

Green Paper on Consumer Collective Redress – Questions and Answers

I. THE ISSUE

1. What is redress?

Consumers have adequate redress if they can require a trader to compensate a loss they have suffered and which was caused by a breach of law by the trader. Consumers may seek redress either in courts or out of court, for instance through mediation or arbitration organised by trade organisations or public authorities.

2. What is consumer collective redress?

Collective redress is a mechanism to seek redress when multiple consumers are harmed by the same or a similar practice of a trader (e.g. by regularly overcharging all their customers). There are different ways to make this possible. For example, consumer organisations could bring the cases to court on behalf of a group of consumers. In the EU, 76% of consumers would be more willing to defend their rights in court if they could join together with other consumers.

3. What is the problem?

Since mass consumer markets expand in size, very large numbers of consumers can be harmed by the same trader. Consumers can always go to court to obtain individual redress. Mass claims could then in principle be resolved with a large number of individual claims. However, when consumers affected by a malpractice want to pursue a case, they face substantial barriers¹ which prevent them from getting effective redress. First, high litigation costs: the legal and expert fees paid by the consumers who decide to go to court may sometimes be much higher than the compensation they might eventually receive. What is more, judicial procedures can be very complex and lengthy, which discourages consumers from trying to defend their rights in court. A Eurobarometer survey² confirms that only 30% consumers think that it is easy to solve disputes through courts. In addition, consumers simply do not know about the different means of redress available.

In mass claim cases affecting a very large number of consumers, the harm for individual consumers may be low, for example when they are overcharged by just a few euros. But if a company, e.g. a large supplier of energy to households, overcharges each of its customers by a few euros, the total harm to society will be much higher.

¹ Cf. Study regarding the problems faced by consumers in obtaining redress for infringements of consumer protection legislation, and the economic consequences of such problems (Problem Study), p.42, http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm

² EB survey on Consumer Protection in the Internal Market, September 2008

Problems of access to easy and affordable redress increase when consumers shop cross-border. Consumers feel even less confident and secure than before their national courts. When asked about the problems they might encounter when shopping across borders, consumers rated highest the difficulties of resolving problems (33%)³.

4. What is the current situation?

Naturally, all Member States have judicial procedures allowing individual consumers to bring their cases to court. But only 13 Member States (France, Germany, Finland, Sweden, Denmark, Bulgaria, Greece, the Netherlands, Italy, Spain, Portugal, Austria and the UK) have introduced collective redress schemes in their legal system, some of them only very recently. Mediation or arbitration schemes can provide consumers with easy and affordable redress. They exist in Member States to different extents and their success varies. In any case, their success is dependent on the willingness of the trader to use this mechanism. Only 39% of European consumers believe that resolving disputes with a trader through an alternative dispute resolution (ADR) scheme is easy.⁴

In the case of small claims, a number of Member States put in place court procedures which are more flexible. For example, under these improved procedures it is easier to provide evidence, which in turn speeds up judicial procedures and lowers their costs.

All Member States also have schemes in place allowing public authorities or consumer organisations to put an end to a breach of consumer protection law by a trader. However, 37% of European consumers do not trust public authorities to protect their rights.⁵

For more details on the situation in the different Member States please see: http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm.

5. What is the experience of the national collective redress schemes?

A study launched by the Commission shows that the 13 national collective redress schemes are very different from one another. In some countries, the systems were created only very recently and the number of reported cases in these countries is too low in order to be able to draw conclusions. Those schemes for which a longer experience exists all have their strengths and weaknesses. Strengths include e.g. no or low litigation fees for consumers or for consumers' representatives. Weaknesses include the financial risk consumer organisations have to face when taking such actions or the difficulties of effectively distributing the proceeds of an action.

According to a study launched by the Commission, the existing national collective redress mechanisms have only been applied in a few cases in recent years. For example, the lowest number of consumers using a collective redress mechanism is in Germany where on average only four in ten million people every year have participated in redress action.

The collective redress scheme that reached the most people in a single case is in Portugal where a case against a telecommunication company gave redress to some 3 million consumers affected by the same overcharging. The Portuguese telecom case (see below 12.) gave redress to some 3 million consumers affected by the same overcharging. The compensation in the order of €70 million shows the potential harm that a large group of consumers can suffer.

³ See footnote 1

⁴ See footnote 1

⁵ See footnote 1

Overall, the studies indicate the average benefit to consumers in those Member States where collective redress exists ranges from €32 in Portugal to €332 in Spain. The results for the Netherlands were excluded as a few cases involving large companies and significant amounts distorted the figures.

II. EXPLORING SOLUTIONS

6. Why a Green Paper?

The Commission is open-minded about possible solutions to the problem. With the Green Paper, it intends to launch a wide consultation and debate on options to improve consumer redress in the EU when multiple consumers have been harmed by the same or a similar practice of a trader. The Green Paper is exploring how such redress could be made more affordable and more easily accessible.

7. What kinds of solutions is the Green Paper exploring?

The Green Paper is exploring four options.

The options are:

- taking no immediate action while continuing to monitor the impact of the national and EU systems which are already in place or are about to be implemented;
- setting up a cooperation scheme between Member States which would extend the protection of national collective redress systems to consumers from other EU countries and recommend to Member States which do not have a collective redress system to establish one;
- putting in place a policy mix of tools which can be either non-binding or binding. The option combines: promoting collective mediation or arbitration, - recommending to Member States that they allow consumers to bring small mass claims under their small claims procedure, - enabling consumer public authorities who are members of the EU enforcement network to require traders to compensate consumers or to skim off the profit of the traders (this would involve amendments to the Consumer Protection Cooperation Regulation), - encouraging business to improve complaint handling schemes and raising consumers' awareness of existing means of redress;
- proposing a non-binding or binding EU measure to ensure that a judicial collective redress procedure exists in all Member States. This would mean that every consumer throughout the EU would be able to obtain adequate redress in mass cases. The issues to be considered for this option include: - how the procedure would be financed, - the conditions under which consumer organisations or public authorities could bring a mass claim to court, - how unfounded claims could be prevented and - whether an opt-in procedure (consumers have to take action to join a court action) or an opt-out procedure (consumers are covered by a court action unless they decide to step out) is chosen.

These options as well as a combination of elements from different options could also be considered.

8. What is the solution?

Studies carried out by the Commission have shown that there is no easy answer to the problem. All the current redress systems have their strengths and weaknesses and no single mechanism is ideal for all types of claims. The Green Paper explores all possible options on how to address the issue. The consultation on the options or combination of elements from different options should enable the Commission to define the appropriate response.

9. Is the Commission considering US-style class action?

US style class action is not envisaged. EU legal systems are very different from the US legal system which is the result of "toxic cocktail" - a combination of several elements (punitive damages, contingency fees, opt-out, pre-trial discovery procedures).

- **Contingency fees:** this means that the consumer only pays the costs of the lawyers' fees but the lawyers get a significant percentage of the compensation granted if the consumer wins.
- **Punitive damages:** allows for the possibility of very high penalties in addition to the compensation granted which seek to deter the defendant from repeating the same malpractice
- **Pre-trial discovery:** this can force companies to disclose information before the trial which allows the plaintiffs' lawyers to find out if they really have a case – it can be abused and result in companies choosing to settle out of court simply to avoid the disclosure obligations
- And **Opt-out systems:** consumers which are victims of the same malpractice are included in an action independently of whether they want to, unless they opt out.

This combination of elements - "toxic cocktail" - should not be introduced in Europe. Different effective safeguards including, loser pays principles, the judge's discretion to exclude unmeritorious claims, and accredited associations which are authorised to take cases on behalf of consumers, are built into existing national collective redress schemes in Europe.

All the Green Paper options, and in particular a possible EU collective procedure outlined above, reflect EU legal traditions. The Commission seeks to encourage a competitiveness culture e.g. where businesses which play by the rules can realise their competitive advantages, not a litigation culture.

11. What is the impact on business?

Removing the unfair competitive advantage. Reputable business will suffer less from competitors who do not play by the rules and who profit unfairly at the expense of consumers and competitors. Why should companies suffer from unfair competition, for example misleading advertising and hidden charges, which allows competitors to make profits by breaking the law?

Legal certainty. There are new systems of collective action being introduced in different Member States – most recently in Greece, Denmark, Finland and Italy. All are different. A European solution will eliminate legal uncertainty with one EU wide system for the Single Market.

A more efficient redress system for settling large scale consumer complaints will - avoid the costs of settling multiple individual consumer complaints on the same issue.

Business who play by the rules have nothing to fear from more effective systems for handling large scale consumers complaints – and to gain in terms of a fairer more competitive market.

III. SCOPE OF THE GREEN PAPER

12. What kinds of practices does the Green Paper address?

The Green Paper addresses illegal commercial practices. The main target is to provide consumers with redress if their basic rights are violated. These rights include for example the right not to be misled by unfair advertising or wrong information, the right not to be overcharged or tricked by unfair contract terms in small print. The exact scope of the illegal practices that the Green Paper addresses is still to be determined after the consultation. The following examples illustrate some of the illegal practices that could be covered:

- A Dutch bank sold to 400.000 customers from various Member States a financial product the profits of which were supposed to reimburse a loan. The bank did not warn consumers explicitly and clearly about the risks involved in buying these financial products. A settlement between 165.300 Dutch clients and the bank was reached, providing partial compensation for the clients totalling €1.5 billion; foreign clients were not included in this compensation.
- A German company offered a supposedly free-of-charge internet lottery on several internet sites. The internet application included a provision written in very small characters which stated that after a certain period the service would automatically continue subject to charges. At the request of a German consumer organisation, a German court declared the practice unfair. However, due to the small loss suffered by consumers individually, very few of them chose to seek reimbursement.
- An Irish insurance company charged its insured clients €25 each when they changed their policy (for example when insuring another car) - without any notification in the policy documents. The Ombudsman ruled that the insurance company had to refund not only the single consumer who started the action, but every insured person who had been charged that fee during the last six years. The company appealed to the High Court, where the judge decided that the power of the Ombudsman was confined to the individual consumer who had complained. Only the individual consumer who had complained was reimbursed.
- A group of consumers in Portugal took action against a telecom company which had charged its 3 million clients a 'start-up fee'. Following their joint complaint, the Lisbon Court ruled that the charge was illegal and had to be refunded to the clients. The compensation awarded to consumers has been in the order of €70 million.

An action initiated by the Swedish Ombudsman is currently on-going against an energy supplier. The company failed to supply electricity to 7.000 consumers at the price agreed in the contract – allegedly raising the price agreed in a fixed contract.

13. What practices are not addressed in the Green Paper?

The Green Paper does not address breaches of competition law. These practices are covered by the Commission White Paper on damages actions for the breach of EC antitrust rules adopted in April 2008. For example, the UK competition authority fined nine companies for unlawfully fixing the price of a range of replica football shirts between 2000 and 2001. A UK consumer organisation estimated that around 2 million consumers had been harmed by the cartel and started a collective claim for damages against one of the company involved in the cartel.

For more information on the White Paper on damages actions for the breach of EC antitrust rules, please visit:

<http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/515&format=HTML&aged=1&language=EN&guiLanguage=en>

<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/08/216&format=HTML&aged=0&language=EN&guiLanguage=en>

14. Which sectors are the focus of the Paper?

The Green Paper does not focus on any particular sectors. However, a study carried out by the Commission identifies sectors where consumers find it most difficult to obtain redress for mass claims. These sectors are financial services (39%), telecommunication (12%), transport (8%) as well as package travel and tourism (7%).

IV. WHAT IS NEXT?

15. What is the timeline for consultations?

Interested parties can provide comments on the Green Paper up until 1st March 2009.

16. How can interested parties give their comments?

Comments can be sent to the Commission using the following address: SANCO-Consumer-Collective-Redress@ec.europa.eu

17. What are the next steps?

The Commission will examine all the contributions received and will publish a summary in the first half of 2009. On the basis of the outcome of the consultation, the Commission will decide on the next step.

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