Consultation Response

Friends of the Earth Europe (FOEE) campaigns for sustainable and just societies and for the protection of the environment, unites 30 national organisations with thousands of local groups and is part of the world’s largest grassroots environmental network, Friends of the Earth International.

FOEE promotes environmentally sustainable societies on a local, national, regional and global level. This work aims to protect the earth against further deterioration and to repair damage inflicted upon the environment by human activities and negligence, whilst also preserving ecological, cultural and ethnic diversity. FOEE works to ensure increased public participation and democratic decision making, both as an end in itself and also as a fundamental part of protecting the environment and managing natural resources. In this way FOEE works to achieve environmental, social, economic and political justice and equal access to resources and opportunities for men and women on the local, national, regional and international levels.

Specifically FOEE aims to influence European and EU policy and raise public awareness on environmental issues by providing institutions, media and the public with regular information via a wide range of campaigns, publications and events. It supports the broader Friends of the Earth network with representation, advice and coordination in European and EU policy making, and sharing of knowledge, skills, tools and resources. This enables people to participate in its international campaigns through local activist groups and national organisations in 30 European countries.

QUESTIONS:

Q1 What added value would the introduction of new mechanisms of collective redress (injunctive and/or compensatory) have for the enforcement of EU law?

The enforcement of (not just EU) law is undermined by several factors that collective redress mechanisms can mitigate:
1. Public authorities are unable to enforce the law because they lack resources, expertise, or will, or because they are exposed to political pressure. Public authorities may also lack the competence to demand compensations on behalf of victims.

2. The victims of illegal behaviour do not attempt to defend their rights because the litigation is too costly and takes too much time, in particular where the value of the claim is too low, or because it is difficult to precisely determine the damage they have suffered which may affect their legal standing to file a lawsuit. The latter relates, in particular, to cases of damage to the values common to the whole society such as the environment.

Standards of law enforcement by public authorities vary in Member States and so does the availability of collective redress mechanisms. In result, the enforcement of EU law and the standards protection of EU citizens differ from Member State to Member State. Businesses operating in Member States with leaner enforcement of EU environmental law can enjoy unfair advantage if they abuse this situation.

Q2 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?

Collective redress mechanisms should be complementary to but independent of enforcement by public authorities. There are two main reasons for this. Firstly, public enforcement does not in itself enable individuals to be compensated for the damage suffered. Secondly, collective redress mechanisms can substitute dysfunctional enforcement by public authorities and protect public interests. This would obviously not be possible if collective redress is dependent upon public authority action.

With regard to the injunctive relief and the enforcement of the EU environmental law, a success of citizen suits in the enforcement of U.S. environmental and civil rights law is particularly instructive. Provisions in U.S. environmental statutes, such as the Clean Water Act and the Clean Air Act allow private citizens to file a lawsuit against another citizen or corporation to enforce these statutes if the enforcement authorities have failed to do so. It should be emphasized that citizen suits and class actions are different mechanisms.

The EU environmental law includes a different version of citizen suits which allows environmental NGOs to enforce a statute only against a public enforcement authority that has failed to fulfil its duty. This does not allow a timely and efficient redress and abatement of violations of the environment in such situations. Furthermore, the application of citizen suits is limited by the scope of the Environmental Liability Directive and does not cover all EU environmental law.

In any case, the option of public enforcement should not be used as an argument against allowing private enforcement. Firstly, access to justice is a fundamental right. Secondly, such an argument lacks any justification if it safeguards against abusive litigation.

Q3 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?

Yes. The EU law should provide harmonised standards for citizen suits enabling EU citizens and their representative organisations to enforce EU law, in particular where it concerns the protection of the environment and labour rights.
Q4 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?

The EU treaties provide, in our opinion, clear justification for EU action. As documented by the European Commission, the EU law is not implemented and enforced in a satisfactory manner. To conform with the principles of subsidiarity and proportionality, the prospective EU legislation on collective redress should define general principles of collective redress and leave details of the regulation to be set by Member States according to their legal traditions.

Q5 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?

Both approaches should be followed because they follow different, although mutually reinforcing, objectives.

Q6 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?

A legally binding approach is needed. A successful non-binding approach in this area is unprecedented. We doubt that it would in itself be able to stimulate Member States reaction.

Q7 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?
Yes.

The most important principle is a broad legal standing. Citizens and their organisations should not face restrictions if they wish to file a lawsuit protecting their rights and common values protected by law.

Furthermore, the redress should be effective and timely, that is, it must be directed against individuals and/or corporations that violated the law, and at the earliest possible time. Risks of high costs of litigation should be limited to prevent their chilling effect on law enforcement. In this respect, a system of legal aid should be considered, under specific conditions to be determined by the European Commission, as well as clear definitions of exceptions from the loser-pays principle.

Q8 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?

Yes, the EU has to take advantage of the experience of the Member States to see what is efficient and what is not, keeping in mind the specificities of legal and judicial systems of those Member States and the fact that the results could thus be different at the European level.

Q9 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?

See above and below.

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?

The Dutch legal order provides a broad legal standing to NGOs to file a lawsuit to enforce statutes protecting public interests that these NGOs promote. This mechanism improves significantly law enforcement while there is no evidence of proliferation of abusive litigation.

French criminal law allows victims of environmental damage, including environmental NGOs promoting and protecting the harmed environment, to request compensations that are not dependant on the impact on their property. These claims have been successfully raised in Total-Erika case in which company Total and several other companies were found liable by French courts for the breakdown of the oil tanker Erika near coasts of Brittany in 1999. [2] The introduction of “class actions” in the French legal order is currently being debated by a special commission of the French Parliament. The features of this action are being discussed and propositions are being made. One of the propositions plans to divide the collective redress action into two successive phases:

In the first phase, the plaintiffs would present some of the cases to the court so that the judge would be able to give a ruling on the responsibility of the defendant. At the end of the first phase, the judge would control the setting up of the organizations of victims. Such setting up would be based upon the following two principles: first, the victims are free to adhere; second, the judge sets the specifications
of adhesion and decides on how to inform the victims of these specifications so that they can adhere. Finally, when the judge receives the demands of the victims, he decides whether or not they conform to the specifications.

In the second phase of the procedure, the judge would appreciate the damages to be granted to the victims whose demands have been received. Although this procedure does not yet exist in France, such scheme seems to provide efficiency and it could thus be used to inspire the EU approach.

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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?

See above.

Collective redress should be:

- timely - i.e. not dependent upon enforcement by public authorities
- the action could be taken on behalf of victims by a representative organisation
- affordable - the Member States should establish adequate mechanisms for funding of group action proceedings should be made available and the legislation should define exceptions from loser-pays principle

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?

Access to justice is a fundamental right. Therefore, the greatest caution must be taken when considering if and how to limit it.

In general, cases where collective redress is at stake are characterised by a strong economic disparity between the alleged law-breaker and the victims. This factor itself discourages potential claimants from bringing their claims forward. Therefore, it would be a sufficient safeguard to limit the incentives for litigation, such as exceptions from the loser-pays principle, to the evidence of a strong economic imbalance between the parties.

To avoid abusive litigations, a specific and independent action against the loser could be considered. Such action exists in France where the person found responsible for abusive litigation can be fined. However, with regard to the injunctive collective redress actions raised by representative organisations, the experience with the Consumer Injunctions Directive does not support a conclusion that it is being abused. In general, we are not aware of any evidence, save anecdotal evidence, suggesting that the abuse of collective injunctive redress mechanisms is a real problem.

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?

Exceptions should be granted from the loser-pays principle, at least in cases where there is strong public interest in litigation. The conditions for exceptions should be circumscribed by law, however,
Courts should be able to assess whether the claimants meet those conditions. In this regard, the courts should look into the question whether the claim is or is not clearly unmeritorious. The decision about whether the claimants could benefit from exception from the loser-pays principle must be taken in the very initial stages of the trial, otherwise its practical impact would be neglected.

For example, in the Czech Republic the judge can relieve a losing party from paying the costs incurred to the winning party if he finds that there are 'important reasons' for such decision. However, because this decision is a part of the final judgement at the very end of the trial, it does not alleviate the risks for claimants and therefore it doesn't encourage would-be claimants to start litigation processes.

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).

Collective redress actions should be available to any individual or organisation that has suffered harm or impairment of their rights. Furthermore, civic organisations that aim to promote public interests protected by EU law should also be able to bring action. EU law already recognises right to bring an injunctive collective redress action by such bodies in the area of consumer law (against other private persons) and environmental law (against public authorities). Limitations of the legal standing of these organisations should be as minimal as possible.

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?

The law should define clear conditions while their fulfilment should be assessed by the courts. There is not a need for involvement of a government body. On contrary, a requirement to be recognised as an entitled entity by public authority creates room for discrimination against watchdog and whistle-blowing entities.

In any case, the conditions should be simple. The experience with applications of Consumer Injunctions Directive and Aarhus Convention show that a statement of protection of the public interest in the statute of the organisation is sufficient.

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?

See above. The courts should determine in the early stage of the trial whether the claimants have right to be protected against the costs of the litigation and/or to receive funding. The criteria for this determination should be the existence of a clear economic disparity between the parties of the dispute and the courts assessment that the claim is not clearly unmeritorious.

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?

Yes, this is a common principle. There is no reason to protect a defendant who was found to have violated the law, caused harm and refused to settle the case out of court.

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

Collective redress actions, at least those concerning injunctive claims by public interest organisations, could be funded from a fund financed from sanctions awarded to unsuccessful defendants.

In any case, the funding of collective actions should not be discouraging for individuals and they should benefit from financial aids similar to national aids if they cannot afford to pay the effective costs of the litigation (See above about the legal aid).

Q 33 Should the Commission's work on compensatory collective redress be extended to other areas of EU law besides competition and consumer protection? If so, to which ones? Are there specificities of these areas that would need to be taken into account?

Compensatory collective redress should have to cover all sectors where the mass damage due to the breaches of EU law is possible and not be limited to the areas of consumer law or competition. This would allow for example cases of loss of personal data or breaches of data protection, negligent financial advice to financial services users, environmental damage or breaches of employment rights to be tackled via collective claims.

A general approach to the collective claims is line with the spirit and principles and the text of EU treaties as well as with the international obligations of the EU.

With regard to the enforcement of EU Environmental law, environmental protection is one of the main objectives of the European Union (Article 3 TEU, Article 114 TFEU). The European Union institutions are under obligation to integrate it into all Union policies and actions (Article 7 and 11 TFEU). Furthermore, proper functioning of the internal market depends on effective enforcement of EU environmental acquis. In the present situation, European citizens on many occasions don't have effective and timely access to justice when they suffer harm resulting from breaches of EU environmental law and responsible European businesses have to face unfair competition.

The European law stipulates that European citizens should be guaranteed effective and timely access to justice (Article 9.3 of the Aarhus Regulation, Article 6 TEU and respective provisions of the European Convention for the Protection of Human Rights) and that the costs of the environmental harm should be borne by the polluter (Article 191 TEU).

Given the legal basis in the EU treaties and the complexity of subsequently developed EU environmental policies and legislation there is no legitimate reason for discriminating against claims based on the EU environmental law from claims based on breaches of provisions of EU consumer and competition law.
Q 34   Should any possible EU initiative on collective redress be of general scope, or would it be more appropriate to consider initiatives in specific policy fields?

In principle, the EU initiative should be of general scope.

Kind regards,

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