

**Summary of the main trends of the public hearing on consumer collective redress
on 29 May 2009¹**

Introduction

This document presents a summary of the main trends and findings of the public hearing on consumer collective redress that was held in Brussels on 29 May 2009.

There was a very large attendance to the hearing. More than 200 stakeholders were present. About half of these belonged to the business sector, as the following table shows. Furthermore, a more or less equal number of consumer representatives, public authorities and legal experts were present.

Countries		Categories of stakeholders					Total
		Business representatives	Consumer representatives	Public authorities	Legal experts	Other	
Austria	AT	7	1		1		9
Belgium	BE	4	1	2	4		11
Denmark	DK		1				1
Finland	FI	2	1	1			4
France	FR	16	2	1	2		21
Germany	DE	15	1	8	5		29
Greece	EL		4	1			5
Ireland	IE		2	1			3
Italy	IT	7	4	1	1		13
Luxembourg	LU		1	1			2
Netherlands	NL	1	1	1	4		7
Portugal	PT		1	3		1	5
Spain	ES	1	2	2	1		6
Sweden	SE	1		2			3
United Kingdom	UK	6	2	1	8	1	18
<i>Subtotal EU15</i>	<i>EU15</i>	<i>60</i>	<i>24</i>	<i>25</i>	<i>26</i>	<i>2</i>	<i>137</i>
Bulgaria	BG		1	1			2
Czech Republic	CZ	1		2			3
Cyprus	CY						0
Estonia	EE			1			1
Hungary	HU			2			2
Latvia	LV		1	1			2
Lithuania	LT						0
Malta	MT		1				1
Poland	PL			1	1	1	3
Romania	RO		1				1
Slovakia	SK		2	1			3
Slovenia	SI		2	1			3
<i>Subtotal EU12</i>	<i>EU12</i>	<i>1</i>	<i>8</i>	<i>10</i>	<i>1</i>	<i>1</i>	<i>21</i>
EU	EU	38			6	4	48
Other	Other	1			1		2
Total	Total	100	32	35	34	7	208

Table 1 Distribution of stakeholders per category of stakeholders and per country

The above table also shows the predominance of participants from the EU15 Member States, with Germany, France, United Kingdom, Italy and Belgium being most prominently represented. About one fourth of the stakeholders had an EU wide scope. A small number of stakeholders were present from the EU12, with the exception of Cyprus and Lithuania.

It can also be observed that when a Member State had a large number of stakeholders present, these predominantly came from the business sector. The stakeholders from countries with fewer participants were mostly consumer representatives and public authorities. Most legal

¹ Submitted by the Consumer Policy Evaluation Consortium

experts either came from the United Kingdom, Germany, the Netherlands or Belgium, or had an EU wide scope.

The distribution of stakeholders per category of stakeholders and per country is however not necessarily representative of the distribution of contributions made during the hearing. It could be observed that business and consumer representatives accounted for about 70% of the contributions, evenly distributed between both categories. Two-thirds of the remaining 30% of the contributions came from legal experts. As mentioned during the hearing, most of the contributions came either from stakeholders with an EU wide scope or from national stakeholders based in one of the EU15 Member States.

The summary is structured around the four themes discussed during the public hearing, which are (in chronological order):

- The problem definition;
- The objectives to be achieved by the EU action;
- The options
- Analysis of impacts.

Please note that the summary is not one of conclusions drawn but merely of the main points that were made. The term “main point” is used either for statements made by several stakeholders, or in some cases also, by a single one, but which seems indeed general and/or pertinent enough. It should also be noted that for organisational reasons, the interventions were limited in time, so that in some cases the points made were not or could not be substantiated in detail.

Finally, it should be noted that several stakeholders promised to send additional comments and information to support their statements and comments made during the hearing, including the results from research, to the European Commission.

Summary of main trends

Main trends concerning the definition of the problem

Consumer organisations quoted examples to illustrate that existing instruments in several Member States do not produce satisfactory results for the consumers whose rights were harmed. Businesses argued that most of these examples concerned national and not cross-border cases and that the actual number of cross-border cases seems to be very limited, and might, according to some industry representatives, as such, not justify EU action. A business representative actually estimated the number of cross-border mass claims at 0.4 cases per year per EU Member State. A Representative of the European Consumer Centre network argued they received in 2008 about 55 000 cross-border complaints, some of which are mass claims, in particular in the air travel area. A consumer organisation also pointed out the difficulty national consumer organisations faced to represent foreign consumers (rules unclear). Foreign consumer organisations are also not always entitled to stand in court. A legal expert estimated the potential for cross-border cases to increase, in particular in the financial services area.

There was a debate on the issue of subsidiarity and the extent to which this principle would be observed. Some business representatives questioned the justifications for and the added value of EU action in the area of consumer collective redress. Consumer organisations, on the other hand, drew attention on the gaps in the national legislation of some Member States, which in their view could only be addressed through initiatives taken at EU level. This concerns for example the need to ensure access to legal procedures by citizens from Member States other than those in which the lawsuit is taking place, or the need to ensure that companies who are condemned indeed pay the required compensation to the consumers involved.

A consumer representative stated that consumers are not always well informed about the instruments that are available to help protect their rights. Another consumer organisation underlined that often consumers with very low value claims do not act as it will not be cost effective.

A legal expert indicated the anomaly that for cross border cases where one of the countries involved is a non-EU country with a collective redress mechanism, EU customers (from EU countries without such a mechanism) would have no choice but to introduce their collective legal action in that country.

Main trends concerning the objectives

In general, the objectives as specified in the discussion document were endorsed by both the consumer organisations and business representatives.

Some representatives from industry, as well as legal experts, indicated that the objectives should not only apply to consumers but also to enterprises. In other words, collective redress schemes should also be introduced for cases where enterprises are harmed.

A legal expert stated that initiatives meeting the objectives should not be limited to cross-border cases, but also apply to national cases, especially in those Member States where current consumer protection instruments are insufficient.

A legal expert stated that some practical objectives, notably in terms of “speed” and “cost”, should be added to the list.

Some business representatives and legal experts stated that the objectives (and consequently also the options) should be “horizontally” coordinated with similar objectives from other Directorates General of the European Commission. Especially the work of DG Competition regarding antitrust law infringements was referred to.

A representative from a consumer organisation pointed out that obtaining better compensation for harmed consumers implies the need for harmonisation of the principles of compensation. The modalities of financial compensation should not be left to the discretion of the Member States.

Main trends concerning the options²

² In the consultation paper, the five options were defined as follows : option 1 : no action – option 2 : developing self regulation – option 3 : non binding setting up of collective ADR and judicial collective redress schemes – option 4 : as option 3, but binding setting up – option 5 : EU wide judicial collective redress mechanism including collective ADR

Most stakeholders representing all the different categories agreed that the redefinition of the five options, compared with the four options elaborated in the Green Paper, has facilitated the discussions.

In general, consumer organisations and legal experts were in favour of options 4 and/or 5. Business representations preferred options 1 and 2, i.e. no or very little new action launched by the European Commission, but with an in-depth evaluation of existing instruments, some of which have been introduced only very recently, and might need to be improved. A business representative pointed out the need to respect the legal traditions of the Member States. Another business representative proposed to oblige, through a EU legal instrument, companies which are found guilty to make provisions in their accounts to pay the claims.

Business representatives as well as consumer representatives of countries that have ADR mechanisms in place, such as mediation, were often satisfied with these instruments. Business representatives (especially from the banking and insurances sectors) pointed out that ADR systems they have set up and finance, mostly are cost-efficient and yield fast results, hence are beneficial to both consumers and businesses, and therefore should be given preference to judicial collective redress. Consumer organisations were however in general in favour of a judicial collective redress mechanism, as it would provide a complementary instrument for cases in which ADR did not work or would yield unsatisfactory results due to the lack of legal certainty that such mechanisms imply. A judicial mechanism could also serve as a “stick”, to push traders to accept ADR particularly where ADR depends only on the ‘goodwill’ of businesses.

Consumer representatives, some business representatives and one legal expert considered collective redress mechanisms to be the “last resort” because of its judicial character. The Dutch system which requires the endorsement by a court of any agreement reached on a voluntary basis could – according to a legal expert – be a good solution too, since it also gives the court a supervising role in checking that the settlement has been reached in an equitable way. A consumer representative, however, pointed out that the existing Dutch system was not adequate for all mass claims. It is based on the willingness of the parties to negotiate.

No consensus was reached on opt-in versus opt-out. Arguments in favour of opt-out made by consumer representatives related, for example, to the fact that opt-out could help to protect the rights of “vulnerable” consumers such as elderly people or low-income families. Arguments against opt-out made by business representatives mainly pointed at the risk of leading to “US-like situations”, and the right of the defendant to know against whom he should defend himself. As to the opt-in approach, it was pointed out by a consumer representative that it implies the risk that there would not be enough consumers explicitly wanting to go to court, so that no judicial procedure would be started.

The test-case approach was supported by a legal expert, who thinks it might help limit overall litigation costs. A consumer representative and another legal expert emphasised that it would be very difficult to obtain uniform results in follow-up cases when these were handled by courts in different Member States applying different laws, although the importance of this problem should, according to still another legal expert, not be exaggerated. One business representative from Finland also reported the results on a hearing organised when preparing the Finnish law on collective redress, and which turned out to be in favour of a test case approach.

Consumer organisations were in favour of public funding to launch collective actions. However, a legal expert indicated that the principle of “everybody is equal before the law” implies that the state cannot discriminate between citizens or entities, whereas consumer organisations, funded with public means, might do so in practice (i.e. by having discretion about which cases to take on). Another legal expert gave the example of public funding in Québec which seems to work well. Finally, a consumer representative wondered if the money that a company has put aside but that was eventually not claimed, could be transferred to a fund and used to finance other cases.

A business representative warned that if a collective redress mechanism was to be made accessible to consumer organisations from other Member States, a uniform set of registration criteria for consumer organisations should be agreed, in order to avoid abuses.

Instruments for collective redress could, *mutatis mutandis*, also be developed for other domains than consumer protection, e.g. for health issues and environmental issues; according to the Commission, this issue is still open. Statements in this sense were made by legal experts.

Main trends concerning the input for the impact assessment

Very little concrete inputs were provided, both in relation to the impacts on national legal systems and regarding implementation and litigation costs.

A consumer organisation underlined that often people have a wrong perception of costs. Compensation of unfair practices as defined by a court should not be considered as costs for businesses. It shows the costs of unfair commercial practices for consumers. According to some other consumer representatives, the socio-economic cost of not having efficient (collective) consumer protection instruments should also be taken into account when undertaking an impact assessment.

Representatives from all types of stakeholders agreed that the options were not detailed enough to make assessments of the impact as well on the national systems as on the costs.

As regards implementation costs of a collective redress scheme, consumer representatives expressed fears that these will be very high, but once implemented the collective redress procedure could be cost effective (compared to total costs of individual procedures). On the other hand, industry representatives and legal experts commented that implementation costs are difficult to predict.

Some consumer organisations stated that the risks of “US-like situations” when choosing a collective redress instrument with opt-out should not be exaggerated, whereas some business representatives specifically warned for such situations, which in the view of one of them could lead to a multiplication of the current judicial costs by a factor 4 to 5.

A legal expert identified the need for considering in more depth the way in which the distribution of damages is organised, as this may be rather complex and as a result also costly.