consumer law and with the availability of ADR (on which see the next section). Strong consumer protection authorities exist for example in the **UK, Finland and Sweden**. These have in the past sorted out numerous problems because of their authority and relevance for businesses.

#### c) High-value claims

In the case of high-value claims, those types of group action and also traditional representative actions in which the risk of losing the case lies with a representative, and maybe ultimately with the state budget, are obviously highly advantageous for the individual consumer, who does not bear the litigation costs. This applies to the group actions in **Portugal, Spain, Finland and Sweden**, and also to the representative action under the **German Legal Services Act**. On the other hand, representatives have limited resources (unless they find third-party financing) and will therefore be very cautious about engaging in mass litigation over high-value claims. This can be seen in **Austria** where claims of an aggregated value of over 100,000 Euro are brought only if financed by a litigation financing company (which then takes of approximately 30% of the amount awarded).

One added value of all group actions in the field of high-value claims, including those for which no representative bears the litigation risk, is certainly the above-mentioned distribution of the (sometimes very high) common costs over the group of claimants or of represented victims. This can be derived from the fact that consumer cases that have come under the **UK Group Litigation Order** are often product liability cases, and in particular pharmaceutical product liability cases, most with difficult issues of evidence. It is also the reason why claimants may apply to the group action under the **German Capital Market Model Claims Act**. Although this latter act has been enacted only recently, one can already see that this procedure is not used by lawyers where the reason of sharing common costs does not play a crucial role because it is far more cumbersome and lengthy than a normal individual court action, while not providing any financial incentive to the lawyer.

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<sup>70</sup> See, for example, results of focus group research in: CPEC (2008): Problem study, Part II.

#### 4.6.2 **Added value compared with ADR**

The relationship of judicial collective redress mechanisms and ADR mechanisms has been confirmed in all country studies. In fact, it is interesting to see that in **Bulgaria**, where no strong ADR mechanisms are in place, relatively low-value claims have been brought through the group action systems. It should also be noted that in **Bulgaria**, **France** and **Germany** collective mechanisms are made available to catch situations in which individual consumers would not or cannot sue, namely the collective representative actions under Article 188 of the Bulgarian Law on Consumer Protection, Article 421-1 of the French Consumer Code, and the above-mentioned **German** skimming-off procedure that is however restricted in scope to the Unfair Competition Act.

##### a) General issues

In all Member States that form part of this study, ADR mechanisms are available. However, the mechanisms, and in particular their use by consumers, vary greatly. The main issues that are relevant for the added value of collective redress mechanisms compared with ADR seem to be the availability and accessibility of ADR schemes, and the compliance by businesses with ADR outcomes.

Only few Member States avail themselves of across-the-board ADR schemes that would cover all sectors of consumer complaints, the prime example being the Scandinavian countries and, more recently, the Baltic States, as well as **Spain**. In other Member States, the picture is more scattered. Sector-specific ADR schemes frequently focus on banking and insurance services, but there are hundreds of specialised ADR schemes, many of which consumers are entirely unaware of, and many of which are not regarded as being impartial and independent. Even in the **Netherlands**, where ADR plays an important role and is well-organised, important business sectors are not covered by ADR schemes. ADR has a strong tradition (and therefore recognition) only in the Scandinavian countries and in the Anglo-American legal tradition, whereas it is not so well-established in other EU Member States. In some countries the increased importance of ADR schemes is alleged to be a consequence of slow civil court systems or distrust of consumers of the court system.<sup>71</sup>

While many ADR schemes can be used free of charge, at least for consumers, some cannot. Some schemes require fairly low amounts to be paid, such as the **Danish** Consumer Complaints Board that charges 150 DKK (20 Euro), which is returned if the claim is successful.

ADR schemes may also have minimum and maximum thresholds that disallow very small claims to be brought. For example, the **Danish** Consumer Complaints Board is available only for claims of more than 800 DKK (133 Euro), with exceptions for shoes and textiles (500 DKK = 83 Euro) and motor vehicles (10,000 DKK = 1,660 Euro), and of a maximum of 100,000 DKK (16,600 Euro).

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<sup>71</sup> See also Centre for Consumer Law of the Katholieke Universiteit Leuven 2007: An analysis and evaluation of alternative means of consumer redress other than redress through ordinary judicial proceedings.

ADR is voluntary by nature, although in certain cases businesses are obliged, due to the statutes of their business associations, to engage in ADR. However, there are always businesses that would not engage in ADR at all, and that avoid membership in an association that requires engagement in ADR.

An important incentive for consumers to use an ADR scheme is the binding effect or the degree of voluntary compliance with ADR decisions. Most ADR schemes do not produce decisions with a formally binding effect. However, voluntary compliance seems to be generally fairly high, and particularly so where the ADR body (for example, the Scandinavian complaint boards) enjoy high reputation and have mechanisms in place to “name and shame” those who do not comply with ADR decisions.

#### b) Country-specific observations

In **Austria**, **Germany** and **Italy**, ADR does not appear to play a major role in facilitating consumer redress in a wider sense. Those schemes that are available are usually sector-specific and voluntary, and they often do not produce binding decisions. In **Germany**, sector-specific arbitration boards are often regarded as not independent and impartial.<sup>72</sup> Even where this is not the case, for example in the case of the **German** Insurance Ombudsman Scheme, consumers are often not aware of these ADR mechanisms. The latter even applies to **Portugal**, where ADR is considered to play an important role in the enforcement of consumer law. In **Greece**, the existing ADR schemes are used but only in a relatively small number of cases. The situation in **France** appears to be similar, although a dramatic increase in mediation and conciliation has been reported for the past decade.

The Member States where ADR is best established are the Scandinavian Member States: **Denmark**, **Finland** and **Sweden**. In these countries, the coverage of ADR is broad if not total in geographical terms as well as in terms of subjects covered, although the focus is, of course, on lower-value claims. For these Member States consumer satisfaction with ADR is reported to be high, and compliance with ADR decisions is reported to be high as well. Still, even in these Member States gaps remain where ADR has not led to a solution because occasionally businesses are unwilling to engage in ADR or to comply with ADR decision. According to the **Finnish** report, the compliance rate very much depends on the business sector in question, and compliance of big companies in competitive markets such as the package travel market is high, whereas small and unknown companies comply less. The **Swedish** report indicates that the introduction of the group action has provided an incentive to engage in ADR even more than before. Interestingly, it is **Sweden** and **Finland** that have in the meantime introduced collective ADR mechanisms (see below, at c)).

Strong ADR systems also exist in the **Netherlands**, the **UK** (in particular the Financial Ombudsman Service), and **Portugal**. As far as the ADR mechanisms apply – they are limited to particular lines of business – the need for collective procedures in these

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<sup>72</sup> Centre for Consumer Law of the Katholieke Universiteit Leuven 2007, p. 152.

countries arises only where businesses refuse to settle under ADR systems, which is rare but does happen. As to the **Netherlands**, the **Dutch** country study has confirmed that the Act on Collective Settlement of Mass Damage is unlikely to be used in large-scale low-value claims precisely because no alternative collective procedure is available, so that the would-be liable party is safe from being sued otherwise.<sup>73</sup>

#### c) Collective ADR

Since 1997, the Consumer Ombudsman has been granted the right to bring proceedings before the **Swedish** National Board for Consumer Complaints (ARN) on behalf of a group of consumers seeking settlement of a series of individual claims stemming from the same circumstances (commonality). In the case that the Consumer Ombudsman decides not to pursue a case, group proceedings can be initiated by a consumer or wage-earners' organisation. Group proceedings are admitted only if this can be justified in view of the public interest. They are based on an opt-out principle. The claim extends automatically to all members of the group without a need for an active step to be made by every consumer. The ARN issues a recommendation in which it can recommend how the dispute should be settled. The Board can pronounce only on issues of contractual liability. The most typical remedy is compensation for damages due to breach of contract. The recommendations are not enforceable. Nevertheless, the high rate of compliance with the recommendations of the Board makes the scheme successful. More complex legal disputes that threaten to become expensive and time-consuming are usually not dealt with by the Board.

The **Finnish** mechanism was introduced only in March 2007 and is modelled on the **Swedish** model. The **Finnish** Consumer Ombudsman has been entitled to initiate a special group claim in the Consumer Complaint Board. Importantly, this is not an opt-in procedure. Instead, the Consumer Ombudsman merely has to define the type of consumer represented, for example, the purchaser of a particular product. If the Board regards the claim as justified, it may recommend that the business in question should give compensation to all consumers who have suffered similar damages because of the activities of the same business. This recommendation is not enforceable but non-compliance will lead to publication of the business on a "black list" on the Consumer Ombudsman's webpage, which is an incentive to comply for those businesses that care about their reputation. In the case of the new group action, however, compliance will be difficult to monitor since the consumers that could benefit from the recommendation are not known, due to the lack of an opt-in procedure. The new mechanism has not yet been used in practice.

#### d) Gaps of ADR

Apart from the limited geographical coverage and, in most countries, the limited availability of ADR mechanisms only in certain lines of business, and apart from the distrust

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<sup>73</sup> See section 1.5.1., question a) of country study The Netherlands (Part II of this study).

of consumers of certain ADR schemes that they regard as being dominated by industry and therefore not impartial and independent, the country studies have identified the following areas in which ADR does not ensure access to justice either.

da) Situations in which no individual claims are possible

Quite obviously, where the substantive law does not provide for individual claims and therefore makes individual litigation impossible, problems cannot be addressed through ADR either. One example is, again, **German** unfair competition law where no individual remedies correspond to breaches of the law.

db) Situations where claims cannot easily be proven

The same would apply to situations where claims cannot easily be proven. It seems worth mentioning that in many cases ADR mechanisms use only a written procedure, and therefore exclude witness evidence, which may be an impediment in individual cases.

dc) Low-value claims

Although the threshold amount below which ADR mechanisms are used is lower than the threshold for individual litigation, it still exists. The threshold depends, in particular, on the fees charged to use the ADR system. For the **Netherlands** it was estimated to be 100 to 200 Euro, and for **Portugal** 50 Euro. Interestingly, the **Swedish** legislator, and later on the **Finnish** legislator, have reacted to this barrier to ADR by introducing the above-mentioned collective opt-out ADR schemes.<sup>74</sup>

dd) High-value claims and complicated matters

ADR is undoubtedly unsuitable for complex procedures for high-value claims or involving expert evidence. Some schemes explicitly exclude high-value claims by setting a maximum amount for claims to be admitted. Most ADR schemes work only with written procedures and written evidence and are therefore unsuited where the problematic issue is one where expert evidence is crucial, as in pharmaceuticals cases.

de) Unwilling businesses

Finally, it should be remembered that ADR simply does not work where businesses are unwilling to engage in ADR or where businesses do not respect the ADR decisions.

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<sup>74</sup> This in spite of the fact that in both countries the public complaint boards do not collect any fees in individual disputes, indicating that even for free ADR schemes a threshold amount exists, caused by other transaction costs (e.g. postage) and time effort involved, see CPEC (2008): Problem study.

This concerns, in particular, those businesses that cause problems related to consumer protection anyway.

#### 4.6.3 **Conclusions**

The civil court systems of the Member States and the available ADR mechanisms guarantee consumers' access to justice to varying extents. Even in those Member States that have a reputation for making it easy for consumers to file complaints or lawsuits, that is, in particular the Scandinavian Member States, a number of situations remain in which damage suffered by consumers is not compensated, or more broadly, the violation of consumer law is not sanctioned in practice.

The added value of the various mechanisms that have been put in place in the Member States, compared with individual litigation and ADR, varies greatly. Leaving aside problems related to individual mechanisms that make those mechanisms ineffective, some structural issues have become clear.

a) In situations in which **no individual claims are possible** (as in some Member States' competition laws), group actions and ADR mechanisms are not viable. Therefore, the only mechanisms that seem to make sense in such cases are those in which individual consumers do not play any role, which are collective representative actions brought by consumer associations in the collective interest of consumers, or skimming-off procedures.

b) Close to this are situations in which it is **unlikely that individual claims can be proven**, for example due to the unimportance of the matter and the time that has passed between the incident and the potential collective action (leading, for example, to a lack of proof of purchase). In such cases, opt-in actions would not seem to work, since the opting in requires some evidence to be put forward, independently of whether the evidence is checked by a consumer association that manages the file, or by a court. The same applies to ADR. Whether or not opt-out group actions would lead to the compensation of individual damage cannot be evaluated yet, since in the 13 countries evaluated only two have an opt-out system<sup>75</sup> (**Portugal** and, very recently, **Denmark**), and very few relevant actions have been filed so far. The experience with the Portugal Telecom case seems to indicate that settlements reached with a defendant can include provisions that lead to some sort of compensation of consumers who cannot prove their individual damage. The importance of this example, however, should not be overstated, as the telecommunications sector is one of the sectors where at least the affected group can usually be well defined (that is, the subscribers of a specific service). In other cases it seems that the distribution of awards to individual consumers would again require some form of evidence that the consumer in question has suffered damage. Therefore, the only mechanisms that seem to make sense in such cases are those in

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<sup>75</sup> The Dutch system does not appear to be relevant for this category of claims, as little incentives for a defendant exist to reach a settlement in case it is unlikely that individual claims can be proven and no collective representative action or skimming off procedure is available for the claimant.

which individual consumers do not play any role, which are collective representative actions brought by consumer associations in the collective interest of consumers, or skimming-off procedures.

c) Where **very low-value claims** are at stake, opt-in group actions do not appear to be used either. Even if no financial risk is involved, the time for signing up, collecting the evidence etc. appears to be a barrier to consumers. Also, follow-on litigation in cases where the trader refuses to comply with a declaratory judgment, is unlikely, even if success is guaranteed, as is now possible in **Greece**. The threshold certainly varies from one Member State to another, the average household income being likely to be an important factor. Even ADR entails thresholds, although they are lower than the thresholds for individual litigation.<sup>76</sup>

In such cases, opt-out group actions are more promising, which is obviously the reason for the **Portuguese** system, the two-fold **Danish** system and for the **Swedish** and **Fin- nish** collective opt-out ADR schemes. Again, collective representative actions brought by consumer associations in the collective interest of consumers, or skimming-off procedures represent alternative mechanisms for sanctioning the breach of consumer law and for preventing further breaches.

d) **Low-value to medium-value claims** can well be brought in opt-in group actions and also in traditional representative actions. The threshold depends on various factors.

On the consumer's side, the litigation risk is relevant, which is obvious from the frequent use of the **Spanish** group action, where consumer associations do not need to pay court fees and where courts can also decide not to apply the "loser-pays principle" against consumer associations.

On the representative's side, the cost and time for handling the claim and the litigation risk are limiting factors. In the case of the **German** traditional representative action under the Legal Advice Act, where the collection of the claims and the management of the file is the responsibility of the claimant, stakeholders have indicated that only a limited number of claims per case can be managed, and that only a few cases per year can be brought, due to limitation of resources. Group actions in which the court handles the signing-up procedure are suitable for including a much higher number of claimants. Moreover, the litigation risk on the representative is a disincentive to bringing an action. In systems where there is financial backup by the state, group actions are more likely to be brought. Third-party financing is not yet well established.

Low- to medium-value claims are also the claims where functioning ADR systems are viable alternatives, and both systems appear to be complementary. Judicial collective redress mechanisms can act as a fall-back system where ADR is unsuccessful in the individual case, for example because a business is unwilling to engage in ADR. At the same time, an effective collective mechanism can act as an additional incentive to use ADR.

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<sup>76</sup> See CPEC (2008): Problem study.

e) **High-value claims** are often of a very complex and complicated nature as to the questions of fact and/or law involved. Collective mechanisms appear to be useful in bringing down the individual share in the common costs and are therefore attractive where the common costs are high, for example in pharmaceuticals cases or in capital market cases. ADR is no alternative in these cases since it is entirely unsuitable for such complex procedures.

f) The broader effect of collective mechanisms also has to do with the attention given to these procedures by the media. Whereas media coverage has always been an important tool in the Scandinavian countries, individual consumer law cases have received less attention in other places. In contrast, a number of country studies, including the reports on **Bulgaria** and **Portugal**, have indicated that group actions attract significant attention from the media, so that the added value would not only constitute in improved access to justice but also in a preventive effect that cannot be underestimated.

These conclusions can be summarised as follows:

22. ***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.*** The added value of different collective mechanisms depends to a significant degree on the type of claim. Collective representative actions and/or opt-out group actions seem to be most useful where substantive law does not provide for individual claims, or such claims are difficult to prove, or the value of the individual claims is too low to motivate consumers to participate, as is the case in large-scale low- or very low-value claims. Opt-in group actions and traditional representative actions seem to be mainly viable above a certain threshold amount of the individual claim, but are then suitable mechanisms to lower litigation costs for consumers and to reduce financial and psychological barriers to taking action. Importantly, the use of collective redress mechanisms seems to attract much higher media coverage than individual litigation and ADR; which is an incentive to out-of-court settlement and also produces a preventive effect.

## 5 Assessment of consumer detriment

### 5.1 Summary of tasks according to TOR

*Economic assessment of whether consumers suffer a detriment in the Member States where collective redress mechanisms are not available.*

- *The contractor will provide an economic assessment of whether consumers based in Member States where collective redress mechanisms are not available suffer a detriment as a result of the unavailability of such mechanisms.*
- *The contractor will provide an economic assessment of whether consumers suffer a detriment if they are unable to bring cross-border collective redress actions.*
- *The analysis should encompass both personal detriment (negative outcome for individual consumers, which may include both financial and non-financial detriment) and structural detriment (loss of consumer welfare).*

### 5.2 Introduction

The purpose of this section<sup>77</sup> is to provide a quantitative estimation of whether consumers in European Union Member States, where collective redress (CR) mechanisms are not available, suffer a detriment as a result of the unavailability of such mechanisms (hereafter called “non-CR countries”).

This analysis encompasses both personal detriment (that is negative outcomes for individual consumers, including both financial and non-financial detriment) and structural detriment (the overall loss of consumer welfare).

The section is structured as follows:

- ❑ Sub-section 5.3 provides an overview of the methodological approach to this report.
- ❑ Sub-section 5.4 presents the data collected during the course of this study.
- ❑ Sub-section 5.5 applies the data to the non-CR countries and analyses the results.
- ❑ Annex 1 provides a more detailed discussion of the methodological approach used for this assessment.

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<sup>77</sup> This analysis was contributed by Oxford Economics on basis of a conceptual approach developed jointly with Civic Consulting and on basis of data collected through the country studies by Civic Consulting.

### 5.3 Methodological approach

#### 5.3.1 Outline of study assumptions

The purpose of this study is to provide a quantitative assessment of whether consumers in EU Member States without a collective redress mechanism suffer a detriment due to the lack of access to such a mechanism.

By definition, the fact that consumers in such countries do not have access to CR makes it difficult to directly measure any possible detriment they face as a result of its absence. However, an alternative approach is to consider whether the introduction of CR has reduced consumer detriment to consumers in countries which have adopted it as a legal mechanism. It is this approach which has been used for the current study.

In considering this approach, it should be recalled that determining whether consumers in non-CR countries suffer a detriment due to lack of access to CR implies defining the structure of such a CR regime. As has been shown in the previous sections of the study, the term “CR”, in fact encompasses a wide range of legal mechanisms. Were the non-CR countries to have adopted CR in the past (or were they to adopt it in the future) it is unlikely they would have done so in isolation from other countries. Most likely they would have looked to the experiences in other Member States, which already practice CR, as well as to their own legal mechanisms, as a guide to legal and policy development. By extension, the ultimate impacts on consumer detriment in the non-CR countries could be expected to reflect such consideration of the experiences in other Member States and adaptation into existing national legal systems. Measuring the prior experiences of countries which have adopted CR therefore provides some indication of whether consumers in non-CR countries are likely to suffer a detriment due to the absence of CR.

The chief means of assessing whether or not consumers in CR countries do enjoy a reduction in consumer detriment (i.e. a benefit) is through the use of a form of cost-benefit analysis. In this instance, what is required is a comparison between impacts on consumers of a CR system (the “option case”) with a counterfactual (i.e. hypothetical) “base case” in which there is no CR mechanism in operation, but rather consumers may only have recourse to an individual redress (IR) system.

Comparison of the base and option cases allows for derivation of the reduction in consumer detriment (i.e. net benefits to consumers only) of collective redress within a given country. Note that these benefits do not encompass the costs of implementing a system of collective redress, nor will they encompass the loss of profits (i.e. producer surplus).

For example, assume that a consumer (along with many others) suffers a consumer detriment of 100 Euro due to a mistake in billing by a telecommunications company. The matter is subsequently part of a CR case and the consumer benefits from a court decision awarding him or herself and others 100 Euro compensation, though there are some costs involved in terms of time and minor anxiety.

Had no CR mechanism been in place, the consumer might never have recovered his or her money, as the legal costs and effort involved in bringing an individual action before

the court would have outweighed any gain. Therefore, while the consumer never engages the legal system, equivalently he or she never receives the benefit of recovering 100 Euro.

Table 8 below illustrates the approach.

**Table 8: Hypothetical impact of CR for an individual consumer**

System	Initial costs		Litigation Costs			Court benefits	Net benefit
	Initial loss (in Euro)	Intangible costs (stress etc.) (in Euro)	Time costs (in Euro)	Intangible costs (stress etc.) (in Euro)	Transaction costs (in Euro)	Court award (in Euro)	
<i>Collective Redress</i>	100	10	5	5	0	100	-20
<i>Individual Redress ("base case")</i>	100	10	0	0	0	0	-110
<b><i>Difference (net benefit of CR)</i></b>	<b>0</b>	<b>0</b>	<b>-5</b>	<b>-5</b>	<b>0</b>	<b>100</b>	<b>90</b>

Note: Assumes state/intermediary pays for transactions costs (e.g. court fees). Pain and suffering costs are hypothetical and intended for illustrative reasons only.

While there is still some detriment to the individual consumer, overall levels of detriment are much reduced, compared to the individual redress (IR) "base case" where no action was undertaken.

Obviously there are many variations on this simplified example. In practice, the approach adopted in this study does not allow for intangible costs, consistent with the recommendations of previous studies.<sup>78</sup> There are also significant difficulties in assessing accurate time and transactions costs due to the lack (or "patchiness") of data available in many jurisdictions.

This approach is discussed in more detail in Annex 1.

Considering whether CR has been of benefit to consumers in other jurisdictions provides an indication (to whatever extent it may be imperfect) of whether consumers in *non-CR countries* who suffer a detriment might have been better off if a CR mechanism were in operation. In theory, the experience (i.e. relative change in detriment) of CR Member States could then be applied to non-CR Member States to give an indication of whether consumers do suffer a detriment as a result of the absence of this mechanism.

In brief, the approach followed by this study was therefore as follows:

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<sup>78</sup> E.g. Europe Economics (2007): An analysis of the issue of consumer detriment and the most appropriate methodologies to estimate it. Final Report for DG SANCO, p.78-90. Europe Economics notes that developing quantitative estimates of ex post psychological detriment (i.e. intangible costs) is a time consuming and difficult exercise, of debateable use.

- ❑ *Data collection* – Data was collected about the operation of CR systems in 13 Member States which have adopted collective redress mechanisms (see country reports, Part II, and collection of cases, Part III of this study). These countries are: **Austria, Bulgaria, Denmark, Finland, France, Germany, Greece, Italy, the Netherlands, Portugal, Spain, Sweden** and the **UK**.
- ❑ Of these, four were excluded from the analysis due to a recent introduction of CR (**Denmark, Finland, Greece, Italy**<sup>79</sup>), while one (the **UK**) was excluded due to privacy issues precluding the collection of detailed data.
- ❑ *Assessment of CR for Member States having a relevant mechanism* – The data gathered through the country studies were collated for each country (i.e. each CR regime). Net benefits of CR were calculated by comparing court outcomes under CR (the option case) to defined IR base cases.
- ❑ *Data mapping* – Results for CR countries were adjusted to allow for the differing characteristics of the non-CR countries (in terms of population, GDP and GDP per capita). This allowed for an estimate of the possible consumer detriment in non-CR countries due to the lack of a CR system.

More detailed descriptions of the methodological approach are contained in the following section and Annex 1.

In practice, a number of broad issues need to be considered, at the outset, when taking this approach. While all of these issues present methodological challenges, it is still possible to provide an estimate of consumer detriment in non-CR states. Accordingly, these issues are listed below, along with the methodology used to resolve them:

### ***Issue: Differing CR systems***

#### *Problem*

While this study uses the broad term “CR”, there is no single “collective redress system”. Rather different Member States have applied a wide variety of legal approaches in the development of such mechanisms. Needless to say, an overlying factor is that Member States also differ in terms of their economic, social and cultural and political structures, which complicates the interpretation of the results of the operation of CR.

#### *Resolution*

Results of the assessment for the individual CR countries are presented both as an average and as a range. This allows for a comparison of the range of likely outcomes, as well as an average. It is then up to the reader to decide on what value to base his or her conclusions. It also allows the reader to draw conclusions about the mechanisms of individual countries. For example, if it is argued that the best benchmark for the analy-

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<sup>79</sup> In Italy the CR mechanism is expected to be available only in 2009.

sis of consumer detriment is the **Spanish** regime, the individual results for **Spain** can be more closely examined.

This approach is similar in philosophy to that increasingly adopted in economic forecasting. Rather than giving a point outcome, a range of possibilities is presented, allowing readers to make better-informed decisions on likely outcomes.

Another methodological point is that, as noted, the non-CR countries themselves differ in terms of their legal, cultural, social, political and economic structures and are likely to adopt differing versions of CR. To this extent, the fact that this study attempts to measure differing versions of CR could be seen as an advantage rather than a difficulty. In other words, by incorporating the experiences of a wide range of CR regimes, a better idea of the range of likely outcomes for CR countries is provided, as opposed to an approach which simply posited a “point estimate” and assumed a single regime for a given set of countries.

An associated point is the fact noted above, that if non-CR regimes were to adopt CR, they might well review the experiences of their CR counterparts (as well as the experience of their own legal frameworks) before they did so. Given this, a diversity of outcomes in CR Member States is therefore likely to be (at least partly) reflected through a diversity of outcomes in non-CR Member States.

### ***Issue: Differing dates of introduction***

#### *Problem*

CR countries have introduced CR at different times and in differing ways. The analysis of the experience of various countries with CR mechanisms indicates that it takes a significant amount of time (several years) before CR systems are fully operational, especially where the legal preconditions for a collective action are subject to dispute. Some countries have introduced the system only recently and thus, only limited information is available on case processes and outcomes.

#### *Resolution*

In practice, this difficulty is partly overcome in the current work by excluding countries which have only adopted CR recently (i.e. since 1 January 2007). As stated above, this excludes **Denmark, Finland, Greece and Italy**. None of these countries has yet reported a finalised case of CR for individual damages.

For the remaining CR Member States, an annual average was estimated for the measurement of personal and structural detriment. This average was generally estimated over the period since the introduction of the mechanism up to 31 December 2007.<sup>80</sup>

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<sup>80</sup> As detailed below France and Austria were exceptions to this. The French CR system dates back to 1973 while various Austrian mechanisms were introduced in 1979, 1983 and 1989. For this study French data were gathered for the period 1997-2007 (inclusive) while Austrian cases were collected for 1994-2007 inclusive.

Thus, in the case of **Spain**, an average was taken of case outcomes over the eight-year period 2000-2007. While Member States differed in the dates of the introduction of collective redress mechanisms, in many cases mechanisms were introduced during the period 1999-2004, allowing for a reasonable consistency of approach and timeframes over which averages were derived.

### ***Issue: Confidentiality constraints and missing data***

#### *Problem*

In many CR countries the amount of information which can be obtained on the processes and outcomes of CR cases is limited. This makes it difficult to determine to which degree consumers have actually benefited (or otherwise) from the operation of the system.

#### *Resolution*

This encompasses a variety of issues. In many cases, awards in court proceedings only specify principles of compensation for individual consumers rather than detailed amounts in absolute terms and/or the transaction costs are not fully known, e.g. because lawyer's fees are freely negotiated.

In order to partly overcome these limitations, a set of "decision rules" have been developed taking into account the outcomes of the country studies. These rules were applied to overcome constraints. The decision rules are further discussed below.

Most problematic are instances where cases are noted with no amounts specified as being either claimed or awarded. This appears to be a particular problem in **Spain**, where 32 of the 49 cases do not detail amounts awarded. However **Germany** (two out of the 13 cases in which court decisions were recorded) and **Sweden** (one case out of three) also present problems of missing data.

In practice, most of these cases would not appear to involve substantive amounts of money. For example, many of the **Spanish** cases relate to disputes about financing contracts for payment of education course fees. Similar **Spanish** cases where data are available suggest that such claims typically relate to only small amounts (in total 5,000 – 20,000 Euro per case). As such, "missing" cases have been excluded from the "base results" of this study.

Nonetheless, sensitivity tests have been developed to allow for the possible effect of the missing data on the final results. These apply the average results for known cases to the unknown ones to develop an estimated total including an allowance for missing data. This approach is further explained in section 5.5.2. below.

In addition, ongoing cases have not been included, as obviously, no judgement can be made of the outcome. In some jurisdictions there are a large number of ongoing cases. For example, some 16 cases were recorded as ongoing in **Germany** (where approximately 30 cases have been initiated since the first **German** CR mechanism was intro-

duced in 2002). However, this does not necessarily indicate that large amounts of compensation awarded are potentially being excluded from the analysis due to the fact hearings are ongoing. Even in a successful case, in many instances, court awards are far smaller than initial claims.

***Issue: Differences in the non-CR countries***

*Problem*

The non-CR Member States differ amongst themselves in legal, cultural, political and economic terms, just as CR Member States do. Further, if they had adopted CR they are likely to have adopted differing types of mechanisms. This complicates efforts to determine whether consumers in such countries suffer a detriment from the absence of CR. However, this issue will remain uncertain unless (or until) such countries adopt and implement CR.

*Resolution*

The clearest resolution of this issue is to treat the non-CR countries as a single jurisdiction.<sup>81</sup> Alternatively, the approach noted above (in terms of reporting a range of results) allows for the flexibility of applying different regime results to individual non-CR countries.

**5.3.2 Detailed approach**

The previous section has provided a brief overview of the proposed approach. The approach is explained in further detail in this section.

The approach followed by this study is as follows:

- *Data collection* – Data was collected about the operation of CR systems in 13 Member States which have adopted CR. Publicly available data concerning all collective action proceedings filed under the existing mechanisms in those 13 Member States was collected with a specific case collection sheet (see Annex 3) prepared for the study.<sup>82</sup> The form provides, among other things, information about the amount for which the case was brought, the level of compensation paid by the courts, whether compensation was paid for lost time and intangible damage (pain/suffering) and which party bore legal costs for the action and if the case was settled out of court (the cases collected are presented in detail in Part III of this study).

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<sup>81</sup> This is consistent with the Terms of Reference of this study which refers to “consumers based in Member States where collective redress mechanisms are not available” without distinguishing between such consumers or such Member States.

<sup>82</sup> As indicated, data collection in the case of France was limited to the period including and after 1997; in the case of Austria to the period including and after 1994.

In practice, the level of information available was limited. Data on compensation for lost time and court transactions costs was scarce. In addition, as previously noted, no allowance has been made for intangible damage in this study (jurisdictions did not provide this data in any case). However, supplementary data gathering through the analysis of hypothetical example cases<sup>83</sup> allowed some “data gaps” (e.g. concerning time costs) to be filled. For the hypothetical example cases, the likely time, legal and other costs under both a CR regime and an IR regime were assessed for each country for which this was possible. These results were used to provide an indication of the likely time and transactions benefits of a CR regime for those litigants<sup>84</sup> who would still have pursued court action under IR. It was also used as a supplement to assess likely time costs for all litigants where no specific information on this issue was available (which was generally the case). The use of these data is further discussed below.

The country studies also gathered expert opinions on the point at which legal action became viable for a proportion of people (“the threshold amount”) and what proportion of litigants were likely to have pursued individual redress through ordinary court procedures if no CR mechanism had been available. In addition, as indicated, several countries were omitted from the final results for timing and consistency reasons, leaving a total of eight CR Member States relevant to the study.

- *Assessment of CR for practising Member States* – The data gathered were collated for each country (i.e. each CR regime). Net benefits of CR were calculated by examining damages awarded to consumers and subtracting time and transactions costs (if any) faced by consumers under CR.

The CR outcomes were benchmarked against a base case in which the same events occurred under IR. (In some cases consumers did nothing under IR, while in others a certain proportion “above the threshold” are assumed to have taken legal action). The difference between the CR and IR outcomes provides an indication of the reduction in both individual detriment and structural detriment (the sum of the individual cases).

Allowance was made for the fact that cases were filed in different years by developing, *for each country, an average annual measure of reduced detriment (i.e. benefit) for individuals and for consumer welfare (structural detriment)*. Therefore, the reduction in individual or structural detriment for a given country represents the average annual reduction.

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<sup>83</sup> In total, three “hypothetical example cases” were analysed by country experts on the basis of cost data that they were able to collect. A hypothetical example case is hereby understood as being an action proceeding which is “invented” on basis of existing cases, and defined through the type of individual damage suffered by a number of consumers, the sector, the category of law, the value of the case, the affected number of consumers, etc. (see country reports, Part II of this study). See also section 5.4.1.

<sup>84</sup> Litigants are defined as the number of persons directly or potentially benefiting from the CR case.

- *Data mapping* – The range of results from CR countries was reviewed, along with the average result. These were then adjusted to allow for the differing characteristics of the non-CR countries (in terms of population, GDP and GDP per capita). This allows for an estimate of the possible consumer detriment in non-CR countries due to the lack of a CR system.

Further details of the methodological approach are contained in Annex 1.

### **5.3.3 Use of threshold amounts and cost-benefit scenarios**

The previous section has provided a brief, simplified, overview of the cost-benefit methodology underlying this study. As indicated, above, in order to determine the impact of CR mechanisms, it is necessary to compare cases in which consumers can engage in collective redress (“the option case”) compared to those in which they have no such avenue – i.e. an IR system (“the base case”).

In conventional cost-benefit analysis, one (or more) option cases are typically compared to a single base case. In this instance, however, it is necessary to compare an option case against two different base cases, depending on the circumstances (i.e. above or below the threshold amount).

This is because consumer responses may differ above and below the threshold amount, with a portion of consumers likely to engage in legal action where the costs of the initial damage reach a certain point. So some consumers who engage in legal action under CR may have engaged in successful legal action under IR anyway. Therefore the incremental benefits of CR may be affected and it is necessary to define two base cases.

The base cases and scenarios used in this study can be defined as follows:

- *Below the threshold* – These are the cases (“small and scattered claims”, also referred to as large-scale low value claims) which would never have been the subject of legal proceedings if there was no collective redress system in the countries under examination. This is because the cost and effort involved in legal action by individual consumers would outweigh the compensation potentially awarded. The threshold amount may vary from country to country.
- The base case effectively relates to a situation in which a consumer suffers a loss and takes no action, while the option case (CR) relates to a situation in which the consumer engages in CR after the initial loss.
- *Above the threshold* – These are the CR cases in which some consumers may still have taken up legal action under an individual redress system. However, the majority of consumers above the threshold amount are unlikely to have done so.

An example of the “below the threshold” scenario has already been presented above in Table 8. Note that consumers *above the threshold* who would never have taken any action under IR are also represented by this type of approach.

An example of an “above the threshold” scenario for a consumer who would have undertaken legal action under IR is presented in Table 9, below. Note that the consumer may benefit from CR, in comparison to IR, through reduced time and intangible costs, even if the award itself (allowing for transactions costs) is no different. While this example concerns a successful case, CR systems in which intermediaries bear all costs of the case (regardless of outcome) would present another source of benefit to potential IR litigants.

**Table 9: Hypothetical impact of CR for an individual “above the threshold” consumer**

System	Initial costs		Litigation Costs			Court benefits	Net benefit
	Initial loss (in Euro)	Intangible costs (stress etc.) (in Euro)	Time costs (in Euro)	Intangible costs (stress etc.) (in Euro)	Transaction costs (in Euro)	Court award (in Euro)	
<i>Collective Redress</i>	3,000	400	100	100	0	3,000	-600
<i>Individual Redress (“base case”)*</i>	3,000	400	200	200	1,000	4,000	-800
<b><i>Difference (net benefit of CR)</i></b>	<b>0</b>	<b>0</b>	<b>100</b>	<b>100</b>	<b>1,000</b>	<b>-1,000</b>	<b>200</b>

Note: Assumes state/intermediary pays for CR transactions costs and that court award covers transactions costs of 1000 Euro (e.g. lawyer’s costs) under IR. (Therefore the IR court award is 4,000 Euro rather than 3,000 Euro.) Intangible costs are intended for illustrative reasons only and have not been incorporated into the analysis of this study.

In practical terms there is a need to define the threshold amounts and proportions of consumers above the threshold who would have engaged in IR. This was dealt with as follows:

- *Thresholds* – The threshold amount will vary from country to country, depending e.g. on the availability of small claims procedures. Also, the complexity of a case influences the threshold. For consistency reasons, a uniform threshold of 100 Euros was incorporated into the estimates of CR impact conducted by this study.<sup>85</sup>

<sup>85</sup> Focus group discussions in four Member States and interviews/expert assessments in 15 EU Member States confirmed that the threshold amount for individual legal action differs by country, and was generally estimated to be in the range of several hundred Euro (for simple cases) to more than 10,000 Euro (for complex legal issues). However, in some cases consumers declared that they were even willing to take legal action for only 100 Euro. While very few consumers may ultimately take legal action for 100 Euro, results from the focus groups discussions (see Annex 6) also suggest that this proportion will rise as the amount in question rises. The focus groups indicated that some consumers will adopt a “matter of principle” approach and engage the legal system even for small amounts. The use of a 100 Euro threshold seeks to capture these effects, notwithstanding that the vast majority of consumers in the CR countries would be unlikely to engage in IR even for greater amounts and therefore remain uncompensated for their losses.

- *Proportion of potential IR litigants* – A second consideration is what proportion of consumers would have engaged in legal action when cases are above the threshold. Obviously this will vary with individual cases. However, the expert assessments collected in the course of the country studies indicate that, on average, some 90% of consumers who engage in collective redress actions would have been unlikely to have engaged in IR. This figure has taken as the average across all cases in the current study.<sup>86</sup>

The treatment of thresholds and proportion of potential IR litigants is also further explored in Annex 1.

#### **5.3.4 Definition and use of consumer detriment in this study**

A key issue for this study is to establish a clear definition of consumer detriment. For the purposes of this study individual detriment and structural detriment have been defined as follows:

- *Individual detriment* – The financial and non-financial loss suffered by an individual consumer as a result of the actions of a trader or service provider (i.e. an ex post measure). Financial losses measured by this study include the initial damage and court transaction costs borne by consumers. Time spent by consumers in the court process is included as non-financial damage, though other intangible pre and post court detriment is not measured.<sup>87</sup>
- *Structural detriment* – The sum of the losses suffered by individual consumers, representative of the total loss in consumer welfare as a result of the actions of the trader or service provider. For the purposes of the study this is also an ex-post measure (in relation to the initial harm suffered and subsequent legal proceedings).<sup>88</sup>

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<sup>86</sup> This figure was developed through the use of stakeholder interviews conducted in CR countries and seems to be a realistic assumption for most collective redress mechanisms analysed. It should be noted that respondents involved in the focus group discussions emphasised the high costs, stress and uncertainty of the court process, with few expressing an interest in individual court action. As noted, some however did indicate the importance of taking action over “a matter of principle”. It also has to be noted that for some specific group actions, where individual actions are literally grouped into one procedure, the proportion may be much higher, namely close to 100%. These are those mechanisms that are mainly used to increase judicial efficiency by grouping individual actions that already have been filed (such as the German KapMuG and the UK GLO). However, for both mechanisms no case data was available, due to the lack of finalised cases or privacy issues.

<sup>87</sup> There are a variety of reasons for this. As indicated in Annex 1, since it is held that initial psychological detriment is already incurred prior to legal proceedings, the introduction of a system of consumer redress would be unlikely to alter this. As noted elsewhere, there are also considerable complexities associated with assessing any intangible detriment associated with court proceedings.

<sup>88</sup> These definitions differ, in some aspects, from those adopted by some previous studies, though they are consistent with those applied in others. In particular, they differ somewhat from the definitions used in Europe Economics (2007): *An analysis of the issue of consumer detriment and the most appropriate methodologies to estimate it. Final Report*. These differences are further discussed in Annex 2.

## 5.4 Data and results for Member States with collective redress mechanism

### 5.4.1 Data collection and application

Data was collected in the country studies concerning the 13 Member States which have adopted CR. Rather than being a sample of cases collected, this data consists of the entire publicly available population of cases for all countries (except for **France**, where one of the CR mechanisms has a long history, starting in 1973, and **Austria** where a mechanism in use since 1994).<sup>89</sup>

CR Member States, together with their year in which they introduced their CR regimes are provided below. Note that five of these countries were excluded from the final group studied. In the case of four of these (**Denmark, Finland, Greece, Italy**) exclusion was on the basis that they had introduced CR only recently (or will introduce it only next year, as is foreseen in Italy) and there were no relevant cases finally decided under the mechanisms. In the case of the fifth (the **UK**) inquiries indicated that most CR data was confidential. As no clear idea of the full population of cases could be obtained, the **UK** was excluded (to be consistent with the treatment of other regimes)

**Table 10: States with CR mechanisms**

Member State	Year CR mechanism introduced
Austria	In use since 1994; 2000
Bulgaria	1999; 2006
Denmark	2008
Finland	2007
France	1973; 1992/1994
Germany	2002; 2004; 2005
Greece	1994; 2007
Italy	2009
Netherlands	2005
Portugal	1995
Spain	2000
Sweden	2003
UK	2000; 2003

<sup>89</sup> As indicated data was collected for the period 1997-2007 for France and 1994-2007 for Austria.

Information documented for each case includes:

- ❑ Date of CR mechanism introduction
- ❑ Date of case filing
- ❑ Case background and business sector
- ❑ Number of consumers affected by alleged damage and represented in the case
- ❑ Total amount of damage claimed per consumer and in total
- ❑ How CR cases were financed
- ❑ Whether a court decision or out of court settlement was reached
- ❑ Nature of the decision
- ❑ Total amount of damage awarded
- ❑ A breakdown of compensation for physical injuries, immaterial damage (consumer pain and suffering), lost time/earnings, court costs and legal fees or other costs
- ❑ Costs of cases ultimately borne by consumers and defendants (i.e. after court decisions/settlements)
- ❑ Whether a “loser pays” principle applied

As indicated above, detailed information on compensation for lost time/earnings and/or immaterial damage was available in relatively few cases. There were also ambiguities and data gaps in many instances relating to the nature of court costs and who bore them.

These data limits required the use of a set of “decision rules” to allow for the analysis of data as indicated before in the introduction. Decision rules were based on supplementary information gathered during the country studies and information gathered for the analysis of hypothetical example cases (see below). Decision rules included:

- ❑ Application of a EU-wide value of leisure time of 7 Euro per hour based on Steer Davies Gleeve (2006).<sup>90</sup> This represents the leisure time forgone due to legal proceedings and was applied in conjunction with estimates of time taken under CR and IR regimes. While this may underestimate the value of leisure time in some jurisdictions, and overestimate it in others, differences are unlikely to be material and it presents a reasonable average value.
- ❑ The value of time was applied to CR case data for time spent by consumers on individual cases, where provided. (The CR time relates to time taken for consumers to be informed of the case at hand, through their own efforts or information provided by others).

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<sup>90</sup> Steer Davies Gleeve (2006): Air and Rail Competition and Complementarity, Final Report for European Commission DG TREN

- ❑ Where information on the time effort of individual consumers in a given CR case was not available, estimates were based on the analysis of the available hypothetical example case data, described above and further detailed below. The simple average of the results for three hypothetical cases concerning telecommunications, finance and tourism (see below) was used to determine appropriate values for time.<sup>91</sup> If a country study could *not* supply any hypothetical data on CR time spent either, the average of the number of hours reported by jurisdictions which *did* provide hypothetical information was used.<sup>92</sup>
- ❑ IR case time estimates were developed using a similar method to that described for CR time estimates and were based on the average results of the hypothetical study time estimates.
- ❑ CR and IR case preparation and court expenses, were also based on country responses to the hypothetical case studies. The simple average of the results for the three hypothetical cases for telecommunications, finance and tourism (see below) was used to determine appropriate values for court preparation and expenses.<sup>93</sup> As was the case for the time estimates, where countries did not provide such data, IR legal and court costs were estimated based on the average results for all countries which *did* provide such data.<sup>94</sup>
- ❑ As indicated, it was estimated that 90% of litigants to CR cases above the threshold would not have undertaken IR action in any case if CR had not been available.
- ❑ Court decisions which did not provide initial claims or final amounts were treated as missing data and ignored. This was mainly an issue with **Spanish** data. While this may seem to underestimate direct CR benefits, the data in question appears to relate to small claims and are unlikely to materially affect the final results. Nonetheless, as indicated, sensitivity tests have been applied to try and gauge the effects of such missing data.

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<sup>91</sup> Note that in the case of Portugal, no allowance was made for time (or other transactions costs). This is due to the fact that Portugal operates an opt-out mechanism, where consumers do not have to take action to be included in the relevant cases. Likewise, no allowance was made for time or transactions costs in Bulgaria or France due to the lack of CR cases directly involving consumers.

<sup>92</sup> Jurisdictions for which it was possible to provide estimates of hours for hypothetical cases were Bulgaria, Germany, Netherlands and Portugal.

<sup>93</sup> For example in the case of the Netherlands, total average IR case preparation and court costs per litigant (ex time) for the tourism hypothetical were 583 Euro, for financial services 1875 Euro and for tourism 612 Euro. This produces an average value of 1,023 Euro.

<sup>94</sup> Jurisdictions for which it was possible to provide estimates of IR and CR court costs were Bulgaria, Germany and Netherlands. Jurisdictions for which it was not possible to provide estimates of either actual case costs or hypothetical costs were Austria, France, Portugal, Spain and Sweden. Note no court or other transactions costs were assessed for Bulgaria or France due to the lack of CR cases directly involving consumers, while Portugal is also excluded due to the operation of an "opt out" mechanism and no cases have yet been brought in Lithuania.

- ❑ Ongoing court decisions have not been included in the results. Arguably this could create downward bias in the results, as many regimes are relatively new. However, the evidence for countries such as **France** (with one long-established CR mechanism) does not support the argument for “downward bias”.
- ❑ In one **Dutch** case (*Shell WCAM*) involving a considerable payout to consumers (267 million Euro) some beneficiaries were spread across the globe (although mainly within Europe). It has not been possible to distinguish these beneficiaries and they have been included in the figures presented for the **Netherlands**. However, even excluding this case, the **Dutch** CR results are still far larger than the others, mainly due to a recent case involving *Dexia*.
- ❑ Reviewing and comparing the results from any single year might distort the impact of CR due to positive or negative “outliers” (i.e. extreme values). The benefits of CR were therefore averaged over the period since the first implementation of a form of CR (in cases where more than one legal mechanism was introduced, the earlier date was chosen). For example, the benefits of CR in **Spain** have been averaged over the eight year period 2000-2007, inclusive, to derive an annual average.

In general, the study results may arguably have a conservative bias due to issues such as missing data and the relatively short period of time over which CR has been implemented in various Member States. *A priori* this may be taken to imply that the figures underestimate the true benefits to consumers of fully functioning CR systems in the long term. However, as indicated, the missing data are unlikely to make a truly material difference to the final results and sensitivity tests have been applied as a way of dealing with this issue. Further, even in regimes where CR has been implemented over long periods (such as **France**) preliminary results suggest that benefits remain modest on an annual basis.

In addition, a final point is that in some regimes (such as **France** and, to date, **Bulgaria**) benefits do not flow directly through to consumers but to consumer organisations. Therefore, while they have been included here, whether these should be termed “consumer benefits” is debatable. So on a narrow interpretation, the inclusion of the benefits for these countries could be seen as biasing the results upwards.<sup>95</sup>

As previously indicated, to provide a supplement to the collection of cases, country studies analysed three hypothetical example cases which could have been dealt with

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<sup>95</sup> However, it could equally be argued that systems which had more direct consumer representation would lead to larger benefits. The view taken in this exercise is to incorporate the Bulgarian and French results into the analysis of individual detriment. It should also be noted that since French and Bulgarian consumers do not directly take part in litigation in these countries, the number of litigants in these countries is effectively zero (0). The total structural detriment results (for all countries) are divided by total litigants (for all countries) to develop the average individual detriment result for the CR countries. Arguably, this individual detriment figure may be seen as an “overestimate” – i.e. if the French and Bulgarian systems *did* have individual litigants, the denominator would be larger and individual detriment smaller. However, again, it could be argued that systems which had more direct consumer representation would lead to larger benefits. The numerator would also be larger if this were so. Accordingly, the Bulgarian and French results have been included in the analysis of individual detriment.

under either CR or IR. These cases were constructed so as to represent typical consumer collective redress issues and consisted of:

- ❑ A telecommunications case involving overcharging due to a billing fault
- ❑ A financial services case involving false information in a company prospectus
- ❑ A tourism case involving a poor quality accommodation

In these studies both the CR and, separately, the IR costs and funding available in respect of these cases were assessed. Information collected included:

- ❑ Court fees
- ❑ Lawyers fees
- ❑ Other costs (e.g. technical expertise)
- ❑ Public financial support to consumers and consumer associations
- ❑ Time involved

This allowed for an estimate of the likely differences in CR and IR costs for those consumers who would otherwise have engaged in IR. It also allowed for an estimate of the likely time and other costs for all consumers where actual case information was not available. (The detailed process through which these figures were applied is described in the above discussion of “decision rules”. The average of the telecommunications, financial services and tourism cases was estimated to derive country-wide data. Where data for hypothetical cases was not available, the average of results for countries which did supply data was used.)

A cost-benefit approach was employed to estimate the reduced consumer detriment (i.e. benefit) associated with CR to consumers. Although information about intangible costs were collected to the extent possible, data limits and methodological concerns meant that these were not included in the estimations. Items allowed for included:

- ❑ *Time costs* – Time taken by consumers involved in cases to inform themselves and/or engage in litigation
- ❑ *Transactions costs* – Court and legal fees faced by consumers
- ❑ *Other costs* – Any other costs specified (excl. intangible costs)
- ❑ *Financial support to consumers* – Whether litigants bore the ultimate financial cost of court action or if governments and/or intermediaries bore transactions and other costs
- ❑ *Court awards (or settlements)* – Final compensation payments (if any) to consumers

Hypothetical illustrations of the approach taken are provided in Table 8 and Table 9 above. Values were expressed in 2007 Euro values. Where data related to awards in past years, values were inflated, wherever possible, to reflect 2007 prices. Each country was treated as a separate regime. As indicated, benefits were averaged over the period since the introduction of CR in each country to give an indication of the average annual benefit of CR.

## 5.4.2 Results

Results for the studied CR regimes (i.e. Member States) are presented below. This provides the range of outcomes (i.e. reduced consumer detriment), which have accrued to countries currently using CR as a legal mechanism. Annual average results for both individuals (reduced individual detriment) and consumers as a whole (reduced structural detriment) are presented in the table below.

**Table 11: Summary of CR outcomes by Member State**

Member State	Average Annual Total Benefit (Avoided Structural Detriment) (€) (1)	Average Annual number of Litigants (2)	Average Annual Benefit per Litigant (Avoided Individual Detriment) (€) (1)/(2) = (3)	Average Annual number of Litigants per million national population (4)	Average Annual Structural Detriment Avoided per million national population (€) (5)
<i>Austria</i>	2,314,759	9,318	248	1,123	278,923
<i>Bulgaria</i> <sup>1)</sup>	1,144	n.a.	n.a.	n.a.	150
<i>France</i> <sup>1)</sup>	86,265	n.a.	n.a.	n.a.	1,361
<i>Germany</i>	2,702	30	89	0.37	33
<i>Netherlands</i>	512,793,008	325,933	1,573	19,851	31,231,683
<i>Portugal</i> <sup>2)</sup>	(7,522,356)	(238,324)	(32)	(22,472)	(709,296)
<i>Spain</i>	302,117	910	332	21	6,875
<i>Sweden</i>	3,762	100	38	11	414
<i>Unweighted total/average benefit (incl. NL)</i>	<i>523,026,113</i>	<i>574,615</i>	<i>910</i>	<i>2,374</i>	<i>2,160,505</i>
<i>Unweighted total/average benefit (excl. NL)</i>	<i>10,233,105</i>	<i>248,682</i>	<i>41</i>	<i>1,102</i>	<i>45,346</i>

Notes: Denmark, Finland, Greece, Italy, excluded due to the fact that no relevant cases have been finally decided under the mechanisms. UK excluded due to lack of consistent data.

<sup>1)</sup> Compensation of damages to the collective interest in the French CR system does not benefit individual consumers directly. Likewise, cases to date under the Bulgarian CR system do not benefit the consumer directly. Therefore no litigants are recorded for these countries.

<sup>2)</sup> The result in Portugal is largely influenced by one large telecommunications case in Portugal to the estimated value of 77 million Euro which had some 3 million potential beneficiaries. The benefits for consumers were, however, largely non-monetary in nature and their valuation is based on an estimate provided by the consumer organisation that brought forward the claim (DECO). The defendant in this case declined to provide any estimate concerning the monetary value of the benefits for consumers accruing from the settlement agreement. Non-monetary benefits of this type were not found in other documented collective redress cases.

The total annual consumer benefit for the eight countries with available data is some 523.0 million Euro. This equates to an average of 2.16 Euro per head of population.

Average annual individual benefit is some 910 Euro per consumer represented in litigation (see previous table).<sup>96</sup>

However these figures are heavily influenced by the results for the **Netherlands**, where a few major cases distort results. It should also be noted that the major cases settled in the **Netherlands** for these significant amounts involved major companies (*Shell*, *Dexia*). It is not clear that actions against such major multinational corporations will have frequent parallels in most non-CR countries for a variety of reasons. In particular, such actions are clearly atypical even in current CR countries, most non-CR countries are home to far fewer multinational corporations and actions against foreign multinationals may involve a variety of legal and cross-jurisdictional considerations.

Excluding the **Netherlands**, consumer benefit is some 10.2 million Euro per annum, while annual individual benefit is some 41 Euro per represented litigant (see previous table). These cases are also influenced by a potential outlier (a large telecommunication case in Portugal to the estimated value of 77 million Euro which had some 3 million potential beneficiaries). However, arguably, this is representative of the fact that such large cases, involving many consumers, will occur within CR regimes.<sup>97</sup>

With this in mind, it is also instructive to review the range of outcomes over this period, excluding the **Netherlands**. This ranges from 1,144 Euro to 7.5 million Euro in total annual benefits (i.e. avoided structural detriment) and from 32 Euro to 332 Euro in annual individual benefits (i.e. avoided individual detriment).<sup>98</sup> As noted, the individual detriment figures are highly sensitive to the number of consumers represented in major cases. While there are clear variations in average annual benefits per consumer, these may reflect factors such as the large numbers of consumers represented in opt-out CR mechanisms, the nature of the cases heard and other specific characteristics of individual CR regimes.

While there are many caveats associated with these results (particularly that the definition of CR varies), with the exception of the **Netherlands**, the results indicate that the benefits of CR to consumers are relatively modest in the Member States where it is employed. To use one comparison, average GDP per capita in the seven CR states

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<sup>96</sup> Note that the individual detriment figure used here and in the later discussion of results for the non-CR countries includes the results for France and Bulgaria, even though consumers do not directly take part in litigation in these countries –i.e. the number of litigants in these countries is effectively zero (0). The total structural detriment results are divided by total litigants from all other countries to develop the average individual detriment result for the CR countries. Arguably, this individual detriment figure may be seen as an “overestimate” – i.e. if the French and Bulgarian systems *did* have individual litigants, the denominator would be larger and individual detriment smaller. However, it could equally be argued that systems which had more direct consumer representation would lead to larger benefits. The view taken in this exercise is to incorporate the Bulgarian and French results into the analysis of individual detriment.

<sup>97</sup> By the same token, an argument could be made for the exclusion of this case. However, while large, the Portuguese telecommunications case is still an order of magnitude smaller than the Dutch cases cited. That is, it involves estimated compensation of some 77 million Euro to consumers, compared with 268 million Euro and 993 million Euro for the *Shell* and *Dexia* cases respectively.

<sup>98</sup> Note that the term “avoided” here relates to what would have happened if CR had not been in place. So consumers in the CR countries have avoided incurring these losses (i.e. enjoyed benefits) due to the presence of CR.

(excluding the **Netherlands**) was 23,716 Euro per annum in 2007. So the average benefit of 41 Euro per represented litigant was equal to only 0.2% of average GDP per capita.

## 5.5 **Assessment for Member States that do not have a collective redress mechanism**

### 5.5.1 **Approach**

Table 12 below indicates the 14 non-CR Member States:

**Table 12: Non-CR Member States**

<b>Member State</b>
Belgium
Cyprus
Czech Republic
Estonia
Hungary
Ireland
Latvia
Lithuania
Luxembourg
Malta
Poland
Romania
Slovakia
Slovenia

As indicated, the non-CR countries will differ from the CR countries (and amongst themselves) in terms of legal structures, political, cultural and economic forms. This study treats the non-CR member states as a single entity, for the reasons provided above. This assists in dealing with differences between the non-CR countries.

It is still necessary to deal with differences between the non-CR and CR countries, however. The main differences are likely to reflect varying levels of income and population sizes. In particular, the average income level per head of population of the non-CR countries is lower than that of the CR countries.<sup>99</sup> Everything else being equal, this will

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<sup>99</sup> While Belgium, Ireland and Cyprus are all non-CR countries, this statement refers to the *entire group* of non-CR

reduce the amount of disposable income which consumers have to spend on goods and services, including those over which they would feel justified in taking consumer action. It is therefore necessary to likewise reduce estimates of consumer detriment to allow for the lower levels of income found (on average) in the non-CR countries.

It is also necessary to adjust for the differing population sizes of the non-CR countries with respect to the CR countries, particularly when considering the estimation of structural detriment.

It is therefore necessary to adjust the results obtained in the previous section to reflect:

- ❑ The different population size of the non-CR countries
- ❑ The different national income levels of the non-CR countries (as measured by GDP per capita)

GDP and population data on Member States were utilised to make these adjustments. The **Netherlands** CR results were an outlier and very likely to distort results for the non-CR countries if incorporated into the analysis. Therefore, the table below presents:

- ❑ Summary data from the seven Member States used for the “base analysis” (i.e. *excluding* the **Netherlands**). These were used to develop the basic results for this study, presented in Table 15.
- ❑ Results for the eight Member States *including* those for the **Netherlands**, which were used for the sensitivity test presented in Table 17.

Data for the non-CR Member States are presented in Table 14.

**Table 13: Summary data concerning selected CR Member States<sup>100</sup>**

Scope	Total Population (mil.)	GDP per capita (€ '000)	Annual direct CR benefits (mil. €)	Annual litigants ('000)	Litigants per million pop.	Annual direct CR benefits per million pop. (€)
Seven Member States <i>excluding</i> the Netherlands (base analysis)	225.7	23.7	10.2	248.7	1,102	45,346
Eight EU states, <i>including</i> the Netherlands	242.1	24.1	523.0	574.6	2,374	2,160,505

The following table indicates population and GDP per capita in non-CR Member States:

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countries, including large countries with relatively low levels of GDP per capita such as Romania and Poland.

<sup>100</sup> Austria, Bulgaria, France, Germany, Portugal, Spain and Sweden included in the base analysis. Results are also presented for this group and the Netherlands.

**Table 14: Population and GDP per capita in non-CR Member States<sup>101</sup>**

Total Population (mil.)	GDP per capita (€ '000)
110.4	10.2

Results for structural detriment were then calculated based on:

- ❑ Multiplying the annual direct CR benefits per million population by the population of the non-CR countries (i.e. 45,346 Euro \* 110.4 ~ 5.0 million Euro)
- ❑ Adjusting this figure by the (lower) per capita incomes of the non-CR countries (i.e.  $10.2 / 23.7 = 0.43$ ;  $0.43 * 5.0$  million Euro ~ 2.1 million Euro)

Results for individual detriment were then calculated based on:

- ❑ Multiplying the average number of litigants per million population in the CR countries by the population of the non-CR countries to derive an estimated number of potential annual litigants (i.e.  $1,102 * 110.4 \sim 121,693$ )
- ❑ Dividing the estimated annual structural detriment (2.1 million Euro) by this figure to determine the average individual detriment (18 Euro)

The full results of these adjustments are presented in the following section.

### 5.5.2 **Results for non-CR countries**

Results for the CR countries were adjusted in order to give an estimate of structural and individual detriment in the non-CR countries due to lack of access to CR. As indicated, some results (such as the calculation of individual detriment) may be highly sensitive to cases involving large groups of consumers. While this is a difficulty in estimating both structural and individual detriment, it is a particular issue for individual detriment, as there may be some cases involving small amounts of money but affecting large numbers of people (or vice versa). More broadly, the non-CR countries would likely have implemented a range of different regimes and thus there are a range of different outcomes which might be possible. For these reasons it is useful to give a range of possible scenarios.

The lower limit of this range is set by **Germany**. If the **German** experience is repeated in the non-CR countries, introduction of CR mechanisms will do little to reduce any structural or individual detriment suffered by consumers. Conversely, the upper limit is set by **Portugal**.

While there are several ways in which upper and lower limits may be calculated based on the seven sampled Member States, the following approach was adopted to calculate minimum and maximum structural detriment:

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<sup>101</sup> Belgium, Cyprus, Czech Republic, Estonia, Hungary, Ireland, Latvia, Lithuania, Luxembourg, Malta, Poland, Romania, Slovakia and Slovenia

- ❑ Choose the Member State with the lowest consumer benefit (i.e. structural detriment avoided) per million population (i.e. **Germany**, with a benefit of some 33 Euro per million population, per annum)
- ❑ Follow the procedure outlined above to adjust for population and per capita differences. In this case the per capita adjustment was based on the differential between **Germany** and the non-CR states (i.e. 0.37)

Likewise, the upper limit was calculated as follows:

- ❑ Choose the Member State with the highest consumer benefit (i.e. structural detriment avoided) per million population (in this case **Portugal**, with a benefit of some 709,296 Euro per million population, per annum)
- ❑ Follow the procedure outlined above to adjust for population and per capita differences. In this case the per capita adjustment was based on the smaller differential between **Portugal** and the non-CR states (i.e. 0.83)

This effectively reflects a scenario in which the non-CR states as a whole experience benefits similar to those delivered by the **Portuguese** CR system.

Minimum and maximum individual detriment figures can also be estimated in several ways. However, in this case, the estimates of minimum and maximum structural detriment derived above were divided by the number of estimated number of litigants in the non-CR countries to produce an upper bound estimate (i.e. 1,352 Euro / 121,693 ~ 0.01 Euro and 64.1 million Euro / 121,693 ~ 527 Euro).<sup>102</sup>

Table 15 below indicates the final results.

**Table 15: Structural and individual detriment in non-CR Member States (excluding Netherlands data)**

Member State	Annual Structural Detriment (€)	Annual Individual Detriment (€)
<b>Average (from EU 7)</b>	<b>2,144,415</b>	<b>18</b>
<i>Maximum</i>	64,144,175	527
<i>Minimum</i>	1,352	0.01

Note: Data from the Netherlands excluded for the extrapolation to non-CR Member States because it can be considered as an outlier (the few major cases settled in the Netherlands for significant amounts involving major companies are unlikely to have frequent parallels in most non-CR Member States). However, Netherlands data and accompanying tests for maximums and minimums are included in the sensitivity tests for Table 17 below.

<sup>102</sup> Arguably, the number of national litigants per million population (e.g. 22,472 in the case of Portugal) could be used to derive numbers of litigants. However, this approach would not work for Bulgaria, while use of Portuguese litigants per million head of population produces a “maximum” individual detriment result of 1.15 Euro per consumer. In general, the use of an average value for the number of non-CR litigants provides a more stable method to estimating minima and maxima.

Sensitivity tests can also be applied in order to allow for issues such as missing data. As indicated, these apply the average jurisdictional results for known cases to the unknown ones to develop an adjusted total.

For example, in the case of **Spain**, there are 49 cases, with 17 known results and 32 unknown ones. The 17 known results produce an annual total of 302,117 Euro of avoided structural detriment and 332 Euro in avoided individual detriment. Assuming that the average “unknown” case would yield similar results, these results represent roughly 35% (17 / 49) of the grossed up total. Therefore, total avoided structural detriment for **Spain** using this sensitivity test equates to approximately 0.87 Euro million per annum (302,117 Euro / 0.35). Assuming that a similar number of consumers participated in the cases with unknown data, the number of consumers represented is 2,623. Avoided individual detriment is therefore constant at some 332 Euro per annum (0.87 million Euro / 2,623).

A similar approach was adopted to account for missing data in the case of **Germany** and **Sweden**.

While these estimates raise the quantum of the detriment estimates (mainly due to **Spain**) the order of magnitude essentially remains the same. Table 16 indicates the results once the sensitivity tests described above are applied to the estimates for the *non-CR countries*.

**Table 16: Structural and individual detriment in non-CR Member States including sensitivity tests for missing data (excluding Netherlands data)<sup>103</sup>**

Member State	Structural Detriment (€)	Individual Detriment (€)
<b>Average (from EU 7): sensitivity tests</b>	<b>2,264,085</b>	<b>18</b>

Note: Data from the Netherlands excluded for the extrapolation to non-CR countries because it can be considered as an outlier (the few major cases settled in the Netherlands for significant amounts involving major companies are unlikely to have frequent parallels in most non-CR Member States). Results adjusted for missing data.

It is also possible to give a figure which *includes* the **Netherlands** data, *though once again, this must be highly caveated*. The maximum and minimum tests applied to Table 15 above have also been included. **Germany** again forms the minimum case, however, the **Netherlands** (with average annual net benefits of 31.2 million Euro, per million population, per annum) is the Member State with the highest structural benefit. (However, note that this result does not include the application of the sensitivity tests, above allowing for missing data.)

<sup>103</sup> The increase in individual detriment reflects the changing proportions of estimated total litigants and total detriment in the non-CR countries. In this case the proportionate change in total detriment exceeds the proportionate change in total claimants, producing a slightly higher individual redress figure.

**Table 17: Structural and individual detriment in non-CR Member States (including Netherlands data)**

Member State	Structural Detriment (€)	Individual Detriment (€)
<i>Average (from EU 8)</i>	100,701,916	384
<i>Maximum</i>	1,215,650,443	4,638
<i>Minimum</i>	1,352	0.01

Note: Data from the Netherlands not excluded for the extrapolation to non-CR Member States.

Arguably, a better picture of detriment in non-CR countries would emerge if a more homogenous set of CR regimes were considered. Which CR regimes are homogenous is a matter of debate. However, for the purposes of this sensitivity test, **Austria, Germany, Spain** and **Sweden** were treated as forming a set of more homogenous CR regimes. A sensitivity test was applied in the same manner as those above, to derive results for the non-CR countries, based on only this set of CR regimes. The results are presented below. This test indicates that avoided structural detriment is smaller if only these more homogenous regimes are considered (though avoided individual detriment rises). A main reason for this is the exclusion of **Portugal**, which reported high levels of avoided detriment (in turn, largely due to its significant telecommunication case).

**Table 18: Structural and individual detriment in non-CR Member States based on more homogenous regimes**

Member State	Structural Detriment (€)	Individual Detriment (€)
<i>Average (from EU 4)</i>	822,904	104

Note: This calculation is based on the assumption that a better picture of detriment in non-CR Member States would emerge if a more homogenous set of CR regimes were considered. For the purposes of this sensitivity test, Austria, Germany, Spain and Sweden were treated as forming a set of more homogenous CR regimes, which are used as a basis for the extrapolation to non-CR Member States.

### 5.5.3 Conclusion

In summary, based on the results of Member States with CR, consumers in Member States which do not have such regimes in place are likely to suffer a detriment as a result of the unavailability of such mechanisms. However, at this stage, this detriment seems to be modest. To use one comparison, average GDP per capita in the seven CR states (excluding the **Netherlands**) was 23,716 Euro per annum in 2007. So the average benefit of 41 Euro per represented litigant was equal to only 0.2% of average GDP per capita.

For consumers as a whole across the 14 non-CR countries, the loss of consumer welfare may be equal to around 2.1 million Euro per annum, though a range of outcomes from 1,352 Euro to 64 million Euro per annum is also possible.

For those consumers who might have otherwise been party to legal action under CR to recover damages, the individual detriment may be around 18 Euro but could range from 0.01 Euro per annum to 527 Euro per annum (depending largely on the number of litigants in the case and the effectiveness/utility of the mechanisms).

It is also instructive to put these results in context by comparing them with results of a 2008 study on consumer detriment within the **UK** by the Office of Fair Trading (OFT). This work indicated that **UK** consumer detriment was in the order of £6.6 billion over the last 12 months (8.3 billion Euro at current exchange rates). So, even including the results for the **Netherlands**, estimated annual avoided consumer detriment in eight EU countries due to CR systems equates to some 6% of the **UK's** national total consumer detriment.<sup>104</sup>

These results, however, are based on the operation of current CR regimes. They do not include possible benefits that may accrue in the future to **Danish, Finish, Greek and Italian** consumers, because there is so far little or no practical experience in these countries with their recent collective redress mechanism. The introduction of more effective collective redress mechanisms could yield additional benefits to consumers in both CR and non-CR countries.

In addition, these figures arguably represent “lower end” estimates, as they relate only to those consumers who would have been party to CR proceedings, had such a system been in place. Arguably, too, the study has a conservative bias due to missing data and short implementation times (but see the discussion in section 5.4.1 above).

It is also possible that all consumers in non-CR countries suffer an additional form of structural detriment through broader economic loss due to higher prices, reduced product quality and/or reduced product consumption applied to all consumers in non-CR countries. However, as indicated, the relatively small implied sanctions resulting from CR cases mounted to date could cast doubt on this argument, as it is not clear that the use of CR would provide a sufficient material incentive to alter economy-wide firm behaviour. On the other hand other incentives, such as deterrence effects through increased media attention for collective redress cases etc, seem to have had a certain relevance in some cases and may have led to behavioural change of businesses even where the CR mechanisms only have resulted in modest material returns to consumers so far (see also section 0). The existence of a collective redress mechanism in a specific country might also induce a higher willingness of business to engage in ADR to

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<sup>104</sup> Office of Fair Trading (2008) *Consumer Detriment – Assessing the frequency and impact of consumer problems with goods and services*. Around a third of respondents (34 per cent) reported one problem or more in the last 12 months with goods or services they had purchased, with 542 problems identified in the survey for every 1000 persons interviewed. When projected across the overall UK population, this leads to an estimated 26.5 million problems within the last 12 months. Fifty-five per cent of problems resulted in a financial detriment below five pounds. Only four per cent of problems led to detriment levels higher than £1,000.

avoid the application of this legal instrument. These effects are impossible to quantify, where they exist, and were out of the scope of this assessment.

These conclusions can be summarised as follows:

23. ***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.*** However, at this stage this detriment is modest. For consumers as a whole across the 14 countries that do not have collective redress mechanisms, the loss of consumer welfare may be equal to around 2.1 million Euro per annum, though a range of outcomes from 1,352 Euro to 64 million Euro per annum is also possible. These results, however, are based on an extrapolation of available data from Member States that have experience with collective redress mechanisms, which are often limited in scope and effectiveness, as the evaluation has indicated. The introduction of more effective collective redress mechanisms could yield benefits to consumers in countries where collective redress mechanisms have not been introduced yet, as well as to consumers in countries where collective redress mechanisms are already available.

## 6 Effects of collective redress approaches on trade and competition

### 6.1 Summary of tasks according to TOR

*Analysis of whether the differing approaches on collective redress between the Member States result in actual or likely obstacles to trade between Member States or in appreciable distortions of competition.*

*The contractor will examine whether the differing approaches on collective redress between the Member States:*

- *Result in actual obstacles to trade between Member States; or*
- *Makes the emergence of future obstacles to trade between Member States likely; or*
- *Results in appreciable distortions of competition.*

*Where the differing approach does result in actual or likely obstacles to trade between Member States or in an appreciable distortion of competition, the contractor will analyse and demonstrate clearly the nature and extent of these obstacles or distortions and why this is the case.*

### 6.2 Introduction

The purpose of this chapter is to assess the current and the potential effects of the differing collective redress approaches between Member States on trade and competition within the internal market. The analysis takes into account the results of the assessment of consumer detriment (section 5 of this report), the evaluation of effectiveness and efficiency of existing collective redress mechanisms in the EU (section 4), and other data, including stakeholder comments received through a survey and interviews.

### 6.3 Actual effects of differing collective redress approaches on trade and competition between Member States

#### 6.3.1 Methodological considerations

A significant fraction of trade activities among the various European national economies relates to consumer-related products and services. Any aspect in the legal framework of a Member State – including collective redress approaches – affecting the way in which consumers seek redress for a physical and financial loss caused by a product or service can therefore in principle have implications for trade among EU Member States, to the extent that this affects the willingness of traders to sell products/services in another Member State and affects the willingness of consumers to purchase them. This is valid both for direct transactions between consumers and sellers/service providers located in different Member States, and for cases where the producer or service provider distributes its products or services through representatives or retailers in the

Member State of the consumer, but retains a certain level of liability, the degree of which can depend on the product/service, the category of law infringement and the type of loss. It is therefore possible that differing collective redress approaches have an effect on trade between Member States.

In order to directly measure possible effects of differing (existing) collective redress mechanisms on trade flows between different Member States, two approaches could be used in theory:

- ❑ The first approach would be to analyse the trade flows concerning a specific Member State that has introduced a collective redress mechanism (CR) in a given year and to analyse any differences that may have resulted in the years before and after the introduction of the mechanism;
- ❑ The second approach is to consider the trade flows between countries with different approaches to collective redress, i.e. to analyse the extent to which trade flows are different between Member States that do not have a collective redress mechanism (non-CR countries) and those that have (CR countries), or between countries having different types of collective redress mechanisms.

Both approaches seem, however, not to be feasible to implement. Trade flows between Member States concerning consumer products/services depend on a variety of factors, including exchange rates (for countries outside the Euro zone), transport prices, prices of commodities, consumer demand etc. In addition, trends in trade flows are likely to differ significantly between different types of consumer goods/services, which would make interpretation difficult. Finally, even if reductions in trade flows were identified, it would practically be impossible to determine to which extent they relate to obstacles created by collective redress approaches or other factors (e.g. other changes in consumer protection law, or in the more general regulatory framework of production and distribution of goods and services, other policy changes affecting the business environment, business decisions of relevant providers/producers or retailers, etc.). Similar to what has been already said regarding possible approaches to assess consumer detriment, methodological and econometric uncertainties of this type of analysis are potentially so great that the results would be of dubious value.

Given the difficulty to provide a reliable quantitative analysis concerning effects of differing collective redress mechanisms on trade between countries, it is possible to identify at a qualitative level the main factors that could influence business decisions to sell products/services in other Member States. This will allow to identify potential obstacles to trade that could arise from differing approaches on collective redress.

### **6.3.2 *Factors influencing firms' decisions to engage in cross-border trade***

From a business perspective, the decision to sell products/services in other Member States could depend on the following factors that are potentially influenced by different approaches in collective redress. These are:

- ❑ *Exposure to liability*: It is possible that collective redress mechanisms create a higher exposure to liability for a company, because other means of redress

(such as individual court action) may be in practice unavailable to consumers due to the costs of litigation or other obstacles.<sup>105</sup>

- ❑ *Litigation costs*: Collective redress mechanisms could provide efficiency gains for businesses concerning mass claims, related to scale economy effects and other factors. On the other hand, unmeritorious claims could be introduced under collective redress mechanisms. Both aspects may have an influence on litigation costs concerning infringements of consumer protection legislation.<sup>106</sup>
- ❑ *Legal uncertainty*: Collective redress mechanisms could increase the complexity of the legal framework and lead to legal uncertainty, especially in the period directly after the introduction of the mechanism until questions of e.g. legal standing are clarified by the courts.

In conclusion, to the extent that firms' decisions to engage in cross-border trade depend on collective redress mechanisms in another Member State, considerations are likely to include the expected exposure to liability that they could be exposed to in other Member States, the possible litigation costs in case infringements of consumer law occur and the potential legal uncertainty. These factors are discussed in more detail in the following sub-section.

### **6.3.3 Assessment of factors**

#### a) Current exposure to liability costs through collective redress mechanisms

The assessment of consumer detriment indicates that the existence of collective redress mechanisms increases consumer welfare because it allows consumers to be compensated for losses suffered that would otherwise not have been compensated, implying an increased level of liability costs for firms. Also, differences between countries are significant, indicating that differing approaches to collective redress can influence the additional liability cost incurred by firms. However, the total number of collective redress proceedings so far (326 documented cases in roughly a decade) and the relatively small amounts of compensation awarded in most cases<sup>107</sup> indicates that the existing collective redress mechanisms so far have only had a limited economic impact and have not substantially increased the overall level of liability costs incurred by businesses.

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<sup>105</sup> The obstacles to satisfactory redress for consumers have been assessed in CPEC (2008): Problem study, section 5

<sup>106</sup> For a discussion of potential efficiency gains of collective redress, see CPEC (2008): Problem study, section 6

<sup>107</sup> Only in a very limited number of cases, defendant companies had to pay high amounts of compensation for damages to the consumers affected by the alleged damages. Among the 55 cases with economic data on the total damage awarded to consumers, only 6 resulted in a compensation of more than 5 million Euro. Most collective actions actually result in relatively small amounts of compensation awarded to the claimants.

#### b) Current litigation costs of collective redress

In none of the Member States that form part of this report, litigation costs related to collective redress that are unreasonable as compared to the general level of litigation costs in the respective Member State could be identified. The evaluation of existing collective redress mechanisms (see section 4) concludes that the existing collective redress mechanisms may decrease rather than increase litigation costs for businesses, in that a multitude of separate litigations, potentially in different courts, is replaced by one collective procedure. This is the explicit goal of a number of collective redress mechanisms and – in the case of the **Dutch** model – the incentive for businesses to engage voluntarily in the settlement procedure. Given the limited number of cases brought to court so far under the existing collective redress mechanisms, it is unlikely that the potential cost effects (including efficiency gains) of collective redress mechanisms in mass litigation are currently considered a relevant factor for firms when deciding whether or not to enter another national market.

#### c) Current legal uncertainty created from collective redress

The country studies indicate that the collective redress mechanisms can create some degree of initial legal uncertainty for all the parties involved. This is particularly true where the legal prerequisites of legal standing or of the preconditions for a collective action are subject to controversies. The evaluation results emphasise the aspect that this initial uncertainty is a major disincentive for the filing of an action – the uncertainty may increase the litigation risk, causing the claimant/representative to have to bear his own and the other party's litigation costs if it materialises (i.e. if the case is lost). For example, it was reported from **Portugal** that it has taken years to firmly establish legal standing of consumer associations in the popular action procedure. Initial legal uncertainty for businesses has not been reported to be an issue of concern, but it seems reasonable that also firms are likely to be affected. However, given the limited number of cases brought to court so far under the existing collective redress mechanisms, it again seems unlikely that legal uncertainty is a determining factor for firms when deciding whether or not to enter another national market.

### 6.3.4 *Effects on trade*

Therefore, it can be concluded that different approaches to collective redress across Member States do not appear to have had a significant influence on firms' cross-border commercial strategies and on the resulting trade flows so far. Such an effect would also have been very unlikely considering the recent introduction of some collective redress mechanisms and the relatively small number of cases brought to court under those mechanisms that already exist for some time, which are often limited in scope and effectiveness (see section 4). In line with this assessment no reports that differing approaches on collective redress between the Member States result in actual obstacles

to trade between Member States have been received in the consultation with business stakeholders.<sup>108</sup>

On the consumers' side litigation costs and legal uncertainty concerning redress can also affect the willingness to engage in direct cross-border transactions and therefore can be expected to have an impact on trade.

Two levels have to be differentiated in this context: 1) *Uncertainty regarding redress in general*: There are a number of obstacles that can prevent consumers from obtaining redress in cross-border cases, including language barriers, the lack of knowledge/information concerning legislation, etc.<sup>109</sup> In the resulting context of uncertainty regarding redress, consumers might be deterred from engaging in cross-border transactions at all. Evidence shows that this situation is quite common in several sectors of the economy. Thus, obstacles for consumers to obtain redress in other Member States are likely to contribute to a reduction of direct cross-border consumer transactions.<sup>110</sup>

2) *Uncertainty regarding collective redress approaches*: Only one of several potential obstacles to cross-border redress is the lack of knowledge/information concerning available collective redress mechanisms in other countries. However, from the focus group discussions conducted, it appears that the knowledge of consumers concerning collective redress mechanisms in their own country is already extremely limited and consumers generally lack any evidence of the assumed power and benefits of collective actions. It cannot therefore be considered likely that consumer trust concerning direct cross-border transactions is currently related to the approach chosen concerning collective redress in different EU Member States. It rather relates to the before mentioned obstacles to obtaining redress in general and other factors. Demand side effects on trade of the particular aspect of different approaches to collective redress are therefore also considered to be of modest relevance at this stage.

### **6.3.5 Effects on competition**

Collective redress approaches vary significantly between Member States. However, as already mentioned before, so far the approach of a given Member State towards collective redress does not seem to have had significant impact on the business environment in which the companies operate (see section 4, above):

- The existing collective redress mechanisms do not seem to have resulted in additional information costs (in terms of being informed about the existing collective redress mechanisms), in additional insurance costs, and also not in unreasonable litigation costs;

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<sup>108</sup> However, in responses to a survey questionnaire circulated by Civic Consulting, EU level and national business stakeholders were very reluctant to provide their view, with a majority of respondent providing no opinion regarding the question whether differing approaches on collective redress result in actual and/or future obstacles to trade.

<sup>109</sup> See CPEC (2008): Problem study, section 5.3.5.

<sup>110</sup> For a detailed analysis of the economic consequences of obstacles preventing consumers' redress in cross border situations, see CPEC (2008): Problem study, section 6.6.

- ❑ None of the collective redress mechanisms available in the EU has led to the closing down of a reputable business;
- ❑ There is no evidence indicating that the existing collective redress mechanism in the EU provoked cross-border investment flows (including relocation of economic activity in Member States which do not have any collective redress mechanisms).

In general, the economic impact of the current collective mechanisms has been too modest to render the above-described effects likely. As a consequence, it does not seem that the differing approaches between Member States towards collective redress have created significant unequal conditions of competition for firms active in the internal market so far. There is also no evidence indicating an impact of the existing collective redress mechanisms on the competitive position of EU firms in comparison with their non-EU rivals. In line with this analysis, concerns of business stakeholders regarding a possible distortion of competition rather refer to potential problems in the future (also because some of the current collective redress mechanisms have been introduced only very recently). For example, a **German** business stakeholder stated: “As the design of the new systems in **Germany** seems quite balanced we cannot identify any negative impact on the competitive position of our members. Still, this evaluation is preliminary as our systems are quite young”. Similarly a **Finnish** business association explained: “We haven’t experienced costs related to the new systems. The situation would be very different if the mechanisms were less restricted.”

These observations lead to the following conclusion:

24. ***The impacts of differing collective redress approaches on trade and competition between Member States appear to have remained very limited so far.*** Such an effect would also seem unlikely considering the very recent introduction of collective redress mechanisms in several Member States and the relatively small number of cases brought to court under those mechanisms that already exist for some time.

#### 6.4 Possible future emergence of obstacles to trade caused by differing approaches on collective redress

The same factors that have already been described above are also relevant to discuss whether or not differing approaches on collective redress makes the emergence of future obstacles to trade between Member States likely:

##### a) Possible future exposure to liability costs through collective redress mechanism

It is not possible to make any detailed prognosis concerning the future exposure to liability through different collective redress mechanisms, as this would depend on many factors, including the characteristics of the mechanism in a specific Member State. However, it is possible to illustrate the issue by considering the potential obstacles that

would be created in a single and extreme case, namely a situation in which Member State A would have introduced an effective collective redress mechanism and Member State B would not have any collective redress mechanism at all. It will also be assumed that substantive law would be identical in both countries (which seems a plausible enough assumption if one takes into account the increasing level of harmonisation of consumer law in Europe). In this situation companies providing products and services to consumers in Member State A would have to bear all potential liability costs arising from infringements of consumer protection legislation, whereas companies active in Member State B would only bear that part of the liability costs that results from redress through other means (individual litigation and ADR). This would mean that, for example, in very low-value mass claims where individual litigation and ADR are unlikely to be used by consumers, companies in Member State B would not have to bear the liability risks related to this type of claims (ignoring any effects of administrative enforcement by consumer protection authorities). Companies selling products/services in country B therefore can expect lower liability costs than companies that sell the same products/services in country A, if all other circumstances in the two countries would be similar.

Trade flows between country A and B can occur in two directions: a company based in country A will have to decide whether to sell its product in country B and vice versa. Exporting its products to country B, the company based in A faces a possible lower exposure to liability costs. It depends on the company whether this reduced legal incentive to avoid undesirable behaviour in consumer markets will affect company behaviour to some extent, or whether reputational aspects and other factors – available technology, spillovers, feasibility and profitability of geographical market segmentation, and so forth – are more important and the company from country A adheres to the same standards in market B as in its home market. Independently of how the company decides to operate, no direct obstacles to trading with consumers in country B are created.

In the opposite situation that a company based in country B wants to sell its products in country A, it faces, however, a higher exposure to liability costs. The existence of an effective collective redress mechanism in country A means that consumer who suffered a loss caused by an infringement in consumer protection legislation are now likely to bring collective actions against the company based in country B. In this case the decision of a firm from country B to enter the market of country A (with collective redress mechanism) could be affected. However, on the assumption that substantive law is the same in both, the impacts on trade would result purely from the fact that the level of private enforcement is lower, and therefore the level of uncompensated consumer loss in country B is higher than in country A. As the implicit assumption from setting consumer law standards is that they maximise consumer welfare, possible deterrent effects created by higher enforcement levels cannot be considered to be a worrying obstacle to trade, given that they improve welfare. This argument is also valid if we consider a situation where two countries have collective redress mechanisms involving different levels of effectiveness. The possible increase in liability costs for infringements of consumer protection legislation as such due to future collective redress mechanisms can therefore not be considered to create an obstacle to trade,

even though it may deter companies to enter a market in another Member State due to a higher level of enforcement of justified consumer claims.

b) Possible future litigation costs of collective redress

Existing collective redress mechanisms do involve transaction costs, and this can be expected to remain the case for any future mechanism. Transaction costs for redress include litigation costs, time effort etc. As has been indicated before, the evaluation concludes that the existing collective redress mechanisms may decrease rather than increase litigation costs for businesses, in that a multitude of separate litigations, potentially in different courts, is replaced by one collective procedure. This is in line with theoretical considerations, that are detailed in a complementary study,<sup>111</sup> and this type of efficiency gains of collective redress mechanism are likely to also be targeted at in any future mechanism a Member State may decide to introduce. The evaluation has also indicated that so far possible inefficiencies of collective redress – such as an increase in unmeritorious claims – have not been detected in the European context. However, the filing of unmeritorious claims is a theoretical possibility for collective redress mechanisms that do not involve an adequate “gatekeeper procedure”. If different approaches to collective redress between Member States would lead to a high number of unmeritorious claims in a specific Member State (because no effective gatekeeper procedure is in place) and this would not be the case in others (because they would either have no collective redress or a mechanism with effective gatekeeper procedure), obstacles to trade could result.

c) Possible future legal uncertainty created from collective redress

There is no reason to believe that the introduction of collective redress mechanisms in the future would not lead to an initial period of legal uncertainty until relevant issues are clarified by the courts. However, it appears unlikely that this legal uncertainty should remain a permanent situation that would be able to deter firms from entering a specific market. This however, would also depend on the overall legal framework and on the technical details of future collective redress mechanisms (such as the degree to which provisions remain vague), which are impossible to assess at this stage. Concerning the already introduced collective redress mechanisms under which cases have been decided, a reduction of legal uncertainty is to be expected to the extent that open questions are clarified through future court decisions.

A more general question is the effect that differing approaches on collective redress may have on the internal market if the highly dynamic development of new mechanisms in recent years continues and leads to a further increase in the complexity and diversity of the legal systems of Member States. As has been discussed in a complementary study,<sup>112</sup> some costs arise from the heterogeneity of applicable rules and standards.<sup>113</sup>

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<sup>111</sup> CPEC (2008): Problem study.

<sup>112</sup> See CPEC (2008): Problem study, section 6.6.4.

If even more differing approaches on collective redress would significantly increase heterogeneity of legal systems and increase transaction costs, this could influence the willingness of entry of firms in other markets in the EU. The extent to which such effects will materialise, however, depends on several factors, including:

- ❑ The degree to which new and differing collective redress approaches will be introduced in Member States in the future;
- ❑ The degree to which the mechanisms will be effectively used in practice and therefore constitute a relevant feature of the legal system or not. Collective redress mechanisms that are overly restrictive and/or complicated and are therefore not used by consumers and their representatives (as is the case with some of the existing mechanisms) are unlikely to be relevant in this respect.

This leads to the following conclusion:

25. ***The emergence of future obstacles to trade between Member States caused by differing approaches on collective redress appears to depend on the specifics of the mechanisms to be introduced.*** The possible increase in liability costs for infringements of consumer protection legislation as such due to future collective redress mechanisms cannot be considered to create an obstacle to trade. Obstacles can be created, however, if collective redress mechanisms do not prevent unmeritorious claims with an effective gatekeeper procedure or vague provisions lead to a long phase of initial legal uncertainty. If even more differing approaches on collective redress would significantly increase heterogeneity of legal systems and increase transaction costs, this could influence the willingness of entry of firms in other markets in the EU.

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<sup>113</sup> See, for an economic analysis of some of the costs of legal heterogeneity, Ribstein, L., and Kobayashi, B. (1996) "An Economic Analysis of Uniform State Laws", 25 *Journal of Legal Studies*, p. 137; Gomez, F. (2008) "The Harmonization of Contract Law in Europe: A Law and Economics perspective", *European Review of Contract Law*, p. 92.

## Annex 1: Methodology consumer detriment

Put simply, the benefits of introducing a system of collective redress (CR) can be estimated through cost-benefit analysis and the definition of a base case and an option case.

Cases in which consumers can engage in CR (“the option case”) can be compared to those in which they have no such avenue – i.e. an individual redress (IR) system (“the base case”).

Comparison of the base and option cases allows for derivation of the net benefits (to consumers only) of the introduction of a system of CR within a given country. Note that these benefits will essentially resemble estimation of a consumer surplus benefit only – they will not encompass the costs of implementing a system of CR, nor will they encompass the loss of producer (i.e. trader and service provider) surplus.

The same process can then be repeated for a number of different countries (regimes). This allows for the estimation of the net benefits of the introduction of a system of CR across several regimes.

These results can then be “mapped” onto countries which do not have a system of CR (the non CR countries) in order to estimate the consumer detriment associated with not having such a legal mechanism.

Note that in conventional cost-benefit analysis, one (or more) option cases are typically compared to a single base case. In this instance, however, it is necessary to compare an option case against two different base cases, depending on the circumstances (i.e. above or below the threshold, as explained below).

This is because consumer responses may differ above and below the threshold, with a portion of consumers likely to engage in legal action where the costs of the initial damage reach a certain point. So, if no CR regime was in place, (i.e. only IR was available) some consumers would have engaged in successful legal action under IR anyway. Therefore the incremental benefits of CR may be affected and it is necessary to define two base cases.

The base cases and scenarios used in this study can be defined as follows:

- *Below the threshold* – These are the cases (“small and scattered claims”, also referred to as large-scale low value claims) which would never have been the subject of legal proceedings if there was no CR system in the countries under examination. This is because the cost and effort involved in legal action by individual consumers would outweigh the compensation potentially awarded. The threshold may vary from country to country.

The base case (IR) effectively relates to a situation in which a consumer suffers a loss and takes no action, while the option case (CR) relates to a situation in which the consumer engages in CR after the initial loss.

- *Above the threshold* – These are the CR cases in which *some* consumers may still have taken up legal action under an IR system. However, the majority of consumers above the threshold are unlikely to have done so.

## Methodology - Below the threshold:

### *Base case*

The base case assumes consumers operate under an IR system. Note that, by definition, if consumers are below the threshold, they do not receive compensation, nor do they have transaction costs.

Under the base case, in theory, consumer detriment may therefore be given by:

$$CD_{IR} = FD_{IR} + I_{IIR}$$

Where the variables are defined as follows:

$CD_{IR}$  = Sum of damages of all consumers (financial and non-financial) under IR

$FD_{IR}$  = Initial financial damage suffered by consumers under IR.

$I_{IIR}$  = Intangible costs incurred by consumers due to the initial loss due to fear and stress.

### *Option case*

The option case represents society taking up the option of introducing a CR system.

Under the option case, in theory, consumer detriment may therefore be given by:

$$CD_{CR} = FD_{CR} + I_{ICR} + T_{CR} + I_{CCR} - C_{CR}$$

Where the variables as follows:

$CD_{CR}$  = Sum of damages of all consumers (financial and non-financial) under CR

$FD_{CR}$  = Financial damage suffered by consumers

$I_{ICR}$  = Intangible costs incurred by consumers due to the initial loss

$T_{CR}$  = Transactions costs incurred by consumers

$I_{CCR}$  = Intangible costs incurred by consumers due to the legal proceedings

$C_{CR}$  = Compensation awarded to consumers

*Net benefits: below the threshold*

The benefit of introducing a system of CR will therefore be given by the difference between:

$$CD_{CR} = FD_{CR} + I_{ICR} + T_{CR} + I_{CCR} - C_{CR}$$

and

$$CD_{IR} = FD_{IR} + I_{IIR}$$

$$\text{i.e.: Net benefit} = [FD_{IR} + I_{IIR}] - [FD_{CR} + I_{ICR} + T_{CR} + I_{CCR} - C_{CR}]$$

Now if we assume that firm behaviour is invariant and the same initial financial and non-financial loss occurs to consumers under both scenarios (i.e. with or without CR), then:

$$FD_{CR} = FD_{IR}$$

$$I_{ICR} = I_{IIR}$$

Since these terms effectively cancel each other out, we then only need to estimate the CR case.

$$\text{i.e.: Net benefit} = - [T_{CR} + I_{CCR} - C_{CR}]$$

If it is further assumed that court compensation and/or the state (in the event of a loss) covers the transaction and intangible costs of the legal proceedings (and/or the intangible costs are negligible, as they are borne by intermediaries), from a consumer's point of view we have:

$$\text{Net benefit} = - [- C_{CR}] = C_{CR}$$

So we need only estimate the compensation costs.

Note that ADR could be allowed for in the above equations but if it is assumed that the take-up of ADR does not vary between individual and CR, the terms simply cancel each other out.

## Methodology - Above the threshold:

### *Base case*

The base case again assumes consumers operate under an IR system. However in this case consumers will incur transactions cost and have a chance at compensation

Under the base case, in theory, consumer detriment may therefore be given by:

$$CD_{IR} = FD_{IR} + I_{IIR} + T_{IR} + I_{CIR} - C_{IR}$$

Where the variables as follows:

$CD_{IR}$  = Sum of damages of all consumers (financial and non-financial) under IR

$FD_{IR}$  = Financial damage suffered by consumers

$I_{IIR}$  = Intangible costs incurred by consumers due to the initial loss

$T_{IR}$  = Transactions costs incurred by consumers

$I_{CIR}$  = Intangible costs incurred by consumers due to the legal proceedings

$C_{IR}$  = Compensation awarded to consumers

### *Option case*

The option case again represents society introducing a CR system. As indicated, this is essentially the same as the option case for below the threshold matters.

Under the option case, in theory consumer detriment may therefore be given by the same formula as previously given for the below the threshold application of CR:

$$CD_{CR} = FD_{CR} + I_{ICR} + T_{CR} + I_{CCR} - C_{CR}$$

### *Net benefits: above the threshold*

The benefit of introducing a system of CR will therefore be given by the difference between:

$$CD_{CR} = FD_{CR} + I_{ICR} + T_{CR} + I_{CCR} - C_{CR}$$

and

$$CD_{IR} = FD_{IR} + I_{IIR} + T_{IR} + I_{CIR} - C_{IR}$$

i.e.: Net benefit = [FDIR + IIR+TIR + ICIR – CIR] – [FDCR + IICR +TCR + ICCR – CCR ]

We again assume that firm behaviour is invariant and the same initial financial and non-financial loss occurs to consumers under both scenarios (i.e. with or without CR), so:

$$FD_{CR} = FD_{IR}$$

$$I_{ICR} = I_{IIR}$$

So net benefit becomes:

$$\text{Net benefit} = [TIR + ICIR – CIR] – [TCR + ICCR – CCR ]$$

And if it is further assumed that (under CR) court compensation and/or the state (in the event of a loss) covers the transaction costs of the legal proceedings, and that consumers suffer few intangible costs from the legal proceedings from a consumer's point of view we obtain:

$$\begin{aligned} \text{Net benefit} &= [T_{IR} + I_{CIR} – C_{IR}] – [- C_{CR} ] \\ &= T_{IR} + I_{CIR} – C_{IR} + C_{CR} \end{aligned}$$

However, this scenario is more complex, as we need to have some idea of what would have happened in the case of IR. How many consumers would have gone to legal action ? What arrangements prevail with transactions costs ?

As indicated in the main report, analysis by Civic Consulting combined with hypothetical case studies was used to derive answers to these questions. In practice, too, intangible court costs ( $I_{CIR}$ ) have been ignored for the purposes of this study

### **Applying to the individual redress countries:**

The results for the CR countries must then be applied to measure the detriment suffered by consumers in non-CR counties due to the lack of a CR regime.

The most straightforward way is to estimate the range of outcomes for the CR countries and estimate the total (i.e. structural) detriment avoided and the estimated number of litigants per head of population.

It is then necessary to adjust for the differing population sizes of the non-CR countries with respect to the CR countries, particularly when considering the estimation of structural detriment.

The results must be adjusted to reflect:

- The different population size of the non-CR countries
- The different national income levels of the non-CR countries (as measured by GDP per capita)

Results for structural detriment for non CR countries can then be calculated based on:

- Multiplying the annual direct CR benefits per million population by the population of the non-CR countries
- Adjusting this figure by the (lower) per capita incomes of the non-CR countries

Results for individual detriment can be calculated based on:

- Multiplying the average number of litigants per million population in the CR countries by the population of the non-CR countries to derive an estimated number of potential annual litigants
- Dividing the estimated annual structural detriment by this figure to determine the average individual detriment.

If required, benefits over time could also be measured from an economic welfare point of view (essentially “structural detriment”) since the introduction of a CR system benefits consumers into the future. Though this has not been done in the current study, the net present value of the stream of CR benefits could also be estimated over a defined period (say 30 years) or in perpetuity, using a defined discount rate (4% is commonly used in the EU, however this could be sensitivity tested). It would be necessary to incorporate some assumptions about regime development, population and/or income growth over time to do this.

## Annex 2: Definition of consumer detriment

As noted in the main text, this study uses the following definitions for individual and structural detriment:

- *Individual detriment* – The financial and non financial loss suffered by an individual consumer as a result of the actions of a trader or service provider (i.e. an ex post measure). Financial losses measured by this study include the initial damage and court transaction costs borne by consumers. Time spent by consumers in the court process is included as non-financial damage, though other intangible pre and post court detriment is not measured.<sup>114</sup>
- *Structural detriment* – The sum of the losses suffered by individual consumers, representative of the total loss in consumer welfare as a result of the actions of the trader or service provider. For the purposes of the study this is also an ex post measure (in relation to the initial harm suffered and subsequent legal proceedings).

These definitions differ, in some aspects, from that adopted by some previous studies, though they are consistent with those applied in others. In particular, they differ somewhat from the definitions used in Europe Economics (2007): *An analysis of the issue of consumer detriment and the most appropriate methodologies to estimate it. Final Report for DG SANCO*. These differences are discussed below.

The Europe Economics study defines personal detriment as a psychology based concept. It relates to detriment suffered at the individual level, against a benchmark of “reasonable expectations” about the transaction. It takes account of only those consumers who suffer negative outcomes as a result of a particular transaction (i.e. ex post). It may include financial and non-financial (including psychological) detriment suffered by consumers, though in practice the study advises against the quantification of psychological detriment as a measure. In contrast, it defines structural detriment as an aggregate, “economics based” measure which occurs ex ante any disputes between consumers and traders or service providers. The benchmark for assessment is the degree of market or regulatory failure. All consumers are considered under this definition, not just consumers involved in disputes with traders or service providers.

As such, by this definition, structural detriment cannot be measured by the sum of individual consumer detriment. Instead it relates to deeper underlying effects such as the use of market power and information asymmetries. So, in theory, the introduction of a new policy initiative such as collective redress would benefit all consumers in an economy – not merely litigants in cases. For example, the introduction of collective redress might give consumers greater confidence in the operations of the marketplace and make trader or service provider more cautious about abusing their market power.

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<sup>114</sup> There are a variety of reasons for this. As indicated in Annex 1, since it is held that initial psychological detriment is already incurred prior to legal proceedings, the introduction of a system of consumer redress would be unlikely to alter this. As noted elsewhere, there are also considerable complexities associated with assessing any intangible detriment associated with court proceedings.

This, in turn, could reduce prices, increase the quantity of goods purchased, improve product and service quality and spur the consumption of new goods and services.

While it represents an important advance in formalising the concepts of detriment, for the purposes of this study these definitions suffer from a number of drawbacks in terms of measuring consumer detriment. These include:

- *Reasonable expectations* – There are difficulties in determining what constitutes “reasonable expectations” on the part of consumers (as opposed to “unreasonable expectations”) for every consumer in every case.
- *Measurement of structural detriment* – There are difficulties in measuring many aspects of structural detriment. For example, as also noted by Europe Economics, the use of international price comparisons to measure the impact of policy changes on consumer detriment faces many methodological difficulties including the fact that products may not be homogenous or tradable, the effects of transport prices, treatment of taxation and the choice of whether to base comparisons on wholesale or retail prices. So while in theory, the approach to structural detriment taken by the Europe Economics study could be supplemented by a measure of prices in CR and non-CR countries, the methodological and econometric uncertainties are potentially so great that the results would be of dubious value. Even greater difficulties arise when attempts are made to measure differences in product quality and consumption. Obvious issues include the absence of a consistent index of product quality and the sale of heterogeneous products across Member States. Therefore, while econometric methods could be applied to investigate this issue, claims that CR had been responsible for shifts in product quality and/or volume shifts would be difficult to substantiate. Clearly product quality and volume demanded would differ across CR and non-CR states for many different reasons.

In practice, many of these issues can be resolved through the use of the simplified definitions of individual and structural detriment presented above and by recalling the context of the current study. The following should also be noted:

- *Reasonable expectations* – The issue of “reasonable expectations” is of less importance for the current study. This is because the focus of the study is on the *incremental benefits of collective redress* to consumers (if any) of a specific legal mechanism (i.e. use of CR). So benefit to consumers in this study is measured through the court outcomes irrespective of the expectations they held about their service encounters with traders or service providers.

For example, if a consumer feels that he or she suffered loss as a result of trader or service provider actions, engages in CR and *loses* the case, he or she is no better off than under individual redress (IR) regardless of whether he or she feels that the trader or service provider violated his or her “reasonable expectations” of product price/quality. The use of court arbitration effectively obviates the need to include a “reasonable expectations” criterion in the definition of individual detriment.

- *Structural detriment* – As indicated above, for the purposes of this study structural detriment (i.e. consumer surplus) is defined in terms of the sum of individual detriment. This ex post approach allows for a simple, actionable measure of the degree to which direct CR benefits consumers in countries in which it is utilised (and by extension the degree to which consumers in non-CR countries suffer a detriment from its absence). This approach is clear, consistent and avoids the uncertainty associated with econometric comparison of product prices and sales in CR and non-CR countries.

To the extent that it is argued that there *are* ex ante benefits from CR, which flow through to all consumers (not just litigants) the results of this study could be seen as a lower end estimate of the impacts on structural detriment. That is, it could be said that, at a minimum, the use of CR mechanisms increases consumer welfare by an amount equal to the net total benefit of CR court awards. Beyond this, a robust econometric approach would need to be developed to justify broader consumer welfare benefits to *all consumers* (litigants or not) from the use of CR.

However, apart from the measurement problems already noted, practical issues would also limit the likely additional benefits to other consumers. In the specific case of CR, the mechanisms introduced in the various Member States to date are in most cases not relevant for consumer compensation in respect to broad competition-related issues (e.g. in case that a firm has abused its market power).<sup>115</sup> This would tend to limit the significance of CR, in terms of inducing significant changes in the price and quality of products in countries which have adopted it.

Arguably, the introduction and use of CR might still indirectly curb abuses of market power due to trader or service provider caution about its implications (deterrence effect). However, the relatively small amounts in damages obtained by CR litigants in many jurisdictions (see main text, above) also raise questions about the effects that CR might have in this respect. In most cases it would appear unlikely that the awarded damages would be sufficient to induce changes in trader or service provider behaviours such as to produce economy-wide effects. This could also be relevant to the issue of initial trader or service provider caution – i.e. even if traders or service providers practised initial caution, the scale of penalties may not be sufficient to induce caution in the long run.

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<sup>115</sup> Of the mechanisms analyzed so far, only one case is documented regarding a violation of competition law (under the UK representative action according to section 47 B of the Competition Act 1998).

## **Annex 3: Case collection sheet**

## CASE COLLECTION SHEET: COLLECTIVE REDRESS FOR DAMAGES

*Please fill in the form in English for each case and save each case as separate Word document with the file name indicating the country, e.g. “UK1-name of case.doc”*

### I. REGISTRATION DATA

A. Country:	Please select from dropdown menu
B. Your case ID number (1,2,3 ...):	Please specify
C. Name of collective redress mechanism:	Please specify
D. Legal basis:	Please specify
E. Mechanism introduced in (date):	Please specify
F. Judicial or non-judicial procedure:	Please select from dropdown menu
G. Person filling in the form	Please specify

### II. GENERAL DATA ON CASE

**1. Please indicate the name of the case.**

Please specify

**2. Please indicate the date of the filing of the original case and the court of first instance.**

Please specify

**3. Please provide the court reference number and the name of the court that has finally decided on the case (for ongoing cases the reference number of the court that currently manages the case).**

Please specify

**4. Please provide details on the case.**

a. Please provide a brief description of the case and the nature of the dispute (5-10 lines).

Please specify

b. Please indicate the sector of industry (e.g. media, pharmaceuticals, financial services, telecommunication...).

*Please specify*

- c. Please indicate the category of law infringement (e.g. consumer protection law, competition law, etc).

*Please specify*

- d. Please indicate if the case involves any cross-border element.

*Please select from the dropdown menu*

*Please specify cross-border element*

**5. Please identify the party filing the original case (i.e. the intermediary) / the lead solicitor.**

- a. Who was the party filing the original case at first instance (i.e. the intermediary)?

*Please select from dropdown menu*

*If other, please specify*

- b. Please identify the lead solicitors on the side of the claimant.

*Please specify*

### **III. GROUP OF AFFECTED CONSUMERS AND DAMAGES SOUGHT**

**6. Please provide data on the group (of consumers) represented in the case.**

- a. What is the definition of the group (of consumers)?

*Please specify*

- b. Please indicate if the case involves an opt-in procedure (members of the group have to notify their desire to be included) or opt-out procedure (members of the group have to notify their desire not to be included).

*Please select from the dropdown menu*

*If other, please specify*

- c. Please provide/estimate the total number of consumers that were affected by the alleged damage.

*Please specify*

- d. Please provide the number of consumers represented in the case.

*Please specify*

**7. Please provide data on the damages/losses suffered and the total amount for which the case was brought.**

- a. Please indicate the total amount for which the original case was brought (in national currency).

*Please specify amount in national currency*

- b. What was the average amount of the alleged damage/loss of each individual consumer affected? (in national currency)

*Please specify amount in national currency*

- c. If the case relates to alleged overcharging, please indicate what was being argued to be the correct and incorrect charges for the product/service and the amount sought as a refund.

*Please specify the amount that was charged incorrectly for the product/service (in national currency)*

*Please specify the amount that would have been the correct charge for the product/service (in national currency)*

*Please specify the amount sought from the defendant as refund/compensation for the overcharging (in national currency)*

- d. If a refund for any non-financial costs is being sought (e.g. injuries, stress, anguish), please separately identify this.

*Please specify non-financial costs sought to be refunded (in national currency)*

#### **IV. COSTS AND DAMAGES AWARDED**

**8. Please indicate how the claimant financed the case.**

*Please specify*

9. Please indicate the existence of any **specific rules concerning litigation costs** of collective redress, compared to general rules of civil procedure (e.g. public support schemes, contingency fees of lawyers).

*Please select from the dropdown menu*

*Please specify specific rules*

10. Was the procedure finalised by a **court decision** or was a **settlement** reached out-of-court?

*Please select from the dropdown menu*

11. Please briefly describe the **court decision/settlement** (5-10 lines).

*Please specify*

12. Please indicate full details of the **compensation awarded** to the claimant (intermediary and represented consumers), if available

A. Compensation awarded for the original material damage/loss of property	<i>Please specify (in national currency)</i>
B. Compensation awarded for physical injuries	<i>Please specify (in national currency)</i>
C. Compensation awarded for immaterial damage (e.g. claimant/consumer pain and suffering)	<i>Please specify (in national currency)</i>
D. Compensation awarded for claimant/consumer lost time and/or earnings	<i>Please specify (in national currency)</i>
E. Compensation awarded for claimant/consumer court, legal and associated costs	<i>Please specify (in national currency)</i>
F. Other compensation awarded <i>Please specify</i>	<i>Please specify (in national currency)</i>
<i>Sum A-F: Total damages awarded (sum of all damages awarded to consumers and intermediary)</i>	<i>Please specify (in national currency)</i>

*Comments on compensation awarded*

13. Please provide data on the **costs of the case** ultimately paid by the parties (i.e. after the court decision/settlement).

- a. Please indicate the **total costs of the claimant** related to the case (i.e. total costs of the intermediary such as consumer organisation, including lawyer and court fees, if available).

*Please specify total costs (in national currency)*

- b. Please indicate the costs of each consumer represented related to the case (per claimant consumer, including lawyer and court fees, if available) and specify the services paid for and the arrangement under which the costs were paid by the consumer.

*Please specify costs per consumer (in national currency)*

- c. Please indicate the total costs of the defendant related to the case (i.e. total costs of the company/organisation from which damages were sought, including lawyer and court fees, if available).

*Please specify total costs (in national currency)*

- d. Please indicate whether a “loser pays” principle applied (for court fees, lawyer’s fees etc.).

*Please select from the dropdown menu*

*Please specify if costs were passed on to consumers (in case claimant lost)*

## V. DURATION OF CASE AND TIME INVOLVED

### 14. Please indicate the duration of the procedure (from filing of case until court decision/settlement).

- a. First instance

*Please specify duration in months*

- b. Second instance

*Please specify duration in months*

- c. Third instance

*Please specify duration in months*

- d. Total duration of the procedure

*Please specify duration in months*

- 15. Please estimate the time effort of the consumers represented in the case (in case information is available in this respect). Relevant is the total amount of time required by the consumers represented in the case to fully familiarise themselves with, and give approval to, the proposed legal action and the time used for court appearances and coordination meetings etc.?**

*Please estimate average time needed per consumer in hours*

- 16. Please estimate the time effort of the intermediary bringing forward the case (in case information is available in this respect). Relevant is the total amount of time required by the intermediary bringing forward the case (e.g. consumer organisation) to constitute the group, to collect evidence and prepare the court proceedings, and the time used for court appearances and coordination meetings etc.?**

*Please estimate the total staff time used by the intermediary (in full time staff days)*

## **VI. SOURCES**

- 17. Please indicate the sources of information and any additional documents available on the case.** Please also specify contact details of persons that could provide additional information (name, position e-mail, phone)

*Please specify*

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## **Annex 4: List of questions for country interviews**

*Evaluation of the effectiveness and efficiency of collective redress mechanisms in the European Union*

**Exploratory questions to stakeholders concerning collective redress**

**1. Overview over collective redress mechanisms**

1.1. We have identified as relevant for our study the collective redress mechanisms in your country listed in the box below. Is this list complete? Covered by the study are the following types of procedures: Group actions, representative actions, test case procedures and procedures for skimming-off profits.<sup>1</sup>

*To be completed by Civic Consulting before the interview*

**2. Difficulties to obtain redress for mass claims**

2.1. Have there been cases in your country, where consumers were not obtaining satisfactory redress for mass claims/mass issues where multiple consumers have claims against the same seller/provider of services? Are there specific sectors where this is especially relevant (e.g. telecommunications, financial services etc.)?

*Please specify*

2.2. What are the factors which prevent groups of consumers from obtaining satisfactory redress related to mass claims/issues?

*Please specify*

2.3. Have there been specific problems related to cross-border situations / cases?

*Please specify*

**3. Collective actions filed so far**

3.1 What is the number of consumer-relevant cases of collective redress in your country since the inception of the relevant mechanism listed above? What were the most important cases?

*Please specify*

3.2 Are you aware of any specific source where we could obtain data on specific collective redress cases?

*Please specify*

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<sup>1</sup> Relevant for this study are group actions where individual actions are literally grouped into one procedure, representative actions, where one individual or an organization represents a multitude of individuals, test case procedures, where a case brought by one or more persons leads to a judgment that forms the basis for other cases brought by persons with the same interest against the same defendant and finally procedures for skimming-off profits, where a defendant who infringes the rules against unfair competition or unfair commercial practices is held liable to reimburse the illegally produced profits.

#### ***4. Effectiveness and efficiency of collective redress mechanisms***

**Please answer all questions for each collective redress mechanism that exists in your country.**

##### **Objectives**

- 4.1 Does the collective redress mechanism fulfil the objectives of the national law which introduced it?

*Please specify*

- 4.2 Has the mechanism enabled consumers to obtain satisfactory redress in cases which they would not otherwise have been able to adequately pursue on an individual basis?

*Please specify*

##### **Incentives provided**

- 4.3 a) Does the mechanism ensure a change in the behaviour of the defendant, which results in the reduction of future harm to all consumers?

*Please specify*

- b) Does the mechanism have a preventive effect and deter potential offenders, for instance by skimming off the profit gained from the incriminated conduct?

*Please specify*

- c) Does the mechanism provide incentives and sufficient opportunity for out-of-court settlement?

*Please specify*

- 4.4 Does the mechanism discourage the introduction of unmeritorious claims? Is there a “gatekeeper procedure” to certify whether a collective action is admissible to the court or not. If yes, how does it work?

*Please specify*

##### **Accessibility**

- 4.5 Is the mechanism easily accessible to consumers? [Costs, rules of standing, length of proceedings and other factors hindering or facilitating access for consumers to the mechanism should be considered]

*Please specify*

- 4.6 What are the litigation costs of collective redress for consumers compared to individual redress? What is the risk of the consumer if case is lost?

*Please specify*

### **Financing and distribution of proceeds**

- 4.7 Are actions under the mechanism financed in a way which ensures that consumers are able to obtain effective legal representation? Are there mechanisms of public support for the party that brings forward a collective action (the intermediary<sup>2</sup>), are contingency fees/conditional fees<sup>3</sup> allowed? What is the risk of the intermediary if a case is lost?

*Please specify*

- 4.8 Are proceeds of collective redress actions distributed in an appropriate manner amongst plaintiffs and their representatives?

*Please specify*

### **Length of proceedings**

- 4.9 Is the length of the proceedings under the mechanism reasonable for consumers, consumer organisations, public bodies, and the defendants?

*Please specify*

### **Costs for consumers, consumer organisations and public bodies**

- 4.10 Are the costs related to bringing an action under the mechanism for consumers, consumer organisations and public bodies proportionate to the amount in dispute?

*Please specify*

- 4.11 Does the mechanism minimise litigation costs for consumers?

*Please specify*

### **Costs for businesses**

- 4.12 *Information costs*: Does the mechanism impose requirements on businesses (in terms of being informed about the existing collective redress mechanisms and providing related information to public authorities) that lead to additional costs? Do these costs weigh in heavily on Small and Medium Enterprises (SMEs)?

*Please specify*

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<sup>2</sup> A collective action is usually brought forward by an intermediary, that organises the action on behalf of consumers. This can be a public intermediary (e.g. an ombudsman), a representative organisation as intermediary (e.g. a consumer organisation) or private intermediaries (e.g. a private law firm/an individual consumer taking the lead in an action). Intermediaries may also engage a private lawyer, who is not considered to be an intermediary in this context, as long as he or she is not responsible for organising the action.

<sup>3</sup> Contingency fees are lawyer's fees that consist of a percentage of the damages awarded. Conditional fees are (possibly additional) fees that are paid in case of success, but not related to the damages awarded.

- 4.13 *Litigation costs and related insurance costs*: Are cost for businesses for (legal) insurance (for litigation and for damages) and the litigation costs under the existing collective redress mechanisms unreasonable?

*Please specify*

- 4.14 Is the *economic impact* on businesses against whom actions have been brought under the mechanism proportionate to the alleged harm caused by the trader's conduct?

*Please specify*

- 4.15 Does the mechanism lead to the *closing down* of businesses?

*Please specify*

### **Competitiveness and investment flows**

- 4.16 Does the mechanism have an impact on the competitive position of EU firms in comparison with their non-EU rivals?

*Please specify*

- 4.17 Does the mechanism provoke cross-border investment flows (including relocation of economic activity in Member States which do not have any collective redress mechanisms?)

*Please specify*

### **Added value**

- 4.18 What is the added value of the collective redress mechanism(s) in your country compared to individual judicial redress and ADR schemes, i.e. what is achieved by the mechanism(s) that is not achieved by individual redress?

*Please specify*

- 4.19 Please estimate, what percentage of consumers who were represented in the collective redress cases in your country would likely have undertaken individual redress through ordinary court procedures if no collective redress system was in place (e.g. none, 10%, 50%)?

*Please specify*

**5. Alternative procedures for consumers (i.e. not related to collective redress)**

Please provide the following background information regarding your country:

**Individual court action**

- 5.1 Is there any data available on the number of consumers seeking individual redress through ordinary court procedures in your country, including small claims procedures? Please list sources of data/statistics regarding consumer-relevant cases and, if possible, contact persons. If you have data available, please include as Annex.

*Please specify*

- 5.2 Please estimate the threshold for claims (in Euro) under which a rational consumer would refrain from seeking individual redress through ordinary court procedures/small claims procedures in your country?

*Please specify*

**Individual action – ADR scheme(s)**

- 5.3 Is there an ADR scheme(s) for consumer cases in your country?

*Please specify*

- 5.4 Is there any data or an evaluation report available on the consumer relevant use of the ADR scheme(s) your country? Relevant data would be the number of consumers seeking redress through the ADR scheme(s), related costs, time taken to conduct the case, and compensation awards. Please list sources of data/statistics and, if possible, contact persons. If you have data available, please include as Annex.

*Please specify*

- 5.5 Please estimate the threshold for claims (in Euro) under which a rational consumer would refrain from seeking redress through an ADR scheme in your country?

*Please specify*

**6. Lessons learned**

- 6.1 Which elements of the collective redress mechanism(s) in your country could also be relevant for other countries? What are the main lessons learned?

*Please specify*

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## Annex 6: Consumer attitudes towards collective redress

*This section is a summary of research results concerning consumer attitudes towards collective redress. For a detailed description of results, please refer to CPEC (2008): Problem study, Part II.*

The general principles of collective action appear to be well understood by European citizens, based on the evidence of our discussion groups in four Member States. The principles of shared costs, and the power that multiple complainants can have, are accepted and appreciated. The situation is confused by the association of collective action with American-style class actions, and examples of these that people are aware of are either frivolous or not relevant to their own country's legal system.

A finding from the Eurobarometer survey 2006 stated that 74% of European citizens polled would be more willing to defend their rights in court, if they could join with other consumers who were complaining about the same thing. The focus group participants underlined aspects of collective actions which would make them a very attractive redress option. This corresponds with the 74% figure in the Eurobarometer survey. The positive aspects most often mentioned, and mentioned by participants of focus group discussions in all four Member States:

- ❑ The opportunity to share costs of taking action, resulting in lower individual costs. As a corollary of this, one participant mentioned that the greater overall fund for fighting the case would mean that it would be possible to engage the best lawyers;
- ❑ Taking on a case with others who had a similar grievance would make individuals feel more confident/empowered, more motivated, and would be a source of support;
- ❑ The greater the number of people involved, the more pressure generally that could be brought to bear. For some participants, this also meant the greater opportunity to attract media interest to further the case.

However, the same Eurobarometer showed that consumers do not give high importance to collective actions as a way of consumer protection: the *right to join other consumers to take sellers/providers to court* came out last in consumers' relative preferences for consumer protection measures (13%).

The focus groups conducted confirmed that there is a clear ambivalence about lawyers and legal action in all four Member States in which the groups were undertaken. Court action is often seen as the only feasible way to settle a dispute, with other methods seen as ineffective. But consumers have serious misgivings about using court action: it is seen as time-consuming, costly and risky.

Focus group statements on negative aspects of collective actions were mostly theoretical, revolving around anxiety, caused by a lack of experience concerning these mechanisms or a lack of understanding how they might work.

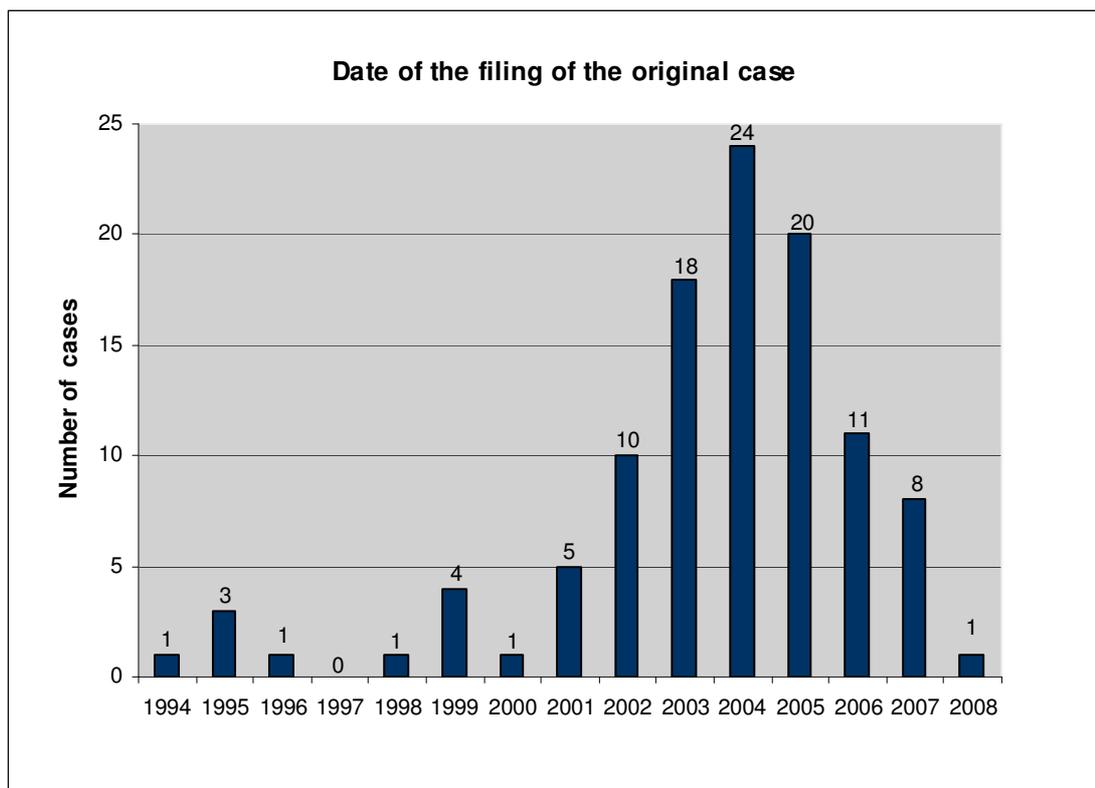
The specific negative aspects mentioned included:

- ❑ Not knowing who would organise the action, or how to gather together people with the same complaint who could take part in a collective action;
- ❑ Lack of knowledge of chances of collective action succeeding (or perhaps not knowing whether a collective action is more likely to succeed than an individual one);
- ❑ A collective action could be more time-consuming than an individual action, because of the need to hear out and manage all the complainants, and reach agreement on how to conduct the case. This could also mean that a collective action would be no less stressful (and possibly more so) than an individual action;
- ❑ Some participants thought a collective action would be feasible for only some types of consumer complaint, for example, to do with financial services or telecommunication services;
- ❑ There was general concern over costs, again largely to do with lack of any information or experience. One participant expressed the concern that lawyers may take advantage of the number of complainants, and increase their own costs, therefore reducing the advantage of collective representation;
- ❑ Loss of control: being one of many could mean you have no direct contact with the person dealing with the case, or possibly a lack of information about progress of case.

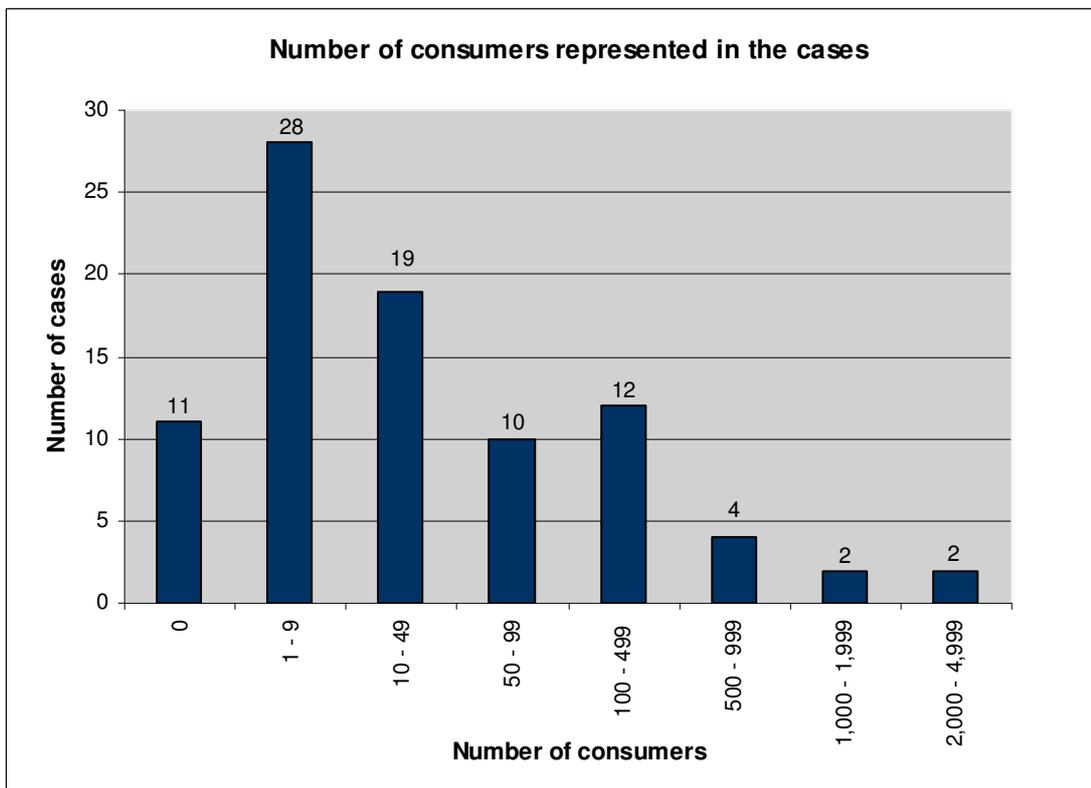
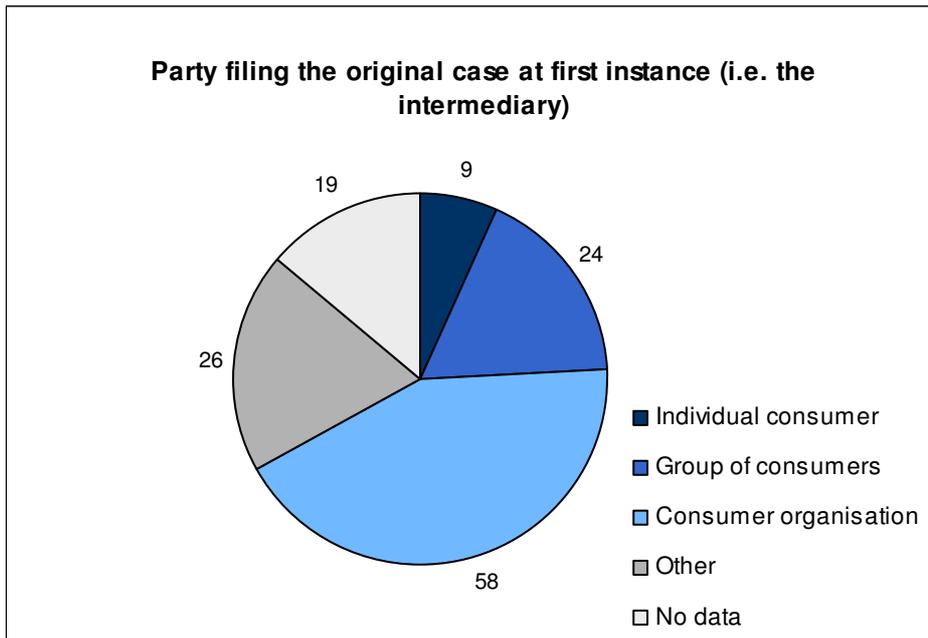
The low level of belief in collective action as an effective consumer protection measure that emerged from the Eurobarometer 2006 survey appears to be largely because of a lack of any evidence of the assumed power and benefits of collective actions. Put simply, very few people have seen any clear cases where collective actions have succeeded, or indeed proven to be a more effective tool of consumer protection than, for example, individual action, or ADR.

## Annex 7: Overview of case statistics

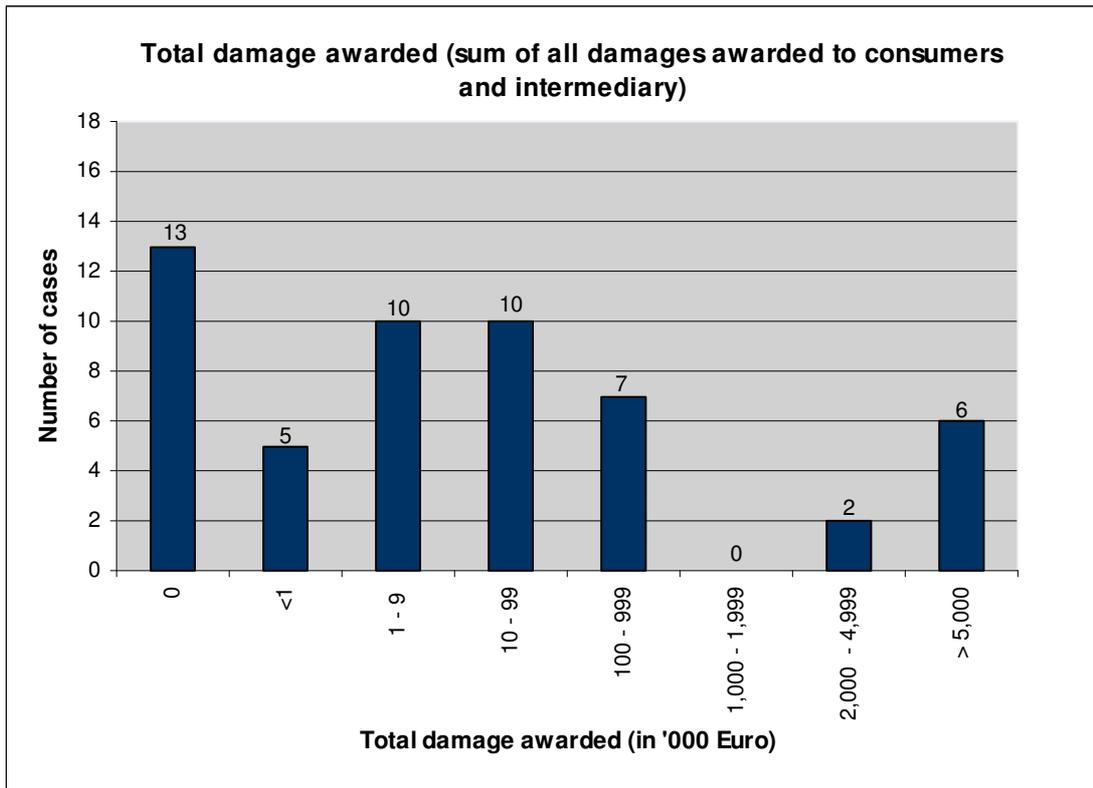
The graphs presented below illustrate characteristics of documented collected redress cases. The graphs do not include the French actions for the financial reparation of the consumer collective interest under Article L. 421 of the Consumer Code, because the high number of these cases (190) brought by a single organisation (the consumer organisation) would distort significantly the overall picture. For more information on the French actions for the financial reparation of the consumer collective interest under Article L. 421 of the Consumer Code, please refer to Part III of this study.



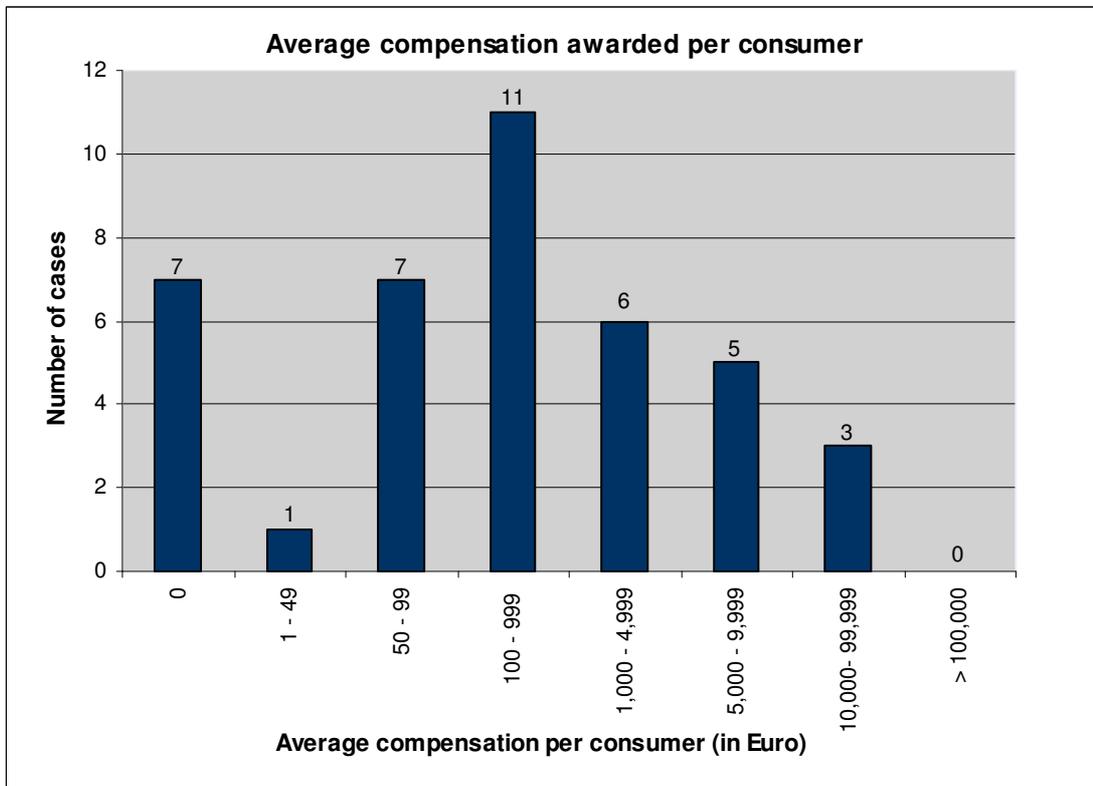
Note: Relevant data available for 108 cases.



Note: Relevant data available for 88 cases



Note: Relevant data available for 53 cases



Note: Relevant data available for 40 cases

## Annex 8: Overview of collective redress mechanisms in the EU

Country	Mechanism	Type	Cases	Reduction consumer detriment	Objectives	Satisfactory redress	Accessibility	Litigation costs	Length of proceedings	Cost for business	Closing down of business	Comments
	<i>Name of mechanism (Year of introduction)</i>	<i>Type of mechanism</i>	<i>Number of cases documented *</i>	<i>Annual benefit of CR mechanisms per million of population **</i>	<i>Does the mechanism fulfil its objectives?</i>	<i>Did consumers obtain satisfactory redress?</i>	<i>Is the mechanism easily accessible to consumers?</i>	<i>What are the litigation costs for consumers?</i>	<i>Is the length of the proceedings reasonable?</i>	<i>Are costs for businesses unreasonable?</i>	<i>Does it lead to closing down of businesses?</i>	
<b>Austria</b>	Representative test case action (in use since 1994)	Test-case procedure	5	278,923 €	Yes	Yes	Yes (however, only test case procedure)	Consumers have no litigation risk	Yes	Not unreasonable	No	<i>The mechanism has a fairly broad effect, presumably also due to the support of the VKI by the responsible ministry.</i>
	Collective redress actions of Austrian Type (in use since 2000)	Traditional representative action	10		Yes	Partly	Yes	Consumers have no litigation risk (but success fees in the case of third party financing)	Yes	Not unreasonable	In one case but this was a fraudulent business operation, which continues operation in other countries	<i>The mechanism has only been used if an out-of-court settlement could not be concluded. However, it is considered to have a very significant impact on negotiation procedures before an action is filed.</i>
<b>Bulgaria</b>	Collective action for damages to collective consumers' Interests (1999)	Representative collective action	3	150 €	Partly – only few cases, to be judged in connection with the next mechanism	No	Not applicable since consumers do not participate	Not applicable	Yes	Not unreasonable	No	<i>The mechanism introduced in 1999 was rarely used and the law was amended in 2006.</i>

Country	Mechanism	Type	Cases	Reduction consumer detriment	Objectives	Satisfactory redress	Accessibility	Litigation costs	Length of proceedings	Cost for business	Closing down of business	Comments
	<i>Name of mechanism (Year of introduction)</i>	<i>Type of mechanism</i>	<i>Number of cases documented *</i>	<i>Annual benefit of CR mechanisms per million of population **</i>	<i>Does the mechanism fulfil its objectives?</i>	<i>Did consumers obtain satisfactory redress?</i>	<i>Is the mechanism easily accessible to consumers?</i>	<i>What are the litigation costs for consumers?</i>	<i>Is the length of the proceedings reasonable?</i>	<i>Are costs for businesses unreasonable?</i>	<i>Does it lead to closing down of businesses?</i>	
	Collective action for damages to the collective consumers' interests (2006)	Representative collective action	2		Partly – only few cases but reportedly significant media coverage	No	Not applicable since consumers do not participate	Not applicable	Yes	Not unreasonable	No	
	Collective action for damages suffered by consumers (2006)	Group action	1		Too recent to be judged	Too recent to be judged	Yes	The litigation costs depend on the value of the claim	No data available yet	Likely to be not unreasonable	Highly unlikely	<i>The effectiveness and efficiency cannot be assessed yet.</i>
<b>Denmark</b>	Group action according to the Administration of Justice Act (2008)	Group action (opt in / opt out)	1	N/a	Too recent to be judged	Too recent to be judged	Yes, where necessary (opt in)	Limited litigation costs in opt-in procedure, to be determined by the court	No data available yet	Likely to be not unreasonable	Highly unlikely	<i>The effectiveness and efficiency cannot be assessed yet.</i>
<b>Finland</b>	Group action for compensation in consumer disputes (2007)	Group action	0	N/a	Too recent to be judged	Too recent to be judged	Right of action limited to Ombudsman. However, joining a group initiated rather easy	Consumers have no litigation risk	No data available yet	Likely to be not unreasonable	Highly unlikely	<i>The effectiveness and efficiency cannot be assessed yet.</i>

Country	Mechanism	Type	Cases	Reduction consumer detriment	Objectives	Satisfactory redress	Accessibility	Litigation costs	Length of proceedings	Cost for business	Closing down of business	Comments
	<i>Name of mechanism (Year of introduction)</i>	<i>Type of mechanism</i>	<i>Number of cases documented *</i>	<i>Annual benefit of CR mechanisms per million of population **</i>	<i>Does the mechanism fulfil its objectives?</i>	<i>Did consumers obtain satisfactory redress?</i>	<i>Is the mechanism easily accessible to consumers?</i>	<i>What are the litigation costs for consumers?</i>	<i>Is the length of the proceedings reasonable?</i>	<i>Are costs for businesses unreasonable?</i>	<i>Does it lead to closing down of businesses?</i>	
France	Actions for the financial reparation of the consumer collective interest under Article L. 421 of the Consumer Code (1973)	Representative collective action	(190)	1,361 €	Yes	Not the aim of the mechanism	Not applicable since consumers do not participate	Not applicable	Considered too long by claimant organisation	Not unreasonable	No	<i>The mechanism is successful since it allows consumer associations to refinance their activities. It does, however, not seem to constitute a significant deterrent for traders.</i>
	Joint representative action for consumers (1992)	Group action	6		No	No	Yes	As in individual litigation	Yes	Not unreasonable	No	<i>The mechanism is too difficult to handle for consumer associations.</i>
	Joint representative action for investors (1994)	Group action	0		No	No	Yes	As in individual litigation	Yes	No case so far, likely to be not unreasonable	No	<i>The mechanism is too difficult to handle for investor associations.</i>
Germany	<i>Gewinnabschöpfungsklage</i> – recovery of ill-gotten gains (2004)	Skimming-off procedure	7	33 €	No	Not the aim of the mechanism	Not applicable since consumers do not participate	Not applicable	Yes	Not unreasonable	No	<i>The requirements of the skimming-off procedure are very strict since the trader's intention to breach the law must be proven.</i>

Country	Mechanism	Type	Cases	Reduction consumer detriment	Objectives	Satisfactory redress	Accessibility	Litigation costs	Length of proceedings	Cost for business	Closing down of business	Comments
	<i>Name of mechanism (Year of introduction)</i>	<i>Type of mechanism</i>	<i>Number of cases documented *</i>	<i>Annual benefit of CR mechanisms per million of population **</i>	<i>Does the mechanism fulfil its objectives?</i>	<i>Did consumers obtain satisfactory redress?</i>	<i>Is the mechanism easily accessible to consumers?</i>	<i>What are the litigation costs for consumers?</i>	<i>Is the length of the proceedings reasonable?</i>	<i>Are costs for businesses unreasonable?</i>	<i>Does it lead to closing down of businesses?</i>	
	<i>Sammel- or Musterklage (2002)</i>	Traditional representative action	18		Partly	Yes, but the effect is limited with a view to the number of claims to be aggregated and the value of the individual claims	Yes	Consumers have no litigation risk	Yes	Not unreasonable	No	<i>After a slow start the mechanism has proved useful for bringing medium-value claims for a limited number of consumers.</i>
	Group actions in the capital market (2005)	Group action	4		Not yet, the most important case is still pending	Not yet, the most important case is still pending	No, they must sue individually before being grouped.	No. Litigation fees apply like in individual litigation, only common costs are shared	No data available yet but lengthy procedures expected (complexity, additional court instances)	Not unreasonable	No	<i>The mechanism is a management tool for complex mass litigation and, at best, suitable for extreme cases.</i>
<b>Greece</b>	Collective action for the protection of the general interest of consumers (1994)	Representative collective action	N/a	N/a	Yes	Not the aim of the mechanism	Not applicable since consumer do not participate	Not applicable	Reasonable in comparison with the rest of the court proceedings	Not unreasonable	No	<i>The mechanism is successful since it allows consumer associations to refinance their activities. It does not constitute a strong deterrent for traders.</i>
	Declaratory action for damages (2007)	Test case procedure	0		Too recent to be judged	Only possible as individual follow-on	Not applicable	Not applicable	No data available yet	Likely to be not unreasonable	No	<i>The effectiveness and efficiency cannot be assessed yet.</i>

Country	Mechanism	Type	Cases	Reduction consumer detriment	Objectives	Satisfactory redress	Accessibility	Litigation costs	Length of proceedings	Cost for business	Closing down of business	Comments
	<i>Name of mechanism (Year of introduction)</i>	<i>Type of mechanism</i>	<i>Number of cases documented *</i>	<i>Annual benefit of CR mechanisms per million of population **</i>	<i>Does the mechanism fulfil its objectives?</i>	<i>Did consumers obtain satisfactory redress?</i>	<i>Is the mechanism easily accessible to consumers?</i>	<i>What are the litigation costs for consumers?</i>	<i>Is the length of the proceedings reasonable?</i>	<i>Are costs for businesses unreasonable?</i>	<i>Does it lead to closing down of businesses?</i>	
<b>Italy</b>	Collective action (2009)	Group action	0	N/a	Not yet in force	Not yet in force	Probably yes	Not yet in force	No data available yet	Not yet in force	No	<i>The law is not yet in force. The group action may be difficult to handle for consumer associations.</i>
<b>The Netherlands</b>	Act on Collective Settlement of Mass Damage (2005)	Group action	3	31,231,683 €	Partly	Yes, although in some cases other consumers have obtained higher compensation through individual litigation	Opt-out mechanism	No direct costs but possibly part of the settlement	Yes	Not unreasonable	Belgian company <i>Dexia</i> closed its operation in NL, seemingly caused by loss of reputation, rather than collective action	<i>The mechanism has a broad effect (opt-out!) but also various limitations. It is not enforceable against the will of the business. Mechanism has so far achieved highest annual benefit for consumers of all mechanisms evaluated.</i>
<b>Portugal</b>	Popular action ( <i>Acção popular</i> ) (1995)	Group action	6	(709,296 €)	Partly	Yes, in some cases.	Opt-out mechanism	Consumers have no litigation risk, if action is brought by representative	No, but this seems to be a general problem of the court system	Not unreasonable	No	<i>The mechanism has received positive comments but is not used very frequently, due to the alleged shortcomings of the court system.</i>
<b>Spain</b>	Action in defense of rights and interests of consumers (2000)	Group action	49	6,875 €	Yes	Yes	Yes	In practice consumers pay only membership fee to be represented by consumer organisation;	Yes	Not unreasonable	No	<i>Frequently and successfully used in mass claims.</i>

Country	Mechanism	Type	Cases	Reduction consumer detriment	Objectives	Satisfactory redress	Accessibility	Litigation costs	Length of proceedings	Cost for business	Closing down of business	Comments
	<i>Name of mechanism (Year of introduction)</i>	<i>Type of mechanism</i>	<i>Number of cases documented *</i>	<i>Annual benefit of CR mechanisms per million of population **</i>	<i>Does the mechanism fulfil its objectives?</i>	<i>Did consumers obtain satisfactory redress?</i>	<i>Is the mechanism easily accessible to consumers?</i>	<i>What are the litigation costs for consumers?</i>	<i>Is the length of the proceedings reasonable?</i>	<i>Are costs for businesses unreasonable?</i>	<i>Does it lead to closing down of businesses?</i>	
								otherwise conditional fee agreements				
Sweden	Group proceedings act (2002)	Group action	8	414 €	A careful yes, the mechanism is still fairly recent	Yes	Yes	Consumers who opt in have no or a very limited litigation risk	Yes	Not unreasonable	No	<i>Opt-in process is organised by the court so that the financial burden of collecting the claims with the individual victims does not lie with the representative.</i>
United Kingdom	Group litigation order (2000)	Group action	13	No data available	Partly	Only in few cases	Individual litigation must be filed first. Signing up after admission of GLO is easy	High litigation fees	Lengthy proceedings but probably owed to complexity of the matter	Not unreasonable	No	<i>The mechanism is unsuitable for low-value claims and has been used only for some package travel and product liability cases.</i>
	Competition action (1998)	Traditional representative action	1		No	Not yet	Right of action limited to consumer organisation. Joining an action rather easy	None	Too rarely used to be judged	Not unreasonable	No	<i>The mechanism has been used only once. It does not seem to be suitable for small claims, one problem being evidence of the damage.</i>

Notes: \*Figures refer to all consumer-relevant cases since the introduction of the mechanisms. For France, figures include only consumer-relevant cases for years 1997-2007 inclusive.

\*\* Average annual structural consumer detriment avoided (i.e. consumer benefit) per million of national population since the introduction of the mechanism.

Assessment is only possible for countries where cases have already been finally decided or settled. For a discussion of consumer detriment, please refer to section 5