

## Overview of the results of the Consultation on Consumer Collective Redress

This is a summary of the main trends arising from the stakeholders' contributions to the consultation paper on consumer collective redress by Directorate General Health and Consumers. The consultation ran from 8 May to 3 July 2009.

This summary covers 100 responses that have been received by 24 July 2009. To facilitate the analysis of the responses five categories of stakeholders have been used, namely: consumers, industry, Member States, legal practitioners and others. More than half of the contributions (62) are from industry representatives. 12 are from consumer representatives, 4 from Member States, 15 from legal practitioners, and 7 contributions from other stakeholders.

| Countries      | Category of stakeholders |           |               |                     |        | Total |
|----------------|--------------------------|-----------|---------------|---------------------|--------|-------|
|                | Industry                 | Consumers | Member States | Legal Practitioners | Others |       |
| Austria        | 2                        |           |               | 1                   |        | 3     |
| Belgium        | 2                        |           |               | 1                   |        | 3     |
| Bulgaria       |                          |           |               |                     |        |       |
| Czech Republic |                          |           |               |                     |        |       |
| Cyprus         |                          |           |               |                     |        |       |
| Denmark        |                          | 1         | 1             |                     |        | 2     |
| Estonia        |                          |           |               |                     |        |       |
| Finland        | 2                        |           |               |                     | 1      | 3     |
| France         | 7                        | 2         |               | 2                   |        | 11    |
| Germany        | 13                       | 1         | 2             | 2                   |        | 18    |
| Greece         |                          |           |               |                     | 1      | 1     |
| Hungary        |                          |           |               |                     |        |       |
| Ireland        |                          |           |               |                     |        |       |
| Italy          | 1                        | 1         |               |                     |        | 2     |
| Latvia         |                          |           |               |                     |        |       |
| Lithuania      |                          |           |               |                     |        |       |
| Luxemburg      | 1                        | 1         |               | 1                   |        | 3     |

|                |           |           |          |           |          |            |
|----------------|-----------|-----------|----------|-----------|----------|------------|
| Malta          |           | 1         |          |           |          | 1          |
| Netherlands    | 1         |           |          |           |          | 1          |
| Poland         | 1         |           |          |           |          | 1          |
| Portugal       |           |           | 1        |           | 1        | 2          |
| Romania        |           |           |          |           |          |            |
| Slovakia       |           | 1         |          |           |          | 1          |
| Slovenia       |           | 1         |          |           |          | 1          |
| Spain          |           |           |          |           | 1        | 1          |
| Sweden         | 1         |           |          |           |          | 1          |
| United Kingdom | 7         | 2         |          | 5         | 3        | 17         |
| EU             | 18        | 1         |          | 3         |          | 22         |
| Others         | 6         |           |          |           |          | 6          |
| <b>Total</b>   | <b>62</b> | <b>12</b> | <b>4</b> | <b>15</b> | <b>7</b> | <b>100</b> |

## **Summary of the main trends**

### *Main trends concerning the definition of the problem*

While some industry representatives and legal practitioners questioned the justification for and the added value of EU action in the area of consumer collective redress, consumer representatives pointed to the existence of a "justice gap" to the detriment of consumers due to the lack of collective redress schemes in a number of Member States.

Industry representatives stated that there was not enough evidence to demonstrate the EU scale of the problem. Referring to two Commission studies, an industry representative estimated the potential of cross-border mass claim cases only at 0.4 cases per year per Member State. Furthermore, industry representatives highlighted that a variety of recently adopted instruments still remain to be evaluated, before any new step is taken in the same field. In particular, some industry representatives pointed out the necessity to analyse the financial and organisational impact on SMEs.

Some consumer representatives submitted that an EU-wide collective redress system is needed to better protect consumers, increase their confidence in the Internal Market and enhance equitable access to justice. In fact, consumer representatives pointed out that due to the discrepancies among the collective redress systems across the EU, consumers face difficulties when trying to apply collective redress cross-border. One consumer representative considered that such intervention would be justified due to the development of mass litigation, the growing number of consumers harmed, the lack of efficiency of the legal framework and the lack of compensation which would result in increased risks of unfair competition. Another consumer representative argued a collective redress system was needed to make businesses engage more effectively in Alternative Dispute Resolution (ADR).

The principle of subsidiarity and the lack of EU competence to introduce consumer collective redress schemes were raised by several industry representatives. Some industry representatives considered that the Commission should focus exclusively on cross-border collective redress cases, leaving the national dimension to the Member States.

Some legal practitioners and industry representatives suggested a horizontal approach should be undertaken in view of the ongoing separate initiatives within different Commission Directorates General – DG Health and Consumers and DG Competition. Moreover, one industry representative mentioned that the outcome of a consultation by DG Internal Market and Services on the functioning of ADR in the financial services sector is also forthcoming.

With regard to the scope of any initiative, an industry representative underlined the necessity to limit it to claims related to consumer law and the compensation of the sole economic damage whereas a legal practitioner suggested broadening the scope of mass claims (i.e. include also environmental claims).

Although the consultation paper does not deal directly with the legal basis, some industry representatives and legal practitioners questioned the existence of a clear legal basis for consumer collective redress, particularly with regard to Article 65, Article 95 and Article 153 of the EC Treaty. One industry representative indicated that a mandate for creating a new system for civil proceedings could only be derived from Article 65 of the EC Treaty. Other

industry representatives stated that the political will is not a legal basis and it is important to establish real evidence that a collective redress system is needed to protect consumers.

Stakeholders from all categories underlined the question of applicable law and competent jurisdiction as an inherent problem to the European collective redress mechanism. One industry representative even warned that the development of a consumer collective redress system in Europe would give rise to a multitude of possible jurisdictions, based on the domicile of affected consumers and the courts being burdened with applying different substantive laws. It was indeed pointed out by a legal practitioner that the criterion of the most affected market may not allow determining with legal certainty the competent jurisdiction.

Some industry and consumer representatives, as well as some legal practitioners did not agree that the rules contained in the Brussels I, Rome I and Rome II Regulations should be altered.

The source of financing for initiating actions has been identified by a consumer representative as a central question that the Commission has not addressed in its consultation paper. One industry representative argued that the financing should remain within the competence of each Member State. A consumer representative suggested that consumer representatives should be financed by EU resources in combination with contributions from each Member State where such an organisation is established. Another consumer representative proposed using as a partial source of funding the remainder of damages that have not been claimed by consumer victims after the proceedings. It was also suggested by an industry representative that claimants should bear the costs of the proceedings themselves. One Member State rejected expressly the idea of direct public funding.

An industry representative and a citizen identified the need for the European Union to strengthen its activities in informing consumers on how to assert their rights.

#### *Main trends concerning the objectives*

An industry representative and several legal practitioners suggested reformulating the general objective from “*to ensure access to effective means of redress for consumer mass claims across the EU*”, to “*to ensure access to justice*”. Several industry representatives noted that the general objective of the Commission should not be to try to harmonise national judicial procedures by imposing mass claim procedures, but to work on means to increase availability, efficiency, awareness and cost-efficient means of redress mainly for small claims. Some industry representatives and legal practitioners emphasised assuring “the efficiency of EU consumer law”. Other industry representatives and legal practitioners were in favour of including the “proportionality” principle in the general objective.

Consumer representatives highlighted the importance of fair compensation, ensuring an effective remedy for all victims of mass consumer law infringements and the necessity for a system in which the cost is not a barrier for access. One consumer representative and one Member State also considered important the existence of a collective redress mechanism for improving the competitiveness on the internal market and making sure that businesses do not gain unjustified profits. Some industry representatives expressed concern on the potential punitive nature of the compensation granted to consumers.

Several industry representatives and legal practitioners emphasised the need to introduce safeguards to prevent abusive claims. In response to this objective, some consumer

representatives criticized the fact that businesses have overstated their fears of abuse of the collective redress mechanisms. According to various consumer representatives ensuring that only meritorious claims are pursued could be done in several ways as a "safety net" in the system, including selection criteria for representative bodies, rigorous management of cases by judges and giving standing to consumer representatives.

An industry representative observed that encouraging litigation in no way improves the effective redress for consumers but promotes the congestion of courts that lack the means to handle mass claims.

#### *Main trends concerning the options*

Most of the consumers, several legal practitioners as well as one Member State supported the idea of a Community intervention in the field of consumer collective redress whereas industry representatives were reluctant towards changing the status quo.

In general, consumer representatives supported options 4 or 5. However, one consumer representative rejected option 5 as its impact on national procedural laws would not be in line with the principle of subsidiarity and favoured option 4. An industry representative and another consumer representative considered option 5 as a viable way of handling high volumes of basically similar court cases involving violations against consumer protection legislation.

Industry representatives were mainly in favour of option 1 and option 2. The main argument developed was the need to launch an in-depth evaluation of existing instruments, some of which have been introduced only very recently. In addition, a number of industry representatives indicated that judicial mechanisms entail significant risks of cost increases, however, without providing supporting data. Several industry representatives highlighted a lack of detailed information on each option. Some industry representatives also showed interest in option 3 if evidence showed that measures at EU level were needed and provided they were non-binding.

The four Member States having participated to the consultation expressed divergent views. One supported option 5 and another option 1. The other two Member States did not express a preference and suggested clarifying the options. One Member State asked for example clarifications on what the introduction of "judicial collective redress in combination with additional powers under the Consumer Protection Cooperation Regulation" practically meant.

A general consensus emerged on the usefulness and efficiency of ADR schemes and sectorial networks such as FIN-NET, irrespective of their articulation with a judicial instrument. However, two consumer representatives and one legal practitioner considered ADR schemes as a complementary instrument not sufficient in itself. In particular, a consumer representative insisted on the fact that the effectiveness of an integrated approach depends on the availability as a last resort, of a judicial collective redress mechanism. In addition, an ADR system representative underlined the weaknesses of ADR schemes as they depend on the sole willingness of the trader to reach a sensible solution. However, according to industry representatives and other ADR system representatives, the positive aspects of ADR systems are cost-effectiveness, simplicity and speed.

No consensus was reached on opt-in versus opt-out. Arguments in favour of opt-out related, for example, to the fact that a consumer representative faced difficulties in collecting the potential victims' agreement and high costs, whilst arguments against opt-out mainly pointed at the risk of leading to "US-like situations" or "a litigation culture" and the equality of arms. A consumer representative, an industry representative and a legal practitioner outlined potential inconsistencies arising from the articulation of the "most affected market" criterion and the "opt-out" principle. The main argument was the difficulty to determine in practice which market was most affected without knowing the number of consumers harmed or at least the potential claimants in all Member States.

The test case approach raised a number of questions among a majority of legal practitioners and industry representatives. Although one Member State and two consumer representatives mainly supported the test case scheme in principle, they suggested clarifying the procedural steps as well as the rules on competent court and applicable law.

Several industry representatives and legal practitioners asked for clarifications on the binding nature of the test case judgement on courts at the same level, especially when it is favourable to the trader.

As regards the scope, some legal practitioners asked whether the test case should be limited to establish certain facts and apply to cross-border disputes. Moreover, some legal practitioners suggested limiting the test case procedure to cases where the individual claim value makes individual litigation uneconomic.

On the fundamental right to a fair trial, one legal practitioner raised particular concerns on how evidence could be challenged in the test case procedure. Several industry representatives and several legal practitioners underlined the practical difficulties (e.g. the application of several substantial laws) implied by the adoption of the most-affected market criterion to determine the competent court and applicable law, particularly if an opt-out system was established.

Some consumer organisations stated that the test case procedure would not solve the problem of costs that consumers face when bringing an individual claim at the follow-up stage. They underlined the fact that follow-up procedures might overburden national courts. Another consumer representative pointed out the risk that too lengthy test cases could result in the dismissal of follow-up procedures because of prescription rules.

A number of industry representatives and several legal practitioners proposed alternative options. One industry representative suggested negotiated agreements as a precondition of instituting a court case following the Dutch system. One Member State suggested setting up a single case where consumer from the whole EU could join.

The funding issue has been raised by a majority of stakeholders in all categories. No consensus was reached on whether the funding should be public or private. Industry representatives emphasised the need to restrict the number of consumer associations entitled to represent consumers' interest in court in order to avoid abusive claims. One industry representative suggested the creation of an EU Ombudsman and a Member State representative mentioned the creation of either a single representative body or a network of national bodies. Industry representatives also mainly rejected the introduction of contingency fees, whereas some legal practitioners suggested not prohibiting them *per se*. The application

of the loser-pays principle was mainly supported by all stakeholders, except two industry representatives.

#### *Main trends concerning the input for the impact assessment*

In general, very little complementary input was provided. Industry representatives insisted on the small number of claims with a particular focus on the small number of cross-border dimension. Industry representatives and ADR system representatives, consumer representatives mainly provided information on ADR schemes in the financial, banking, insurance, and transport sectors.

One industry representative referred to a recently published interim report on civil litigation costs in England and Wales made by Lord Justice Jackson. The report examined a number of issues associated with cost-shifting, conditional fee arrangements and contingency fees. Another industry representative provided some data on the Dutch Dexia case intended to correct a number of supposedly mistaken statements. The settlement sum was €1 billion (and not 1.5) and also Belgian consumers were compensated. Finally, a third industry representative provided information on an online conciliation procedure that has been set up with all consumer associations in Italy, including information on self-regulation and out-of-court settlement cases. Some industry representatives highlighted that 50 007 cross-border cases between 2001 and 2007 were solved within the framework of FIN-NET.

A consumer representative provided input on its filed actions, classified under 6 categories, respectively food safety, health, sales and service provision, finance, abusive provisions, security and environment. In total, 88 actions have been mentioned. Some legal practitioners provided examples of the potential for collective cases. A consumer representative provided input on the ongoing judicial actions initiated by the legal department of the association. One legal representative submitted a number of examples and information regarding consumer grievances that could benefit from an opt-out mechanism. Another legal practitioner provided explanations on the German test case procedure and indicated that, as of early June 2009, 207 requests were still pending. A third legal practitioner submitted a 2008 study on collective redress in Europe with an overview of redress systems in selected countries, including non-EU Member States.

Finally, one Member State provided an analysis of cases that could benefit from collective redress. Via the Consumer Direct Database (which records consumer complaints in the UK) the contribution identified four sectors which could potentially benefit from a representative action.