

SUMMARY
OF THE LEUVEN BRAINSTORMING EVENT ON COLLECTIVE REDRESS
29 JUNE 2007
COLLECTING THOUGHTS AND EXPERIENCES ON COLLECTIVE REDRESS

The event was opened by Commissioner Meglena Kuneva who gave a key-note speech underlining the importance of redress as a key part of the European Commission's Consumer Policy Strategy for 2007-2013. The Commissioner expressed her interest in receiving early input on the issue of collective redress from all stakeholders who wish to contribute by sharing experiences and providing relevant information on this matter¹.

After a short introduction explaining the underlying problem on collective redress, a moderated panel discussion between representatives from consumer associations, industry, retail business, legal practitioners, a national consumer protection ombudsman and an academic took place. The discussion was organised in three modules, each of them approaching specific aspects of the question of collective redress. A brief summary of the issues discussed under each module is provided below.

Closing remarks were made by Ms Agne Pantelouri Director of the Consumer Affairs Directorate of the Commission *Health and Consumer Protection* Directorate General.

From the discussion it appeared that most of the participants are of the opinion that before envisaging an initiative at EU level on collective redress, a clear picture should be drawn as to whether the current situation has a negative impact on the single market and whether it causes consumer detriment. Participants stressed that the European added value of a system of collective redress is to be assessed in the light of the redress systems already in place in Member States.

1st Module - Impact on the single market and on consumers of the differences in the systems of collective redress existing in Member States

Situation in countries where no system of collective redress exists

Many participants stressed that the lack of a common standard for collective redress might be detrimental to consumers in Member States where a system of collective redress does not exist. Several participants stressed that this situation does not provide for equal guarantees for respect of EU consumer rights.

Some business representatives were, however, of the opinion that despite their fragmentation, the existing redress mechanisms in the EU Member States are sufficient. They consider it crucial to firstly assess thoroughly the current situation in Member States and to clearly

¹ Commissioner Kuneva speech can be found at :
http://ec.europa.eu/commission_barroso/kuneva/speeches/speech_leuven_29062007_en.pdf

identify any problems that are faced by consumers regarding enforcement of their rights in the single market.

Collective redress in a cross-border context

A business representative brought the example of a case in the Netherlands where more than 55,000 private investors of a bank lodged a mass claim for loss suffered from a financial product. After the court trial, the consumer associations and the bank reached a settlement which was accepted by the court. However, consumer claims with cross border elements were excluded from the settlement.

A consumer ombudsman stressed that under its national legislation, it is very difficult to represent consumer interests outside the country of their residence. The problem is even more acute when it comes to defending the rights of non citizens who have suffered a loss from a company located abroad.

A consumer representative gave the example of FIFA "unfair fees" case which occurred at the occasion of the Football World Cup in Germany. A German court ruled that the FIFA fees were an unfair commercial practice and declared them void. However, numerous residents outside Germany could not obtain any compensation. Other consumer associations gave also examples of similar difficulties when dealing with cases with cross border implications, especially in the tourism sector.

Many participants stated that the lack of common rules on collective redress at EU level makes cross border purchases less attractive and thus results in an indirect obstacle to intracommunity trade.

2nd Module - Expected consequences of a possible EU initiative, if any, on collective redress

Expected consequences for stakeholders and for the single market

Many participants expressed the view that EU consumers would be more willing to engage in cross border trade if a common standard was set up to ensure adequate redress, whatever the country of purchase of their goods or services. According to some, the current fragmentation of collective redress mechanisms does not inspire sufficient trust in consumers as there is no guarantee that they have at their disposal an affordable means of redress throughout the EU.

Several participants were of the opinion that EU rules on collective redress will provide for an adequate enforcement mechanism for small claims at EU level and thus guarantee respect for existing EU consumer protection regulations.

Some legal practitioners stated that in cross border cases an EU initiative could solve many legal problems (e.g . applicable limitation periods, evidence gathering etc.).

Retail sector representatives took the opposite view. They stressed that an EU initiative would create an additional burden for companies, resulting in less economic incentives and less growth for them. Several expressed their concern that enterprises would be exposed to "settlement blackmail" or destabilisation attempts, as evidenced by examples of class actions

in the US. They were of the opinion that collective actions would have an adverse impact on business, as there is a clear risk of abuse of the system, especially if punitive damages were admitted.

Business representatives pointed out in addition that the class actions in the US were created to compensate for government's relative weakness and lack of intervention. The EU, on the contrary, has a strong administrative and regulative protection in the consumer protection field. A collective redress mechanism in Europe would not therefore bring any added value for consumers. A retail business representative also pointed out that collective redress should be placed within the broader context of all the various avenues for enforcement and redress; it should be seen as a useful addition rather than the first line of defence. With the UCP Directive dealing with marketing practices and the follow-up of the green paper on the acquis review dealing with contractual elements can create approach to enforcement and redress would seem to be a logical third pillar.

Consumer representatives stressed that a system of collective redress would strengthen their capacity to defend consumers. It would also allow them a saving in resources by reducing financial support for multiple court cases.

According to some participants, an EU initiative would also allow budgetary savings to be made from judicial expenditure, as one court would rule on a single case where collective redress is sought as opposed to situations where different courts handle separate individual complaints. By the same means, legal certainty would be strengthened.

Judicial redress versus no judicial redress and Alternative Dispute Resolution

Some participants pointed out that collective mediation and non judicial collective redress could be successfully used to solve problems with small claims.

A business representative and some legal practitioners stated that mediation is important but reported that in reality it is more likely that a settlement be reached after a successful action in court. It was pointed out that in some jurisdictions, such as in the Netherlands, an out-of-court settlement is not legally binding without a previous court ruling.

Many business and retail sector representatives insisted on the importance of looking for the alternative dispute resolution means for collective redress and of avoiding a privatisation of enforcement, which would lead to a "litigation culture" in Europe.

Some participants – mainly business representatives – claimed that whilst there might be a need to improve judicial systems and access to justice in some MS this issue touches upon the core of national procedural law and an EU initiative does not seem admissible. They stressed that the principle of subsidiarity should be strictly respected. An alternative to collective redress can be to establish network to liaise between Member States and resolve cross border cases.

Purpose of collective redress mechanisms

Many participants stressed that a distinction should be made between damages for compensation, injunctive relief and deterring wrongful behaviour, including punitive

damages. Several consumer representatives agreed that introducing punitive damages will bring more responsible business behaviour.

Business and retail sector representatives insisted however that the companies will suffer considerable loss if punitive damages are introduced and declared strong opposition to any initiative of this type at EU level.

Some business representatives pointed out that class actions appeared in the US because there was little intervention and protection by the state administration in antitrust cases and consumer protection generally. The situation in the EU is different and it would be a mistake to import the US model to Europe. For many of the business representatives, there is a clear risk that a private enforcement system would become a considerable revenue of income only for lawyers instead of helping consumers. A public body should ensure the enforcement of consumer law in the EU instead.

Retail sector representatives insisted that collective redress for compensation will have a negative impact on their business because companies will be forced to invest more in risk management, insurances, legal advice, litigation costs etc. to avoid running the risk of losing a court case for collective damages. It has been pointed out that 90% of the collective redress cases in the US were settled regardless of the merits of the case, just to prevent bad publicity for the company. Therefore, a European legislation on collective redress might stop business from offering new products and will certainly increase the overall cost of consumer goods. According to some of them, it will be also against the principles of better regulation which both Member States and the European institutions are committed to respect, in order to boost growth and promote innovation.

Some participants mentioned that a system of collective redress could be envisaged for the protection of general consumer interests rather than a means of compensation for individual claims. To ensure this, they considered that compensation should mainly be gathered and used to promote general consumer interests.

Module 3 - Advantages and disadvantages of the existing national systems of collective redress

Perceived advantages and disadvantages, lessons learned from concrete cases in Member States where a mechanism of collective redress exist

Consumer representatives reported several practical difficulties under their national systems of consumer redress. Most of them stressed that the costs and the length of redress procedures are deterring for consumers. It makes defending small claims in court economically ineffective. They also explained that defendant companies frequently try to delay proceedings, making it even more expensive for consumers to continue the trial until the end. This favours systematically large claims in comparison to small claims.

Other participants reported however that collective redress mechanism functions properly in their countries. In countries where there is a specific funding for collective redress actions, many cases were successfully resolved by consumer protection associations.

Issues related to funding, case management and procedure

Many consumer representatives and legal practitioners mentioned funding as the main issue in their national collective redress systems. Several participants were strongly opposed to funding of the redress mechanisms by third parties but others agreed that this appears to be more practicable.

Some business representative warned against contingency fees by pointing to several collective redress cases where up to 40% of the allocated damages were for lawyers and litigation fees. To avoid such a profit generating system, a legal practitioner stressed that a close court supervision of the lawyer's fees can be the appropriate guarantee against this.

The question of a threshold amount from which a collective redress action can be brought to court was also debated. It appeared that in some Member States there is no monetary threshold but requirements for a certain number of complainants do exist. In other Member States, a monetary threshold amount exists but, in principle, it is not high. Some participants insisted that no threshold amount for collective redress should exist at EU level.

Many participants expressed the view that it is easier to prove consumer detriment when several consumers have joined their claims in court.

Several participants discussed the rules of procedure and some of them were of the opinion that national judges should be given the possibility to choose between an opt-in/opt-out system.

Closing remarks

The Commission noted the interest expressed and the valuable input made by all participants and asked participants explicitly to communicate to the Commission² all practical cases, data or other useful information.

It was stressed that this is the beginning of a process and that the Commission will seek to gather all relevant information and data, in order to draw a clear picture of the existing national systems for consumer redress and to evaluate their impact on the single market and on consumers. Any future work of the Commission in this regard will not be a solution in search of a problem, but tackle real problems which are a common challenge for the EU as a whole. Only if there is a genuine need for an initiative at EU level the Commission will consider action in this respect. If the need for action was to be confirmed, this would not necessarily involve proposing a legislative initiative, as other more suitable options may exist.

At the moment, it appears that many economic and legal issues need to be scrutinised beforehand. In particular, the existence of barriers to cross-border trade for business and consumers should be examined and, in so far as they are EU-relevant, also the problem of access to justice and the relationship between measures aimed at providing compensation injunctive relief and enforcement. Moreover, both judicial and non judicial collective redress mechanism and their relationship should be analysed in detail.

² A functional mail box was set up for this purpose at : Sanco-Collective-Consumer-Redress@ec.europa.eu