CEA response to the European Commission’s consultation “Towards a Coherent European Approach to Collective Redress”

CEA Key Messages on the EC’s consultation on collective redress

- There is no case for a European collective redress system
  - **Prerequisite**: transferability of the individual case to a multitude of cases
    The prerequisite for a collective redress system at EU level is the transferability of the individual case to a multitude of cases that have the same factual and legal background. However, this is generally not possible for claims in the insurance sector, eg typically for personal injury claims, which cannot be easily bundled as they necessarily require an individual assessment. Furthermore, the complexity of the applicable law constitutes an obstacle which may not be overcome under existing international private law. Closely linked to the question of the applicable law, the question of the jurisdiction will lead to as much complexity. There are already a number of EU measures that enable consumers to enforce their rights. It would therefore be reasonable to await their effects in order to see their practical value.

- Thorough impact assessment needed
  The need for an EU-wide collective redress system capable of handling mass claims has not been established by the Commission and further detailed assessment is imperative before any initiative is taken in this area.

- Improvement of consumer awareness about existing alternative dispute resolution systems
  A priority should be to improve consumer awareness of existing ADR systems before introducing any new procedure at EU level. The CEA is willing to contribute accordingly and makes concrete proposals in this regard in its response to the recent EC consultation on ADR.
Safeguards needed for an EU collective redress system
If, however, the EC decides to establish an EU wide collective redress system, adequate safeguards are necessary and should have the following features:
- an opt-in system
- the « Loser pays » principle
- only non profit designated organisations should be entitled to bring collective redress actions.

Features to be excluded from any EU collective redress system
The following features should in any case be excluded:
- punitive damages
- recovery of unlawful profits beyond the compensation of the damage suffered
- contingency fees
- the creation of a fund financing future collective redress claims.

ADR schemes to be preferred
ADR should always be preferred to a judicial procedure, which should be a last resort solution. The usage of ADR systems should be encouraged as a valuable alternative to court proceedings. Preference for ADR schemes is also the view shared by consumers, as shown in the European Commission’s 5th Consumer Conditions Scoreboard of 11 March 2011. According to this Scoreboard, European consumers prefer to use ADR to obtain redress rather than go to court. More specifically, 48% of them believe that it is easier to resolve disputes through ADR mechanisms.

The CEA supports conciliatory solutions of disputes as they offer a flexible, cost-efficient and fast settlement procedure and, due to their nature, are less confrontational for the parties than court proceedings. They also help keeping legal expenses at a minimum, which the CEA highlighted in its response to the recent EC consultation on ADR. The CEA therefore recommends awaiting the results of the ongoing consultation on ADR in order to assess the practical value of ADR and allow for greater consistency between these different initiatives.

1 See paragraphs 13 and 95 of the Scoreboard:
1. INTRODUCTORY REMARKS

The CEA welcomes the opportunity to respond to the European Commission’s consultation “Towards a Coherent European Approach to Collective Redress” (SEC(2011)173 final). The CEA would like to take this opportunity to reiterate its support for consumers’ access to effective redress in cases where their rights have been violated. The CEA believes that consumers should always be able to obtain satisfactory compensation if their rights have been violated. However, the possible introduction of a collective redress system at EU level raises several issues:

1.1. The need for an EU-wide collective redress scheme not demonstrated

Any EU initiative to ensure an effective consumer redress system must be appropriate and necessary to tackle an identified problem. We believe that the need for an EU-wide collective redress system dealing with mass claims at EU level has not yet been proved. Any redress system must meet the objective of providing significant benefits for consumers, while at the same time respecting the principles of subsidiarity and proportionality. According to these principles, the European Union has the competence to take initiatives to implement cross-border solutions only where the objectives of the proposed action cannot be sufficiently achieved by the Member States and such EU action shall not exceed what is necessary to achieve the objectives of the Treaties. The evidence that an EU-wide collective redress mechanism would improve consumers’ access to justice has not been established. Therefore, the feasibility and the benefit to consumers of an EU collective redress system need to be more carefully and thoroughly assessed.

1.2. Specificities of the insurance sector

The debate on the insurance sector is complex, since insurers could be involved:

- as a defendant
- as a provider of general liability insurance for the defendant, or
- as a potential provider of legal expenses insurance for the claimant.

As a defendant, the CEA wishes to emphasise the fact that different individual insurance claims cannot be bundled into one class of claims. Thus, with regard to collective redress schemes in the insurance sector, practical difficulties would arise in defining uniform solutions for specific contractual situations.

It is likely that the insurance industry will be mainly affected as a provider of general liability insurance for the defendant. Therefore, the CEA has analysed the suggested design options primarily in view of insurability.

Whenever general liability insurance has to adapt to a new legal environment, it is of utmost importance for the consumer and the policyholder that there is sufficient insurance cover and sufficient choice between providers on the market. The CEA considers that there is no doubt that the introduction of EU collective redress mechanisms would have repercussions for the professional liability insurance market, as it would:

- increase the frequency of claims (particularly small claims that may otherwise not proceed)
- increase serial losses, and therefore
- increase the risk in a meaningful way.

This will also have an impact on premiums: as the totality of the risk is not transferable to insurers, the part of the risk which is not transferred would have to be supported by professionals who, in turn, would have to pass an increase on to consumers.
We believe that the complexity of the applicable law and jurisdiction constitutes an obstacle to any collective redress system at EU level. The collectivisation of claims requires the substantive liability rules of the area concerned to be based on constituent facts which can be generalised and allow homogeneous decisions on facts and legal issues.

1.3. Nature of the problem

Cross-border activity is still relatively low in the insurance industry. Insurance is a purely legal product and, due to different design and legal frameworks, consumers prefer purchasing national products and thus choose local providers. Other factors which determine consumer choice include language and cultural barriers, or simply differences in consumer demand in different Member States. As a result, there have been very few cross-border cases registered with FIN-NET. Therefore, the CEA currently would consider any European measure disproportionate to the number of cases. The CEA is rather aiming at a solution which fits best with existing national mechanisms. Therefore, a thorough analysis of existing complaint systems and a dialogue with the ADR schemes in the various Member States is essential.

As already stated in the CEA’s response to the Green Paper on collective redress and to the follow-up to the Green Paper, the main obstacle to cross-border claims remains the complexity of applicable law and rules on jurisdiction. In a cross-border case involving different EU nationals, the laws of several Member States will have to be applied, which significantly affects the aggregation of claims. In the insurance sector, it is unlikely that a cross-border class of claimants would be able to allege the same legal infringement, since insurance advice is given on an individual basis and insurance claims cannot be aggregated on the basis of the same facts and legal grounds.

Legal uncertainty regarding the applicable law and limited knowledge of foreign law are also important factors restricting the cross-border provision of services by insurance companies. A trader can face enormous difficulties in determining the applicable law and adapting terms and conditions of products to the local market.

2. POTENTIAL ADDED VALUE OF COLLECTIVE REDRESS FOR IMPROVING THE ENFORCEMENT OF EU LAW

Q 1 What added value would the introduction of new mechanisms of collective redress (injunctive and/or compensatory) have for the enforcement of EU law?

The CEA agrees with the European Commission’s objectives to ensure consumers’ access to effective means of redress. However, we deem it important to stress that the introduction of a new system at EU level does not necessarily provide for an improvement of consumers’ access to justice.

First, the CEA believes that the European Commission should await the results of the ongoing consultation on ADR before taking any further action on collective redress.

Second, the national and European regulatory framework for consumer law enforcement already provides for several mechanisms which consumers can use effectively.

At national level, most collective redress mechanisms that currently exist were introduced only recently (2005-2009), and therefore more time should be given to these systems to gain sufficient experience to allow for a comprehensive assessment of their functioning. As the Commission acknowledges in its 2009 Consultation paper
on the follow-up to its Green Paper on Consumer Collective Redress, the collective redress mechanisms analysed in the 2008 Evaluation Study forming the basis for defining the scale of the problem “have been put in place rather recently and experiences are still fairly limited.” This is particularly evident from the fact that the study is based on 326 cases collected over 10 years in 8 Member States which have had judicial collective redress mechanisms in place for more than two years – this equates to 32.6 cases per year, of which only 10% had a cross-border element, thereby giving an average of 0.4 cases with a cross-border element per country and per year. Thus, only after careful and extensive examination of the existing national systems can the question as to whether these systems provide efficient means of redress to the benefit of consumers be answered.

At EU level, there are already a number of EU measures which allow consumers to enforce their rights (a Regulation establishing a European Small Claims Procedure, the Consumer Protection Cooperation Regulation, the Injunctions Directive, the Mediation Directive, two Recommendations on ADR, ECC-Net and FIN-NET). Some of these EU initiatives were also introduced only recently. As the Commission is mandated to report on their functioning and application, it would therefore be reasonable to await these reports and to assess the effects and practical value of these measures.

Q 2 Should private collective redress be independent of, complementary to, or subsidiary to enforcement by public bodies? Is there need for coordination between private collective redress and public enforcement? If yes, how can this coordination be achieved? In your view, are there examples in the Member States or in third countries that you consider particularly instructive for any possible EU initiative?

At national and EU level, there is already a strong supervisory architecture in place, which ensures effective and efficient consumer protection in the insurance sector. The CEA therefore doesn’t see the need for any further enforcement by public bodies, which would weaken the existing instruments in the various Member States.

Private collective redress should never be used for the purpose of enforcing public law. The purpose of private redress is simply to gain compensation for meritorious claims.

Q 3 Should the EU strengthen the role of national public bodies and/or private representative organisations in the enforcement of EU law? If so, how and in which areas should this be done?

The CEA would like to reiterate that there is no need for any EU collective redress scheme as solutions already exist at national level.

If, however, such a scheme is adopted at EU level, then it should in any case be ensured that only non-profit organisations that fulfil certain conditions are entitled to enforce EU law, as follows:

If the action is being brought by a third party on behalf of affected consumers, it is important that the third party be a designated body whose principal activities are consumer advocacy and/or consumer advice. In order to avoid unmeritorious claims, the designated body should meet a number of criteria which guarantee the impartiality, independence and integrity of that body. It must firstly be able to demonstrate that it represents the interests of consumers, which may be the interests of consumers generally or of specific groups of consumers. The body must also be non-profit, as profit motivations have the potential to provide incentives to pursue claims that are in the interest of the organisation itself, rather than that of consumers. The additional advantage of a non-profit organisation is that it has no interest in extending the length of proceedings, but aims at a quick settlement in the consumers’ interest.

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The non-profit organisation should also be recognised by a state body so that its professionalism is guaranteed in the consumers’ interest. The certification by a state body guarantees that the organisation acts in the general public interest. Each Member State should define an exhaustive list of designated bodies, and an open list of certification criteria should be avoided to discourage the establishment of *ad hoc* or occasion-driven bodies. The relevant certification criteria should be strict and met by designated bodies on a continuous basis.

The designated body must be able to individually identify affected consumers and determine whether they wish to participate in the action. It must also be in a position to adhere to the “loser pays” principle. In order to comply with this principle, the designated body should have sufficient financial resources.

**Q 4** What in your opinion is required for an action at European level on collective redress (injunctive and/or compensatory) to conform with the principles of EU law, e.g. those of subsidiarity, proportionality and effectiveness? Would your answer vary depending on the area in which action is taken?

Any EU initiative to ensure an effective consumer redress must be appropriate and necessary to an identified problem. According to the principles of subsidiarity and proportionality as laid down in Article 5 of the Treaty on the Functioning of the European Union (TFEU), and as acknowledged by the Commission³, the European Union has the competence to take initiatives to implement cross-border solutions only where the objectives of the proposed action cannot be sufficiently achieved by the Member States and such EU action shall not exceed what is necessary to achieve the objectives of the Treaties. Hence, the CEA wonders if the EU has competence in this area. We further believe, however, that the evidence that collective redress mechanisms at EU level would improve consumers’ access to justice in this context has not been established. Therefore, the feasibility and the benefits for consumers need to be more carefully assessed.

**Q 5** Would it be sufficient to extend the scope of the existing EU rules on collective injunctive relief to other areas; or would it be appropriate to introduce mechanisms of collective compensatory redress at EU level?

As mentioned earlier, there are indeed already a number of EU measures which allow consumers to enforce their rights (European Small Claims Procedure, Consumer Protection Cooperation Regulation, the Injunctions Directive, the Insurance Mediation Directive, two recommendations on ADR, ECC-Net and FIN-NET). Some of these EU initiatives were introduced only recently. As the Commission is mandated to report on their functioning and application, it would therefore be reasonable to await these reports to assess the effects and practical value of these measures.

The Injunctions Directive (98/27/EC) grants the right to file an action for an injunction to all recognised entities that are included in the list of qualified entities established by the European Commission. Cases already brought under this Directive illustrate that it has contributed to the easier enforcement of consumer protection legislation in cross-border situations. The CEA has already highlighted the low level of cross-border insurance activity in the insurance sector, in line with the EC DG MARKT Europe Economics 2010 study on cross-border household and motor insurance⁴. In this study, it is explained that the lack of consumer demand for cross-border insurance products (specifically in motor and household) is because of associated problems with cultural and linguistic factors along with currency and payment differences. On the side of insurers, there is a lack of consumer demand to produce cross-border products, the worry about differing approaches in supervisory activity, strict data protection rules that could leave insurers subject to fraudulent activity, and the low switching rates of EU consumers between insurers.

³ Commission staff working document – Public consultation: Towards a Coherent European Approach to Collective Redress, page 5

However, any potential collective actions in this area would likely concern unfair contract terms. Thus, the most effective way of taking action at EU level to deal with such an issue in the collective interest would be to file an action for an injunction. Any other insurance-related claims would necessarily be individual in nature and therefore would be best resolved through ADR mechanisms.

Unlike in other sectors, and as rightly stated in the Commission’s 2010 consultation paper on the use of ADR as a means to resolve disputes (see §24), ADR schemes have been widely set up in the financial services area. These schemes have proved to work effectively and provide satisfactory redress for consumers. Most of these mechanisms are readily available and guarantee the independence and impartiality of the procedure, as they all comply with the principles laid down in the Commission Recommendations on ADR. Conciliatory resolution of disputes is the most cost-effective and quickest way to resolve disputes at both national and cross-border level, and provides an easier alternative to litigation.

Q 6 Would possible EU action require a legally binding approach or a non-binding approach (such as a set of good practices guidance)? How do you see the respective benefits or risks of each approach? Would your answer vary depending on the area in which action is taken?

Due to the great divergences between national systems, the CEA believes that only a non-binding approach is foreseeable in this area.

3. GENERAL PRINCIPLES TO GUIDE POSSIBLE FUTURE EU INITIATIVES ON COLLECTIVE REDRESS

Q 7 Do you agree that any possible EU initiative on collective redress (injunctive and/or compensatory) should comply with a set of common principles established at EU level? What should these principles be? To which principle would you attach special significance?

The CEA wishes to reiterate that the need for an EU-wide collective redress system capable of handling mass claims has not been established by the Commission and further detailed assessment is imperative. Furthermore, and as acknowledged by the European Commission, any new initiative should have to comply with the principles of subsidiarity and proportionality, as laid down in Article 5 TFEU. Moreover, an individual settlement of disputes should always be preferred to the settlement of mass claims. Individual problems require individual solutions, especially in the insurance sector where disputes relate to complex products, ie contracts.

However, should the Commission be fully convinced and satisfied on the basis of the evidence and data collected that there is a clear necessity for an EU-wide collective redress mechanism, the CEA believes that the following design features should be taken into consideration in the development of any such system:

- adequate safeguards are needed such as an opt-in system and the «Loser pays» principle, and only designated non profit bodies should be entitled to bring a collective redress action (see our responses under Q 20 to 24 for further details);
- ADR should always be preferred to a judicial procedure.
Q 8 As cited above, a number of Member States have adopted initiatives in the area of collective redress. Could the experience gained so far by the Member States contribute to formulating a European set of principles?

Q 9 Are there specific features of any possible EU initiative that, in your opinion, are necessary to ensure effective access to justice while taking due account of the EU legal tradition and the legal orders of the 27 Member States?

Q 10 Are you aware of specific good practices in the area of collective redress in one or more Member States that could serve as inspiration from which the EU/other Member States could learn? Please explain why you consider these practices as particular valuable. Are there on the other hand national practices that have posed problems and how have/could these problems be overcome?

Based on the principles of subsidiarity and proportionality as laid down in Article 5 TFEU as well as due to the diversity of legal traditions and legal frameworks at national level, the design of such initiatives should be left to the Member States’ discretion.

3.1. The need for effective and efficient redress

Q 11 In your view, what would be the defining features of an efficient and effective system of collective redress? Are there specific features that need to be present if the collective redress mechanism would be open for SMEs?

Again, the CEA sees no need for a collective redress mechanism at EU level. However, if such a system were to be introduced, then it should only be open to consumers, i.e. natural persons who are acting for purposes that are outside their trade, business craft or profession (see Article 2 of the proposed Directive on Consumer Rights). Any extension to SMEs would lead to legal uncertainty since the SME concept is defined differently in the different Member States. Moreover, the structure and size can evolve within a short timeframe and it would be administratively very cumbersome to assess every year which SME would fall within the scope of a collective redress mechanism.

Q 12 How can effective redress be obtained, while avoiding lengthy and costly litigation?

As already stated in previous position papers, the CEA considers that in any case, the use of ADR systems, rather than judicial proceedings, should be encouraged to resolve disputes between insurers and consumers. These mechanisms generally provide faster resolution of disputes for plaintiffs and defendants, help to keep legal expenses to a minimum and due to their nature, are less confrontational for the parties. The CEA appreciates the Commission's acknowledgement of this point in their consultation document on the use of Alternative Dispute Resolution as a means to resolve disputes related to commercial transactions and practices in the European Union⁵.

A number of national out-of-court redress mechanisms have been introduced by the insurance industry, and have been proven to work effectively and provide suitable redress for consumers. The majority of these mechanisms are readily available and guarantee the independence and impartiality of the procedure, as they all comply with the principles laid down in the Commission Recommendations on ADR. Conciliatory resolution of disputes is the most cost-effective and quickest way to resolve disputes at both national and cross-border level, and provides an easier alternative to litigation.

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⁵ European Commission Consultation Paper: on the use of Alternative Dispute Resolution as a means to resolve disputes related to commercial transactions and practices in the European Union, January 2010, paragraph 10
3.2. The importance of information and of the role of representative bodies

Q 13 How, when and by whom should victims of EU law infringements be informed about the possibilities to bring a collective (injunctive and/or compensatory) claim or to join an existing lawsuit? What would be the most efficient means to make sure that a maximum of victims are informed, in particular when victims are domiciled in several Member States?

Q 14 How the efficient representation of victims could be best achieved, in particular in cross-border situations? How could cooperation between different representative entities be facilitated, in particular in cross-border cases?

The CEA considers it important to inform the victims efficiently, but the way this should be done will depend on the design of the procedure, if introduced at EU level. However, from a general point of view, we believe that the information obligation should be on the claimants.

3.3. The need to take account of collective consensual resolution as alternative dispute resolution

Q 15 Apart from a judicial mechanism, which other incentives would be necessary to promote recourse to ADR in situations of multiple claims?

With regard to collective ADR, it should be noted that ADR systems in the insurance sector already cooperate at EU level within the framework of FIN-NET. However, improvement of consumers’ awareness of national ADR systems and FIN-NET is crucial. We are also considering the option of mandatory information about out-of-court settlement possibilities in the insurance contract.

As opposed to judicial procedures, conciliatory resolution of disputes is the most cost-effective and quickest way to resolve disputes at both national and cross-border level, and provides an easier alternative to litigation. This is why they should be preferred.

The CEA believes that the Commission should seek to build upon individual ADR schemes and look at how they differ between Member States. However, it remains to be seen how these individual ADR schemes can be collectivised and efficiently managed, and therefore further analysis from the Commission will be necessary, as it is difficult to provide detailed comment at this stage without knowing the design of such a system. The CEA suggests that the Commission consider contacting national ADR schemes in the Member States to seek their opinion and advice as to how best this might be achieved. This would be particularly advisable as ADR schemes have a limited role in many Member States and cannot decide on any legal issues that have not already been determined by a court. The CEA supports a system which will not interfere with the currently existing national systems, so that its effective functioning is guaranteed.

As there is an ongoing consultation on the use of ADR as a means to resolve disputes, the CEA would recommend awaiting the results of this process to ensure that a consistent approach is adopted between the different initiatives.

Collective redress should be restricted to those areas where the judicial enforcement of claims is not sufficiently ensured otherwise. The collectivisation of claims will only be possible if the substantive liability rules of the area concerned are based on constituent facts which may be generalised and allow homogeneous decisions on facts and legal issues.
The CEA also believes that an individual settlement of disputes should always be preferred to the settlement of mass claims. Individual problems require individual solutions, as provided by existing ADR systems, especially in the insurance sector where disputes relate to complex products, ie contracts.

Q 16 Should an attempt to resolve a dispute via collective consensual dispute resolution be a mandatory step in connection with a collective court case for compensation?

According to the CEA, in general any out-of-court settlement is preferable to a court proceeding, be it for consumers or for businesses. Conciliatory solutions of disputes are more particularly in the interest of consumers as they are more flexible, cheaper and faster than judicial litigation systems. Therefore, when the dialogue between a consumer and an insurer fails to find a satisfactory solution for both parties, the consumer should be encouraged to use an ADR mechanism before engaging in judicial proceedings. The CEA values positively all initiatives aimed at promoting the use of alternative means of redress. However, such use should remain optional and based on the free will of the parties.

The added value of ADR mechanisms for insurance disputes generally has been evidenced by the broad development of such systems. There are already a great number of different national out-of-court redress mechanisms and they have proved to work effectively and provide satisfactory redress for consumers. This is due among others to the fact that most of these mechanisms are free of charge for the consumer and guarantee the independence and impartiality of the procedure as they all comply with the principles laid down in the Commission Recommendations on ADR.

Moreover, ADR schemes as a consensus-based form of redress play an important role in improving the right perception of consumers regarding insurance. In this context, we believe that emphasis should also be placed on the promotion of dialogue between a dissatisfied consumer and his/her insurer rather than on the mandatory nature of the procedure. Consumers should be encouraged to try and resolve the dispute directly with the insurer before initiating any other dispute mechanism. In this respect, both sides should endeavour to find a satisfactory solution, and only if such a dialogue has failed, then the ADR system should provide a neutral platform for an out-of-court dispute settlement.

Q 17 How can the fairness of the outcome of a collective consensual dispute resolution best be guaranteed? Should the courts exercise such fairness control?

Q 18 Should it be possible to make the outcome of a collective consensual dispute resolution binding on the participating parties also in cases which are currently not covered by Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters?

Q 19 Are there any other issues with regard to collective consensual dispute resolution that need to be ensured for effective access to justice?

The general procedure fairness rules should apply here. Furthermore, the outcome of a collective consensual dispute resolution should not be made binding where they are the result of a purely consensual and voluntary procedure. In any case, insurers comply with the ADR decision, as being a member of the ADR scheme implies a commitment to do so and insurers are fully aware that not complying with an ADR scheme’s decision is likely to affect negatively their image and reputation, and thus to have a detrimental commercial impact.
3.4. Strong safeguards against abusive litigation

Q 20 How could the legitimate interests of all parties adequately be safeguarded in (injunctive and/or compensatory) collective redress actions? Which safeguards existing in Member States or in third countries do you consider as particularly successful in limiting abusive litigation?

Q 21 Should the "loser pays" principle apply to (injunctive and/or compensatory) collective actions in the EU? Are there circumstances which in your view would justify exceptions to this principle? If so, should those exceptions rigorously be circumscribed by law or should they be left to case-by-case assessment by the courts, possibly within the framework of a general legal provision?

Q 22 Who should be allowed to bring a collective redress action? Should the right to bring a collective redress action be reserved for certain entities? If so, what are the criteria to be fulfilled by such entities? Please mention if your reply varies depending on the kind of collective redress mechanism and on the kind of victims (e.g. consumers or SMEs).

Q 23 What role should be given to the judge in collective redress proceedings? Where representative entities are entitled to bring a claim, should these entities be recognised as representative entities by a competent government body or should this issue be left to a case-by-case assessment by the courts?

Q 24 Which other safeguards should be incorporated in any possible European initiative on collective redress?

The CEA has identified several safeguards that would be needed if an EU collective redress mechanism was introduced at EU level. Furthermore, the CEA would like to highlight the features that should in any case be avoided in that case.

- Safeguards needed

The aim for a collective redress system must be compensation of harm for the victims. Regimes that encourage the introduction of unmeritorious claims and fees should be avoided. Therefore, if an EU-wide collective redress mechanism is introduced, the CEA believes that the following safeguards are necessary:

- Opt-in

The CEA believes that an “opt-in” system is the best solution for consumers, as this is the only system that complies with the principle of consumer choice since the consumer can decide whether he/she wishes to join a collective redress action. In addition, the number of claimants is known to the defendant and the compensation can be assessed according to each individual’s loss. The “opt-in” system thus ensures that the consumer is compensated adequately for his/her loss and also allows the defendant to assess his potential liability, which in turn allows him to make a determination as to whether the claim should be settled, go through an ADR process or be litigated. For the insurance sector, it is of primary importance to know the number of claimants and quantum of damages beforehand. This is true not only for legal expenses insurers, who cover the legal expenses of their clients, but also for liability insurers of the defendants and insurance companies, which may get involved in collective actions themselves. Furthermore, the “opt-in” system complies with Art. 6 of the European Convention on Human Rights, which is enshrined in the constitutions of many Member States, and is also consistent with ordinary procedures to commence legal proceedings.

- Non-profit designated organisation

As already explained under Q3, if the action is being brought by a third party on behalf of affected consumers, it is important that the third party be a designated body whose principal activities are consumer advocacy and/or
consumer advice. In order to avoid unmeritorious claims, the designated body should meet a number of criteria which guarantee the impartiality, independence and integrity of that body. It must firstly be able to demonstrate that it represents the interests of consumers, which may be the interests of consumers generally or of specific groups of consumers. The body must also be non-profit, as profit motivations have the potential to provide incentives to pursue claims that are in the interest of the organisation itself, rather than that of consumers. The additional advantage of a non-profit organisation is that it has no interest in extending the length of proceedings, but aims at a quick settlement in the consumers’ interest.

The non-profit organisation should also be recognised by a state body so that its professionalism is guaranteed in the consumers’ interest. The certification by a state body guarantees that the organisation acts in the general public interest. Each Member State should define an exhaustive list of designated bodies, and an open list of certification criteria should be avoided to discourage the establishment of ad hoc or occasion-driven bodies. The relevant certification criteria should be strict and met by designated bodies on a continuous basis.

The designated body must be able to individually identify affected consumers and determine whether they wish to participate in the action. It must also be in a position to adhere to the “loser pays” principle. In order to comply with this principle, the designated body should have sufficient financial resources.

- **The “loser pays” principle**

The “loser pays” principle should be applied so as to avoid unmeritorious claims and the risk of financing collective actions with funds created to this end. Claimants should indeed bear their share of legal costs or the costs related to out-of-court settlement procedures.

- **Compensation**

The compensation to be paid has to be assessed according to national civil law. This means especially compensation according to the principle of *restitutio in integrum* (i.e., restoration of the victim’s original condition), which is enshrined in the national civil law of all Member States.

- **Funding**

Funding options can be divided into public and private funding. Public funding should be avoided so that a claims culture is not encouraged. Private funders are among others legal expenses insurers. Legal expenses insurance covers the claimant’s potential costs of various kinds of legal action on a permanent long-term basis. However, whether the legal expenses insurers could cover the risks associated with a European-style collective redress in the future depends largely on the way the collective redress system is designed. It is, for example, of primary importance for legal expenses insurers to know the number of claimants beforehand, so they would therefore consider opt-in as the only solution in order to offer a relevant cover at an affordable cost for consumers.

- **The role of the competent body/judge**

Empowering the competent body (ADR) or the judge (judicial procedure) to admit or deny the collective status of the claim could be a means of guaranteeing that unmeritorious claims are avoided and that a claims culture is not encouraged. The competent body/judge must, in particular, assess whether the claim of each member of the class arises out of a common factual and legal scenario, and whether such claims are so small that it is not in the interest of justice that they are taken to court as individual actions. Furthermore, the competent body/judge needs to assess carefully whether the individual claim has merit and can be accepted into the class, and should
therefore apply appropriate mechanisms to identify unmeritorious claims at the earliest opportunity. Moreover, the competent body/judge should take the decision as regards the costs of procedure in line with the “loser pays” principle.

### Features to be avoided

In any case, the following features should be excluded from any EU collective redress procedure:

- **Punitive damages**  
  The aim of a collective redress scheme should only be to ensure compensation for consumers and not to penalise the industry. Punitive damages must therefore be prohibited.

- **Recovery of unlawful profits beyond the compensation of the damage suffered**  
  As mentioned above, compensation should be limited to the restoration of the victim’s original condition (*restitutio in integrum*). Any system providing for the recovery of unlawful profits beyond this compensation would create an incentive for unmeritorious and vexatious claims, which should be avoided.

- **Contingency fees**  
  The costs of proceedings should be reasonable for both the defendant and the plaintiff. In this context, the CEA is against any kind of contingency fee system. The enforcement of individual legal rights should not be abused by third parties.

- **The creation of a fund financing future collective redress claims**  
  The creation of public funds which are solely dedicated to consumer collective redress carries the risk of creating a litigation culture and thus of jeopardising free trade and industry, ultimately to the detriment of consumers.

### 3.5. Finding appropriate mechanisms for financing collective redress, notably for citizens and SMEs

**Q 25** How could funding for collective redress actions (injunctive and/or compensatory) be arranged in an appropriate manner, in particular in view of the need to avoid abusive litigation?

In order to avoid any abuse of the collective redress system, it is important that the consumer is not allowed to join a collective action at no cost, as this acts as an incentive for unmeritorious claims. However, it also needs to be ensured that any procedural costs are not disproportionate to the amount in dispute, so that the consumer is not hindered from enforcing his rights. The “loser pays” principle would therefore strike a balance between the interests of both consumer and industry, while at the same time treating individual claimants and claimants of collective redress systems equally.

**Q 26** Are non-public solutions of financing (such as third party funding or legal costs insurance) conceivable which would ensure the right balance between guaranteeing access to justice and avoiding any abuse of procedure?

Private funders are, among others, legal expenses insurers. Legal expenses insurance covers the claimant’s potential costs of various kinds of legal action on a permanent long-term basis. However, as already explained, whether legal expenses insurers could cover the risks associated with a Europe-wide collective redress system in the future depends largely on the way such a system is designed. It is, for example, of primary importance for...
legal expenses insurers to know the number of claimants beforehand, so they would therefore consider opt-in as the only solution in order to offer a relevant cover at an affordable cost for consumers.

Q 27 Should representative entities bringing collective redress actions be able to recover the costs of proceedings, including their administrative costs, from the losing party? Alternatively, are there other means to cover the costs of representative entities?

In order to avoid unmeritorious claims, only non-profit organisations should be entitled to bring collective redress actions (see our response under item 3.4) and the “loser pays” principle should apply, ie that claimants should bear their share of legal costs or the costs related to out-of-court settlement procedures.

Q 28 Are there any further issues regarding funding of collective redress that should be considered to ensure effective access to justice?

In the event that an individual withdraws from the collective redress action, this individual plaintiff should reimburse the proportionate costs incurred. This solution could help in reducing the potential free-rider problem. Additionally, in case a claim is not admitted by the court, the plaintiff should reimburse the defendant all the costs arising out of the claim so far, eg for the statement of defence.

The number of lawyers representing the plaintiffs should be limited in order to achieve the economic benefits normally associated with collective redress. The introduction of a collective redress system should not encourage Member States to introduce contingency fees since they provide for increased litigation culture and reduce consumers’ compensation. The enforcement of individual legal rights should not be open to abuse by third parties.

3.6. Effective enforcement in the EU

Q 29 Are there to your knowledge examples of specific cross-border problems in the practical application of the jurisdiction, recognition or enforcement of judgements? What consequences did these problems have and what counter-strategies were ultimately found?

Q 30 Are special rules on jurisdiction, recognition, enforcement of judgments and/or applicable law required with regard to collective redress to ensure effective enforcement of EU law across the EU?

Q 31 Do you see a need for any other special rules with regard to collective redress in cross-border situations, for example for collective consensual dispute resolution or for infringements of EU legislation by online providers for goods and services?

The differences in applicable law constitute an obstacle for collective redress since the requirement of same legal background cannot be applied to cross-border disputes arising between consumers and the insurance industry.

The law applicable in collective redress cases should be the law of the Member State where the defendant resides rather than that of the market most affected. This rule respects the defendant’s proximity to the legal system which he is familiar with. Application of the law of the defendant would have the additional advantage that international competence of courts and applicable law converge (both stem from the same jurisdiction). This makes the handling by the courts much easier as courts usually do not have requisite knowledge of foreign law, or are at least reluctant to apply it.

A rule allowing the application of the law of the market most affected brings legal uncertainty and may lead to different results according to the personal preference of judges at different courts. The law of the market most
affected is also not foreseeable for the defendant at the moment he acts initially and therefore cannot give him guidance in respect of how to act and behave correctly. It is only applied to a case retrospectively and therefore leads to a situation that a case is judged according to rules different from those the defendant could and should respect when acting.

For collective consensual dispute resolution in cross border situations there are already existing mechanism like FIN-NET. It is a valuable instrument in a cross-border dimension and has proven its efficiency. The success is due to the fact that it is independent, transparent, confidential and cost-efficient.

However, the CEA believes it is not necessary to create a centralised Online Dispute Resolution (ODR) for cross-border e-commerce transactions. It is better to rely on - and further improve - existing mechanisms dealing with cross-border consumer complaints. Furthermore, both the EEC-NET and FIN-NET are already accessible through the Internet.

Q 32 Are there any other common principles which should be added by the EU?

The CEA has no further comments on any other principles which should be added in this context.