

FEEDBACK STATEMENT ON DRAFT CONSUMER COLLECTIVE REDRESS BENCHMARK CONSULTATION

DG SANCO has identified 10 draft benchmarks that should be respected by effective and efficient collective redress systems in order to ensure satisfactory redress for consumers:

1. The mechanism should enable consumers to obtain satisfactory redress in cases which they could not otherwise adequately pursue on an individual basis.
2. It should be possible to finance the actions in a way that allows either the consumers themselves to proceed with a collective action, or to be effectively represented by a third party. Plaintiffs' costs for bringing an action should not be disproportionate to the amount in dispute.
3. The costs of proceedings for defendants should not be disproportionate to the amount in dispute. On the one hand, this would ensure that defendants will not be unreasonably burdened. On the other hand, defendants should not for instance artificially and unreasonably increase their legal costs. Consumers would therefore not be deterred from bringing an action in Member States which apply the "loser-pays" principle.
4. The compensation to be provided by traders/service providers against whom actions have been successfully brought should be at least equal to the harm caused by the incriminated conduct, but should not be excessive as for instance to amount to punitive damages.
5. One outcome should be the reduction of future harm to all consumers. Therefore a preventive effect for potential future wrongful conduct by traders or service providers concerned is desirable – for instance by skimming off the profit gained from the incriminated conduct.
6. The introduction of unmeritorious claims should be discouraged.
7. Sufficient opportunity for adequate out-of-court settlement should be foreseen.
8. The information networking preparing and managing possible collective redress actions should allow for effective "bundling" of individual actions.
9. The length of proceedings leading to the solution of the problem in question should be reasonable for the parties.
10. Collective redress actions should aim at distributing the proceeds in an appropriate manner amongst plaintiffs, their representatives and possibly other related entities.

DG SANCO launched a public consultation on draft benchmarks asking stakeholders whether they

1. agree with these benchmarks;
2. consider other benchmarks to be important;
3. consider that more benchmarks or fewer benchmarks are necessary;
4. have experiences with existing mechanisms of collective redress, especially in relation to specific sectors and/or in relation to cross-border disputes.

DG SANCO received 70 contributions from consumer organisations, industry, legal practitioners and academics. This document summarises the various positions, starting with a summary overview of the positions followed by the positions grouped by benchmarks.

Summary overview of positions

Consumer organisations

The majority of consumer organisations consider DG SANCO's initiative to be constructive and useful. They believe that the proposed benchmarks could be helpful in identifying well-functioning systems in Member States and to develop an EU scheme for collective redress. However, the benchmarks should not be used to restrict or define the options of future debate and consultations.

Industry

Industry representatives appreciate the opportunity to provide the DG SANCO with feedback, and they are interested in active participation in further discussions on the best approach to be adopted in order to improve access to justice for European consumers. Nevertheless, they consider that the discussion about possible assessment criteria is rather premature, and they would have preferred to wait for the presentation of the results of the 2 studies launched by the Commission before specific criteria are established.

They support the Commission in its efforts to further investigate the efficiency of existing different consumer redress mechanisms across the EU before contemplating the introduction of any measures at EU level in this area.

They believe it would be wise to adopt a step-by-step approach in which a minimalist position is adopted initially, with the option of expansion if it is proven that consumers face difficulties in obtaining redress, in order to genuinely provide a valuable alternative approach for consumers without undermining the overall competitiveness of EU businesses.

The majority of business representatives criticise the proposed benchmarks, since they appear to them to be conceived only from the point of view of consumers. They express the need to balance the interest of the consumers in having better access to justice on the one hand with the interest of both the judiciary and the economy on the other hand in adequate safeguards to prevent unmeritorious claims.

They believe that collective redress mechanisms should be envisaged only as a matter of last resort, when consumers cannot adequately enforce their rights through individual judicial action or out-of-court redress.

Legal practitioners and academics

In general, legal practitioners support the proposed benchmarks. However, they wonder to what extent it is feasible to judge existing collective redress mechanisms by these benchmarks, given their very general nature.

Therefore, they ask DG SANCO to specify and give more precise details about some undefined concepts such as "*satisfactory*", "*disproportionate*", "*excessive*", "*appropriate*", and "*merit*", and to be clear in the definition of costs DG SANCO deals with in benchmarks 2 and 3.

The academics also welcome the initiative of establishing benchmarks and concentrate on the legal base of a possible EU instrument on collective redress. They come to the conclusion that Article 95 or 65 could be a legal base for a full harmonisation Directive on collective redress.

Positions grouped by benchmarks

- 1. The mechanism should enable consumers to obtain satisfactory redress in cases which they could not otherwise adequately pursue on an individual basis.**

Consumer organisations

They point out that even if collective redress is often used to allow consumers to take actions which would not have been possible or worthwhile individually because the costs may outweigh any damage compensation they may receive, this is not the only purpose of the introduction of an EU collective redress system. Instead, there is a variety of reasons (psychological, complexity of the case, efficiency, etc) that shows the benefit of a collective redress system.

If the formulation of the benchmark intends to suggest that all other avenues of redress (e.g. ADR mechanisms, individual actions etc.) must have been exhausted before such an action is undertaken, they would not agree.

They show a preference towards an opt-out model, because in their opinion an opt-in solution will not necessarily solve all the obstacles of civil procedure law designed for individual cases, and, at the same time the opt-in model will subject individual members who have opted into the group to a very large amount of individual requirements, with the risk of losing the genuine collective nature of the action.

Industry

The general industry impression of the assumption underlying DG SANCO's benchmarking exercise is that the existing consumer redress mechanisms do not work satisfactorily. They criticise this approach because the results of the Commission's review of the efficiency of existing consumer redress mechanisms are not yet available, and similarly the Commission has not waited to see the effects of recently passed EC legislation, such as the small claims procedure, before considering drafting new legislation.

Above all, the main concern for industry representatives is that a need for collective redress at the current time has not yet been proven.

There is a broad consensus that the US model should not be applicable in the European Union due to the diverging legal traditions in both jurisdictions.

The large majority believes that it is important not to undermine voluntary procedures whether these are ADR or Code of Conduct based. There should, therefore, be a minimum requirement that consumers have used these procedures or individual redress mechanisms at their disposal to solve their disputes before they are allowed to pursue redress through a collective mechanism. Collective redress should be the last resort, for situations where individual consumers cannot enforce their rights, as collective redress also bears negative effects for consumers and industry. The procedure itself might become more complex, negatively affecting the duration and costs of procedures. Also, plaintiffs face negative effects, when individual group participants have to accept decisions which are not adequate for their personal cases.

Contributors also consider that efficient cross border cooperation between national administrations entitled to fight against any form of unfair practices is the best way to protect consumers in cross border transactions and to remove rogue operators that try to take advantage of the very existence of a border to develop unfair practices without undergoing sanctions from the market. The principles of subsidiarity and better regulation must be respected, since civil procedural laws in the EU Member States are often different for

historical, cultural or other social reasons, and collective redress instruments, in order to be effective, must respect these differences.

If in the end an EU mechanism were to be adopted by the EU institutions, then it should only deal with cross-border disputes, in accordance with the principle of subsidiarity; settlements may realistically be introduced at various levels whereby consumers with high-value claims may proportionately receive less than the average consumer; in the absence of any real injury, the mere potential for damage should not be accepted as a cause of action.

In order to avoid legal uncertainty, the Commission is asked to clarify expressions they consider vague, such as “*satisfactory*” and “*adequately*”.

Legal practitioners and academics

The majority of contributors would want a clearer definition of what DG SANCO means by the term “*satisfactory*”.

They stress that it is important to limit the availability of a collective redress mechanism to those cases where it can be shown that pursuing a case individually is not the better option for both consumers and the judiciary.

They also point out that any new mechanism should not allow individual claimants to avoid the requirement that their individual case has to be proven.

The vast majority of the lawyers strongly affirm that a collective redress system should be limited to cross-border cases, as it is unclear whether a legal base would support applying an EU mechanism to domestic cases and also because they think that, in line with the principle of subsidiarity, it should be up to Member States to determine the shape of their own domestic legal systems.

They show a preference for the opt-in-principle, stressing that this is the only way to appropriately respect and guarantee the freedom of every single consumer to individually decide whether to pursue an action in a self-determined and active way.

One academic contributor suggests widening the wording of the benchmark in order to encompass all possible models including the activity of public authorities.

- 2. It should be possible to finance the actions in a way that allows either the consumers themselves to proceed with a collective action, or to be effectively represented by a third party. Plaintiffs' costs for bringing an action should not be disproportionate to the amount in dispute.**

Consumer organisations

They stress the importance of foreseeing an efficient funding mechanism, proposing various solutions such as a group action fund, third party financing (e.g. through insurance) or a fund to be financed by part of the damage compensation not distributed in previous cases. In the area of court and lawyers' fees, they see possibilities to reduce court fees, to allow contingency fees or to foresee special lawyer rates in cases of collective redress. They also mention loans which should not be repayable in the event that the client loses, whereas it should be recoverable from the other party if the plaintiff wins the case.

Industry

All contributors believe that the financing of the action should remain neutral and the plaintiffs in a collective action should fund it, possibly by using legal expense insurances or third party funding. Some criticise public funding of collective actions as encouraging a litigation industry.

In general they assert that normal litigation cost-allocation principles (i.e. general rules applied in the Member States) should apply and strongly support maintaining the “loser pays” principle in order to discourage speculative litigation. They propose that minor cases should be covered by means of simplified procedures or through arbitration.

With regard to third party representation of consumers, most industry representatives stress the need that the person/organisation entitled to represent a group of consumers pursues only consumer interests, so as to avoid the excesses observed in the United States. They propose limiting third party standing in court to representative consumer bodies (which could be the same as those recognised under the Injunctions Directive). It should also be required to demonstrate that the entity has sufficient financial resources to meet any liabilities that it may incur as a result of bringing the representative action. Some contributors affirm that, given the likely complexity of any collective complaint, it is in the public interest to require that parties must be represented by a lawyer.

Legal practitioners and academics

Some of the contributors stress the importance of strictly separating financing from the claims in dispute, and ask DG SANCO to specify if the proposed scheme is aimed at introducing a state funding arrangement, contingency fees, conditional fee arrangements, funding by third parties or a new instrument.

Half of them welcome the idea of introducing a representative mechanism, since it represents a way in which individual consumers can be shielded from exposure to costs risks, as a consumer association or similar public interest body would be able to bear such risk.

The other contributors think that the introduction of intermediaries, whether in the form of representative bodies, third party funders or law firms acting with a pecuniary interest, raises the potential for actions to be pursued in the interests of the intermediaries rather than claimants. Therefore, consideration should be given to the status of any representative body, to ensure that it does not have any pecuniary interest in the outcome of any actions other than recovery of costs. They ask DG SANCO to express more explicitly what kind of entity would constitute a legitimate third party, which operational criteria should be fixed for third parties and how an arbitrary selection of cases to be pursued by third parties could be avoided.

- 3. The costs of proceedings for defendants should not be disproportionate to the amount in dispute. On the one hand, this would ensure that defendants will not be unreasonably burdened. On the other hand, defendants should not for instance artificially and unreasonably increase their legal costs. Consumers would therefore not be deterred from bringing an action in Member States which apply the "loser-pays" principle.**

Consumer organisations

In general, they find the benchmark well balanced and approve it, but some organisations stress the importance of avoiding the loser-pays principle, and propose that in the countries where the principle is applicable, the costs should be paid, totally or partially, by some governmental institutions or non- governmental organisations.

Others are concerned about the possibility that, if the principle is applied too strictly, it will restrict the objective of providing consumers with access to collective redress. In cases where the potential number of plaintiffs may not be easily identifiable at the beginning of the case, it

may appear that the amount in dispute is relatively low compared to the costs likely to be incurred by the defendant. Therefore, the court should take into account all potential claims when assessing the proportionality between the amount in dispute and the defendant's costs.

Industry

All industry representatives believe that the "loser pays" principle is fundamental for the legal systems of most Member States and that it should be upheld. It is an important aspect in preventing unmeritorious claims. In any case, it should be ensured that the successful party will be reimbursed its costs in an uncomplicated manner, given that the defendant cannot be expected to search for each individual consumer plaintiff wherever he is in Europe in order to seek reimbursement of the costs. Accordingly, if consumers participate in a collective redress action, it must be ensured (e.g. through joint liability for the court costs or through an appropriate advance on those costs) that the group itself fully assumes the liability of the costs it may have to pay.

With regard to the fact that consumers should not be deterred from bringing an action in Member States which apply the "loser-pays" principle, contributors warn against any solution which would allow *forum shopping*. This is why it is very important that clear and unambiguous rules on jurisdiction for a possible collective redress mechanism are established. A cap on legal fees and a limitation of the number of law firms engaged in a case could be considered by some contributors.

At the same time, contributors state that proceedings should not cause disproportionate burdens on society and business, and in particular should not prevent businesses from financing actions to the level they consider necessary for their defence (according to the principle of fair trial). The statement "*defendants should not for instance artificially and unreasonably increase their legal costs*" seems to create a presumption of bad faith in the defendant company which they consider inappropriate.

Legal practitioners and academics

Some fear that this benchmark risks preventing defendants from mounting an adequate defence since the essential criterion is the relationship between the amount in dispute and the legal costs. Others suggest that a more appropriate measure of proportionality might be the amount of costs recoverable. However, in general legal practitioners assert that parties should not be limited in the amount that they wish to spend on an action.

They all agree to consider the "loser pays" principle as one of the key measures to avoid the abuse of the mechanism of collective redress.

4. **The compensation to be provided by traders/service providers against whom actions have been successfully brought should be at least equal to the harm caused by the incriminated conduct, but should not be excessive as for instance to amount to punitive damages.**

Consumer organisations

Consumer organisations propose to widen the wording of the benchmark by focusing not only on compensation, but also on other remedies such as conduct remedies, restorative justice etc.

They also stress that the principle should not restrict the payment of moral damages, which also include factors such as stress and inconvenience suffered by consumers as a result of the defendant's actions.

Industry

A large majority of contributors feels that this benchmark does not sufficiently emphasise the rejection of US-style class actions. They strongly disagree with the idea that compensation could be higher than the actual harm suffered by the consumer, as suggested by the term "at least". Punitive, exemplary or any other non-compensatory damages have to be excluded, as they are not consistent with the legal traditions in Europe and threaten the existence of enterprises, especially SMEs. Any punishment should be a matter for the public authorities and not for civil procedures.

They add that compensation should be strictly limited to proven damage suffered by identified harmed customers.

Legal practitioners and academics

They believe that remedies for damage should not be anything other than compensatory. Actions of a punitive nature should be left to public authorities.

Given the current differences in the Member States' legal traditions, they propose that Member States should determine the types of damages qualifying for compensation.

- 5. One outcome should be the reduction of future harm to all consumers. Therefore a preventive effect for potential future wrongful conduct by traders or service providers concerned is desirable – for instance by skimming off the profit gained from the incriminated conduct.**

Consumer organisations

Consumer organisations believe that it appears difficult to quantify the deterrent and preventive effects of collective redress mechanisms, so they do not find this benchmark useful in evaluating the benefits of collective redress systems.

However, they affirm that in cases when the social interest of skimming-off profits gained from the incriminated conduct outweighs the individual interest of compensation, effective remedies should be provided for consumer organisations to realise skimming-off profits for the benefit of a consumer protection fund.

Industry

The industry strongly rejects this benchmark. In their opinion, the idea of skimming off profits gained from incriminated conducts is a means of punishment that goes beyond the aim of compensating consumers for the damages suffered. This benchmark appears to condone a punitive damages approach which the previous benchmark condemned.

Skimming-off procedures should be reserved to public authorities and not mixed up with civil claims for compensation. Recovered profit should only go to the national treasury, never to a private group of individuals.

Furthermore, applying this benchmark would be particularly disproportionate where the claim relates to a small number of units of the product concerned, but where the defendant could be

forced to return the entire profit related to all the units of this product including those without defects. Such a result would clearly be unfair and it might lead to insolvencies.

All contributors believe that the complete compensation of all damages provides sufficient incentives for prevention. In addition, injunctive remedies – at domestic and cross-border level - are available to consumers in order to avoid the repetition of the misconduct.

Legal practitioners and academics

The majority of legal practitioners and academics agree to the position of the industry. However, two contributors support the benchmark: one agrees with the proposal of skimming the unfair profit as an additional sanction if the enterprise does not respect an injunction order or does not pay the required compensation for damages (measures to be decided by the judge); the second contributor suggests that the possibility of passing the award (or a part of it) to a general ‘public utility’ fund for the benefit of consumers should form part of this policy benchmark.

6. The introduction of unmeritorious claims should be discouraged.

Consumer organisations

They consider this benchmark to be too vague, and propose to define specifically what should be the filter against unmeritorious claims. It could be provided by a third impartial party, such as the Consumer Ombudsman in Finland, who is solely allowed to bring a collective redress case to court. Alternatively, a third party organisation which wants to bring the case to court would have to be designated by the government, while non-designated bodies have to ask specific court permission on a case by case basis, so as to ensure that only reputable, pre-vetted organisations could take the case straight to the court.

Industry

The representatives of the industry agree with the proposed benchmark asking for more clarification about the measures DG SANCO wants to take in order to discourage unmeritorious claims.

They suggest several mechanisms, which could be combined, to ensure that unmeritorious claims are avoided:

- the collective redress scheme should include an evaluation process where the judge decides on the admissibility of an action,
- an opt-in procedure would improve the defendants' ability to assess the costs involved;
- a minimum number of plaintiffs and a minimum amount in dispute could be foreseen;
- strict requirements should be met by consumer organisations before they are given legal standing;
- sanctions should be foreseen in case of abusive claims;
- the “loser-pays” principle at EU level should be introduced;
- a ban on contingency fees should be foreseen;
- plaintiffs should be obliged to pay a security deposit for legal costs before the process starts;
- no case should proceed unless and until a trader has been convicted of an offence in a court or through such other processes as may be formally adopted in a Member State and all appeal procedures have been completed;
- discovery procedures should be avoided.

Legal practitioners and academics

They ask for clarification as to the understanding of the term of “*unmeritorious*” and believe that in any system of collective redress the role of the “gatekeeper” should be played by the judiciary.

Some of them express the view that the “loser pays” principle is considered as one of the key measures being appropriate to avoid abuse of the mechanism.

7. Sufficient opportunity for adequate out-of-court settlement should be foreseen.

Consumer organisations

They point out the lack of clarity in the formulation of the benchmark, as it could be interpreted as a requirement for consumers to exhaust this route before considering taking part in a collective redress action.

They stress the drawbacks of ADR, e.g. some systems being highly dependent on the cooperation of business parties involved, such as in the Dutch system. Therefore, a preliminary requirement of ADR could potentially create a significant barrier because a trader could effectively stifle a claim by refusing to participate in ADR or accept any outcome of ADR. In any case, they ask for the control of potential out-of-court settlements by the judge (especially in opt-out procedures where settlements may be detrimental to some group members).

Industry

The majority of the contributors strongly supports this benchmark and feel that DG SANCO should give real priority to out-of-court procedures such as arbitration and mediation. In many cases, these have proven to be effective in providing solutions acceptable to both parties whilst being faster and less expensive than court proceedings.

Since they consider this benchmark essential, it should be given higher priority and it should be made clearer (terms such as “sufficient” and “adequate” mechanisms for out-of-court settlement are considered to be too vague) and mandatory in each Member State. They also point out that work should be focused on promoting existing out-of-court settlements, rather than establishing new ones. They propose using the principles set by the Commission recommendations (98/257/EC on the principles applicable to the bodies responsible for out-of-court settlement of consumer disputes and 2001/310/EC on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes) as minimum guarantees which ADR bodies in each Member State should offer to their users.

Some of the contributors think that consumers should start with an ADR procedure before they were allowed to proceed with a collective action before the courts.

Legal practitioners and academics

They all welcome this benchmark, pointing out that any collective redress system should include a procedure which allows for claims to be resolved without recourse to litigation. Adequate settlements might not only involve compensation paid directly to those affected, but could also form part of an indirect collective settlement (e.g. a *cy-pres type fund*) or could constitute in changes in the trading behaviour on the part of the businesses concerned.

However, there may have to be court approval of this process, particularly when it comes to systems involving opt-out proceedings.

8. The information networking preparing and managing possible collective redress actions should allow for effective "bundling" of individual actions.

Consumer organisations

They stress the importance of information dissemination and propose to inform consumers at each stage of the procedure.

Some organisations ask for further additions to the benchmark concerning the duty to inform consumers who live in another Member State, but are affected by the same harm, the duty of the trader to inform all the consumers affected, and the possibility to join the action even after its conclusion. They also affirm that the common factor in bundling consumers in a case should be the actions of the trader, and not the scale of damages being pursued or the breaches of legislation.

Industry

By contrast, business representatives are very sceptical of this benchmark. They believe that it is not clear and needs more explanation.

For instance, they raise the question concerning who would act as the body responsible for bringing similar cases together either at national or EU level.

Some of the contributors are of the opinion that the consumer association promoting the action should bear the obligation of identifying the group of the injured parties affected by the judgments. It should also be the associations' task to make the action known to the public and to acquire the agreement of the consumers who fall within the group in question and intend to participate in the collective redress action. The costs for identifying the parties belonging to the class and their involvement should be charged in their entirety to persons/entity promoting the action. The information network should be monitored by an independent board.

They stress also that joining the claim should be limited to a distinct period of time.

They affirm that any publicity must fully respect the rights of the defence, before and after the proceedings. This could only be reached by an opt-in system where the defendant is in the position to know of all consumers wishing to be part of the collective redress action.

Legal practitioners and academics

The contributors generally agree with this benchmark. They underline that any publicity undertaken either to launch a collective redress procedure, or to inform the public of a decision declaring the collective redress action admissible and calling consumers to join action, shall mention that “prejudiced consumers” are not obliged to join the collective redress action and that they can bring individual actions.

9. The length of proceedings leading to the solution of the problem in question should be reasonable for the parties.

Consumer organisations

Generally, they are in favour of the benchmark. They propose that the definition of “reasonable” may need to vary pending on the complexity of the case including cross-border issues.

Industry

Business representatives also agree to this benchmark.

They stress how good case management (e.g limited pleadings), organisational improvements (electronic communication, clear contact rules etc.), avoiding abusive claims and favouring ADR schemes could help in reducing the length of proceedings. Moreover, dividing the procedure between a declaratory stage and an affirmative stage could accelerate proceedings since it would separate the legal appreciation and fact-finding stage from the substantiation and allocation of individual damages.

At the same time, they point out that this should not mean that the basic rights of the parties with regard to the proceedings are curtailed in any way.

Legal practitioners and academics

They are also in favour of this benchmark and propose that in order to achieve the aim, it would be useful to simplify the procedures and to reserve a special channel of access to justice for consumer collective actions.

10. Collective redress actions should aim at distributing the proceeds in an appropriate manner amongst plaintiffs, their representatives and possibly other related entities.

Consumer organisations

In their view it should be within the competence of the court to decide on the modalities of the compensation. It is also important for them to ensure that in cases of opt-out models all reasonable attempts are made to alert the relevant consumers about remaining funds to be distributed.

Industry

Business representatives strongly disagree with this benchmark.

They believe that under no circumstances a new financing method, such as the one arising through the distribution of proceeds, should be created for professionals involved in the proceedings or for third parties. They point out that only the direct loss should be compensated and only victims should receive this compensation.

They also ask for an explanation of what is meant by “other related entities” and why they should be entitled to compensation if they did not join the proceedings as plaintiffs.

Among them, there is also concern that this benchmark could refer to the introduction of contingency fees in Europe.

Legal practitioners and academics

Their comments are close to the position of the industry stressing that the distribution of proceeds to third parties should be avoided.

