

Collective Redress

Remarks

by

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European Commission

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Ladies and Gentlemen,

I am delighted to be here in Lisbon today to open together with Commissioner Kroes and State Secretary Serrasqueiro this conference organised by the Portuguese Council Presidency.

I am sure we will enjoy an open and constructive discussion among all participants on the issue of collective redress.

In recent months, we have held consultations with a number of stakeholders and have received interesting information on cases and experiences.

Based on this information, we were able to gather around 40 cases, although unfortunately, the information we received did not enable us to re-constitute all these cases in a legally and factually complete manner.

In the months to come, the studies which the Commission has launched will provide us with more detailed and in-depth information. Such a basis is a key precursor for any subsequent decision on possible policy action.

The information we have received, however, has already provided us with some initial evidence which would appear to confirm the existence of problems in situations where multiple consumers suffer damages caused by the same or similar illegal behaviour of a trader or service provider.

In some cases the lack of national redress mechanisms prevented all or some of the consumers who were victims of the illegal behaviour from obtaining adequate redress.

For instance, this became evident in the case of an Irish insurance company which charged its clients unfair fees each time the company was asked to insure a different vehicle to the one initially insured.

A consumer filed a claim for damages with the Irish Ombudsman.

The Ombudsman found that this practice was illegal and that as a consequence the insurance company had to refund all its consumers charged with the same fee.

The insurance company appealed against the decision – and the High Court ruled that the Ombudsman was merely entitled to make a decision regarding the individual consumer who had lodged the complaint.

The court found that regardless of the fact that the same illegal behaviour by the same company affected many other consumers, the ombudsman's decision could not affect their situation and thus entitle them to obtain damages on the same grounds.

Thus, in short, all the consumers except for the one who filed the complaint remained uncompensated.

Problems of this nature become even more difficult if the case in question has a cross-border dimension.

It is much more difficult for a consumer from another country to obtain adequate redress – be it through commercial complaints handling procedures, through representation by a consumer association or by a state entity such as an ombudsman.

I can, for instance, cite the case of a French company which sold via the Internet electronic devices of bad quality to thousands of consumers in France, Denmark and Germany.

Due to the fact that this company had an office in France, some French consumers finally managed to agree a settlement with the company concerned, but none of the non-French clients of the company were able to obtain redress.

An ombudsman of another country which tried to bring collective action on behalf of consumers in his country in France was not able to do so.

A procedural possibility for this ombudsman to bring a collective action on the grounds that French law has been violated does not exist in France.

I should make clear that I am not claiming that these cases constitute comprehensive and conclusive data – rather they serve, at this point, more as anecdotal evidence.

However, these examples and many other cases convince us of the need to continue to collect more data and to consult with all interested stakeholders on the problems and issues at stake.

We are therefore looking forward to hearing your views and learning of your experiences in the area of collective redress.

Your substantial input will help to steer the future work of the Commission in this field. Let me therefore set out our expectations for this conference.

The first panel of today's discussion will be mainly devoted to the economics of collective redress. There are a number of issues on which we would like to hear your views.

Some of these are related to the central question of whether an EU initiative in the area of collective redress is necessary.

For instance, we are keen to hear the views of the panellists and the audience on the question of whether or not there are perceived distortions of competition or obstacles to the internal market due to the existing differences in national legislations on collective redress.

It is also crucial for us to understand more about the actual factors that prevent consumers from obtaining adequate redress in situations where multiple consumers suffer damages caused by the same or similar illegal behaviour by a company.

These factors could be of an economic nature. In the light of the amount at stake, it may simply not be economically viable for consumers to go to court with a complaint.

We know for instance that only upwards of a certain amount – 500 € or 1000 € – significant percentages of consumers would be prepared to go to court.

But obviously these figures depend on a number of other elements – such as the efficiency of the judicial system concerned or more precisely the perception of its efficiency; the existence of the "loser pays" principle; the spread of legal expenses insurance; and the existence of a "litigation culture".

But these factors may also be of a behavioural nature. We know from behavioural science that the consumer is not at all the rational being that some like to portray.

In addition, we want to hear your views about the economic consequences of these factors for consumers, competitors and the market concerned.

The damage for consumers would be the easiest to assess as it is likely to be the difference between the price paid and the real value of the goods or services received.

But there could be also damages for competitors if they stick to the standards and are missing out on potential demand for their products because there is unfair competition from rogue traders who do not apply or flout the rules.

[Finally, in such a situation one cannot speak about a functioning market with proper resource allocation either.]

Other economic issues we would like to discuss today concern more the status quo and its impact on the problems identified.

The main question in this context is whether the identified redress problems can be solved for instance simply by market-led solutions like effective and efficient complaints-handling.

Or do the existing national individual or collective redress schemes provide a solution?

Perhaps the existing ADR mechanisms can provide satisfactory redress for consumers?

A possible, but probably only partial answer to problems in this area could be individual redress. Therefore it would be very important to know how the systems of individual and collective redress compare in terms of costs and benefits for all possible stakeholders concerned.

This includes individual consumers, consumer associations, national entities like an ombudsman, businesses in their role as potential or actual defendants, legal professions and insurance companies doing business in the area of legal expenses or professional liability.

Another possible answer to the underlying problems is non-judicial redress. By the same token, we would therefore be interested to know how systems of collective judicial and non-judicial redress compare in terms of costs and benefits for consumers and businesses.

Finally, the last set of economic issues we would like to discuss today concerns the design of a potential EU initiative.

Such an initiative should ideally achieve at the same time adequate redress for consumers and not overburden businesses. Therefore the question is, whether it is possible – and if so, how – to design a system of collective redress to be advantageous both for consumers and businesses.

In the afternoon session we will have a debate on the legal challenges of collective redress.

Collective actions already exist in a number of Member States. Other Member States are currently considering introducing a system of collective redress.

In the modules of the second panel we will hear about Member States' experiences of different collective redress systems; the class action model from a Canadian perspective; an example of ADR used for collective redress in Italy; and the role of public authorities in ensuring satisfactory collective redress.

From the presentations and the discussion we would like to learn whether you have experienced specific problems in cross border cases of collective redress.

In particular we have understood – recalling my earlier example – that there are cases where consumers were not able to take advantage of existing collective redress schemes in other Member States.

It is important to identify what are the obstacles for a consumer to join in a collective action in a Member State which is different from their country of residence or for a consumer representative body or a public entity to represent consumers from other Member States.

Other legal issues on which we are keen to have feedback concern the design of collective redress schemes.

Looking at the existing national systems and the reasons why they work or do not work well, we should try to put ourselves in the position of designing an ideal system of collective redress.

What form of collective redress would ensure simple and fast proceedings at minimised procedural costs for all parties?

The enforcement and redress systems in the Member States are all rather different.

In particular, the balance between public and private enforcement has grown over time in each Member State. This balance should be respected as much as possible.

So what form of collective redress would ensure an adequate balance between public and private enforcement?

The *raison d'être* of ADR mechanisms is to provide an easy and mutually satisfactory solution to problems without going to court.

What could and should therefore be the role of mediation and out-of-court settlements?

Finally, beside these more general questions of design of collective redress it would also be interesting to discuss more detailed points.

We understand for instance that major application problems of existing national mechanisms stem from practical problems concerning the bundling and handling of collective redress claims.

How can one find other victims of the same incriminated behaviour who may also be willing to join a collective redress action?

How should potential plaintiffs be informed or notified?

Who bears the costs?

Should a private entity or a public authority bundle and handle the claims?

Another Achilles heel of existing systems to which our attention has been drawn concerns the essential question of financing.

How could collective redress be financed in a way which allows consumers either to proceed themselves with a collective action or to be effectively represented by a third party at costs which are not disproportionate to the amount in dispute?

Existing national systems have developed different forms of compensation. A particular problem is what is going to happen to small claims which are typical for consumer complaints.

Should every victim be reimbursed an amount, for instance 20 € or 100 or 500... or where does one draw a limit?

If consumer associations or other entities act on behalf of consumers, do they have an incentive to do so?

Therefore we should ask the question – what form and amount could compensation have, and how could it be distributed in an appropriate manner among plaintiffs and their representatives?

As I have already said, we should aim for a situation where consumers obtain adequate redress and business is not overburdened or even has advantages, like for instance legal security resulting from a collective redress scheme.

This may sound idealistic, but why should we *a priori* not even try to achieve such a win-win situation?

Therefore, we need to discuss if and how it could be guaranteed that the economic impact on a business against which actions have been successfully brought is proportionate to the harm caused by the incriminating conduct.

At the same time, however, one should not forget the preventive effect for future wrongful conduct. It would clearly also be very useful both for consumers and reputable business to deter rogue traders from future harmful conduct.

Finally, it is crystal clear that probably nobody in this room – and not only those who have read the books of John Grisham – wants to have the excesses of the US-style class actions, characterised by a mixture of punitive damages, contingency fees, pre-trial discovery and opt-out system.

Therefore I also look forward to your suggestions on the question of how to avoid unmeritorious claims.

Ladies and Gentlemen, if we succeed in discussing all the questions I have set out, we will be able to reflect on an extremely successful conference.

Let me therefore present to you this challenge. I look forward with great interest to your input and views.

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