

**BRE-JBZ**

**From:** Kaai, Geran  
**Sent:** vrijdag 3 april 2015 16:00  
**To:** Verweij, Ellen  
**Subject:** FW: Meeting request: [REDACTED] - Executive Director - European Justice Forum (EJF) - Brussels 21 Feb [REDACTED]  
**Attachments:** Towards a Coherent European Approach to Collective Redress.pdf  
**Follow Up Flag:** Follow up [REDACTED]  
**Flag Status:** Completed

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**From:** European Justice Forum [mailto:info@europeanjusticeforum.org]  
**Sent:** woensdag 27 februari 2013 15:19  
**To:** Kaai, Geran  
**Subject:** RE: Meeting request: [REDACTED] - Executive Director - European Justice Forum (EJF) - Brussels 21 Feb [REDACTED]

Dear Geran,

Many thanks for meeting with [REDACTED] and I last week, to discuss the proposed Data Protection Regulation and specifically the contents of Chapter VIII. During our conversations about collective redress policy you mentioned that you would be interested in seeing a copy of the European Parliament's own-initiative report on the subject, adopted in January 2012. Please find a copy of this report attached, along with an electronic link below.

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2012-0012+0+DOC+PDF+V0//EN>

I hope you find this useful. Please do not hesitate to contact us should you have any further questions.

Many thanks,

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**From:** European Justice Forum [mailto:info@europeanjusticeforum.org]  
**Sent:** 14 February 2013 10:37  
**To:** 'geran.kaai@minbuza.nl'  
**Subject:** Meeting request: [REDACTED] Executive Director - European Justice Forum (EJF) - Brussels 21 Feb

Dear Mr Kaai,

I was given your contact details by your colleague Jerome Larosch, who we have been in contact with on a number of occasions in Brussels regarding consumer justice issue, in particular ADR. The European Justice Forum (EJF) is a research led coalition of businesses, individuals and organisations working to promote fair, balanced, transparent and efficient civil justice laws and systems in Europe.

I am writing to you on behalf of [REDACTED] the Executive Director of the EJF, to invite you to a meeting with him in Brussels at a time convenient to you on 21<sup>st</sup> February 2013.

This meeting would be an opportunity for [REDACTED] to introduce himself and the work of EJF. In particular this would be an opportunity to discuss the European Commission's proposed Regulation in the field of Data Protection, focusing on the articles in Chapter VIII relating to liability, litigation and restorative justice.

Given your role in the Working Party on Information Exchange and Data Protection (DAPIX), which is currently reviewing the Commission's Data Protection Regulation proposal, we would most appreciate an opportunity to meet with you.

We await your response and look forward to the opportunity of meeting with you.

Kindest regards,

[REDACTED] | EJF Secretariat

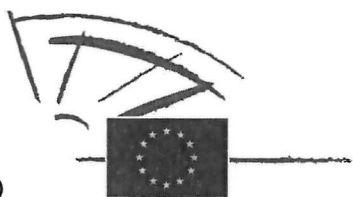
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**A7-0012/2012**

12.1.2012

## REPORT

on 'Towards a Coherent European Approach to Collective Redress'  
(2011/2089(INI))

Committee on Legal Affairs

Rapporteur: Klaus-Heiner Lehne

## CONTENTS

	<b>Page</b>
MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION .....	3
EXPLANATORY STATEMENT.....	11
OPINION OF THE COMMITTEE ON ECONOMIC AND MONETARY AFFAIRS.....	17
OPINION OF THE COMMITTEE ON THE INTERNAL MARKET AND CONSUMER PROTECTION .....	23
RESULT OF FINAL VOTE IN COMMITTEE .....	30



## MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION

### on 'Towards a Coherent European Approach to Collective Redress'

(2011/2089(INI))

*The European Parliament,*

- having regard to the Commission staff working document of 4 February 2011 entitled 'Public Consultation: Towards a Coherent European Approach to Collective Redress' (SEC(2011)0173),
- having regard to the draft guidance paper entitled 'Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union', published by the Commission in June 2011,
- having regard to Directive 2009/22/EC on injunctions for the protection of consumers' interests<sup>1</sup>,
- having regard to the consultation paper for discussion on the follow-up to the Green Paper on consumer collective redress, published by the Commission in 2009,
- having regard to its resolution of 26 March 2009 on the White Paper on damages actions for breach of the EC antitrust rules<sup>2</sup>,
- having regard to the Commission Green Paper of 27 November 2008 on consumer collective redress (COM(2008)0794),
- having regard to its resolution of 20 January 2011 on the Report on Competition Policy 2009<sup>3</sup>,
- having regard to the Commission White Paper of 2 April 2008 on damages actions for breach of the EC antitrust rules (COM(2008)0165),
- having regard to the Monti report of 9 May 2010 on a new strategy for the single market,
- having regard to the Commission communication of 13 March 2007 entitled 'EU Consumer Policy Strategy 2007-2013: Empowering Consumers, Enhancing their Welfare, Effectively Protecting Them' (COM(2007)0099),
- having regard to its resolution of 25 October 2011 on alternative dispute resolution in civil, commercial and family matters<sup>4</sup>,
- having regard to its resolution of 13 September 2011 on the implementation of the directive on mediation in the Member States, its impact on mediation and its take-up by

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<sup>1</sup> OJ L 110, 1.5.2009, p.30.

<sup>2</sup> OJ C 117 E, 6.5.2010, p.161.

<sup>3</sup> Texts adopted, P7\_TA(2011)0023.

<sup>4</sup> Texts adopted, P7\_TA(2011)0449.

the courts<sup>1</sup>,

- having regard to Rule 48 of its Rules of Procedure,
  - having regard to the report of the Committee on Legal Affairs and the opinions of the Committee on Economic and Monetary Affairs, the Committee on Industry, Research and Energy and the Committee on the Internal Market and Consumer Protection (A7-0012/2012),
- A. whereas in the European area of justice, citizens and companies must not only enjoy rights but must also be able to enforce those rights effectively and efficiently;
- B. whereas recently adopted EU legislation is designed to enable parties in cross-border situations either to enforce their rights effectively<sup>2</sup> or to seek out-of-court settlement by way of mediation<sup>3</sup>;
- C. whereas the benefits of the alternative dispute resolution method are undisputed and fair access to justice should remain available to all EU citizens;
- D. whereas, according to the Flash Eurobarometer on 'Consumer attitudes towards cross-border trade and consumer protection' published in March 2011, 79% of European consumers agree that they would be more willing to defend their rights in court if they could join other consumers complaining about the same issue;
- E. whereas consumers affected by a legal infringement who wish to pursue a court case in order to obtain redress on an individual basis often face significant barriers in terms of accessibility, effectiveness and affordability owing to sometimes high litigation costs, potential psychological costs, complex and lengthy procedures, and lack of information on the available means of redress;
- F. whereas, when a group of citizens are victims of the same infringement, individual lawsuits may not constitute an effective means of stopping unlawful practices or obtaining compensation, in particular if the individual loss is small in comparison with the litigation costs;
- G. whereas in some Member States the overall performance of the existing consumer redress and enforcement tools designed at EU level is not deemed satisfactory, or such mechanisms are not sufficiently well known, which results in their limited use;
- H. whereas the integration of European markets and the consequent increase in cross-border activities highlight the need for a coherent EU-wide approach to address cases where consumers are left empty-handed as the procedures for the collective claim of

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<sup>1</sup> Texts adopted, P7\_TA(2011)0361.

<sup>2</sup> Regulation (EC) No 861/2007 establishing a European Small Claims Procedure (OJ L 199 , 31.07.2007, p. 1); Regulation (EC) No 1896/2006 creating a European order for payment procedure (OJ L 399 , 30.12.2006, p. 1); Regulation (EC) No 805/2004 creating a European Enforcement Order for uncontested claims (OJ L 143, 30.04.2004, p. 15).

<sup>3</sup> Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (OJ L 136, 24.05.2008, p. 3).

compensatory relief which have been introduced in a number of Member States do not provide for cross-border solutions;

- I. whereas national and European authorities play a pivotal role in the enforcement of EU law, and private enforcement should only supplement, but not replace, public enforcement;
  - J. whereas public enforcement to stop infringements and impose fines does not of itself enable consumers to be compensated for damage suffered;
  - K. whereas bundling claims in a single collective redress procedure, or allowing such a claim to be brought by a representative entity or body acting in the public interest, could simplify the process and reduce costs for the parties involved;
  - L. whereas a system based on collective legal actions can usefully supplement, but is no substitute for, individual legal protection;
  - M. whereas the Commission must respect the principles of subsidiarity and proportionality with regard to any proposal that does not fall within the exclusive competence of the Union;
1. Welcomes the abovementioned horizontal consultation and stresses that victims of unlawful practices – citizens and companies alike – must be able to claim compensation for their individual loss or damage suffered, in particular in the case of scattered and dispersed damages, where the cost risk might not be proportionate to the damages suffered;
  2. Notes the efforts made by the US Supreme Court to limit frivolous litigation and abuse of the US class action system<sup>1</sup>, and stresses that Europe must refrain from introducing a US-style class action system or any system which does not respect European legal traditions;
  3. Welcomes the efforts of Member States to strengthen the rights of victims of unlawful behaviour by introducing or planning to introduce legislation aimed at facilitating redress while avoiding an abusive litigation culture, but also recognises that national collective redress mechanisms are widely divergent, in particular in terms of scope and procedural characteristics, which may undermine the enjoyment of rights by citizens;
  4. Welcomes the Commission's work towards a coherent European approach to collective redress and asks the Commission to demonstrate in its impact assessment that, pursuant to the principle of subsidiarity, action is needed at EU level in order to improve the current EU regulatory framework so as to allow victims of infringements of EU law to be compensated for the damage they sustain and thus contribute to consumer confidence and smoother functioning of the internal market;
  5. Underlines the possible benefits of collective judicial actions in terms of lower costs and greater legal certainty for claimants, defendants and the judicial system alike by avoiding parallel litigation of similar claims;

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<sup>1</sup> Wal-Mart Stores Inc. v. Dukes et al. 564 U. S. xxx (2011).

6. Believes, as regards the competition sector, that public enforcement is essential to implement the provisions of the Treaties, to fully achieve the goals of the EU and to ensure the enforcement of EU competition law by the Commission and national competition authorities;
7. Recalls that, currently, only Member States legislate on national rules for quantifying the amount of compensation that can be awarded; notes, furthermore, that the enforcement of national law must not prevent the uniform application of European law;
8. Calls on the Commission to examine thoroughly the appropriate (legal basis for any measures in the field of collective redress;
9. Notes that the information available to date, in particular a study carried out for DG SANCO in 2008 entitled 'Evaluation of the effectiveness and efficiency of collective redress mechanisms in the EU', indicates that collective redress mechanisms available within the EU have not generated disproportionate economic consequences;

#### **Existing EU legislation and injunctive relief**

10. Notes that some enforcement mechanisms for individual cases, such as Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters and Regulation (EC) No 805/2004 creating a European Enforcement Order for uncontested claims, already exist at EU level and believes that, in particular, Regulation No 861/2007 establishing a European Small Claims Procedure provides access to justice by simplifying cross-border litigation and reducing costs in cases involving claims for a sum of less than EUR 2 000, but notes that this legislation is not designed to provide effective access to justice in cases where a large number of victims suffer similar damage;
11. Takes the view that injunctive relief also plays an important role in safeguarding rights which citizens and companies enjoy under EU law and believes that the mechanisms introduced under Regulation (EC) No 2006/2004 on consumer protection cooperation<sup>1</sup>, as well as Directive 2009/22/EC on injunctions for the protection of consumer interests can be significantly improved so as to foster cooperation and injunctive relief in cross-border situations;
12. Takes the view that the need to improve injunctive relief remedies is particularly great in the environmental sector; calls on the Commission to explore ways of extending relief to that sector;
13. Considers that injunctive relief should focus on the protection of both the individual interest and the public interest, and calls for caution to be exercised when widening access to justice for organisations, since organisations should not enjoy easier access to justice than individuals;
14. Calls therefore on the Commission to strengthen and increase the effectiveness of existing instruments such as Directive 98/27/EC on injunctions for the protection of consumers' interests and Regulation (EC) No 2006/2004 on cooperation between national authorities

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<sup>1</sup> OJ L 364, 9.12.2004, p. 1.

responsible for the enforcement of consumer protection laws, in order to ensure appropriate public enforcement of consumers' rights in the EU; emphasises, nonetheless, the fact that neither Directive 98/27/EC nor Regulation (EC) No 2006/2004 allows consumers to be compensated for the damage suffered;

#### **Legally binding horizontal framework and safeguards**

15. Takes the view that access to justice by means of collective redress comes within the sphere of procedural law and is concerned that uncoordinated EU initiatives in the field of collective redress will result in a fragmentation of national procedural and damages laws, which will weaken and not strengthen access to justice within the EU; calls, in the event that it is decided after detailed consideration that a Union scheme of collective redress is needed and desirable, for any proposal in the field of collective redress to take the form of a horizontal framework including a common set of principles providing uniform access to justice via collective redress within the EU and specifically but not exclusively dealing with the infringement of consumers' rights;
16. Stresses the need to take due account of the legal traditions and legal orders of the individual Member States and enhance the coordination of good practices between Member States, and believes that the work on an EU scheme fostering effective relief for both consumers and SMEs should not cause delays in the adoption of the horizontal framework;
17. Stresses that any legally binding horizontal framework must cover the core aspects of obtaining damages collectively; further stresses that, in particular, procedural and international private law issues must apply to collective actions in general irrespective of the sector concerned, while a limited number of rules relevant to consumer protection or competition law, dealing with matters such as the potential binding effect of decisions adopted by national competition authorities, could be laid down, for instance, in separate articles or chapters of the horizontal instrument itself or in separate legal instruments in parallel or subsequent to the adoption of the horizontal instrument;
18. Believes that the individual damage or loss suffered plays a pivotal role when deciding to file an action as these are inevitably compared with the potential costs of proceeding with an action; reminds the Commission, therefore, of the need for a horizontal framework on collective redress to be an efficient and cost-effective tool for all parties and takes the view that national procedural rules in Member States could use Regulation (EC) No 861/2007 establishing a European Small Claims Procedure as a reference for the purposes of collective redress in cases where the value of the claim does not exceed that regulation's scope;
19. Considers that collective action under a horizontal framework would deliver the most benefit in cases where the defendant and victims represented are not domiciled in the same Member State (cross-border dimension) and where the rights alleged to have been infringed are granted by EU legislation (infringement of EU law); calls for further examination of how to improve redress in cases of infringements of national law which may have large, cross-border implications;
20. Reiterates that safeguards must be put in place within the horizontal instrument in order to

avoid unmeritorious claims and misuse of collective redress, so as to guarantee fair court proceedings, and stresses that such safeguards must cover, inter alia, the following points:

### **Standing**

- for a representative action to be admissible there must be a clearly identified group, and identification of the group members must have taken place before the claim is brought;
- the European approach to collective redress must be founded on the opt-in principle, whereby victims are clearly identified and take part in the procedure only if they have expressly indicated their wish to do so, in order to avoid potential abuses; underlines the need to respect existing national systems, in accordance with the principle of subsidiarity; calls on the Commission to consider a system which will provide relevant information to all potential victims involved, increase the representativeness of collective actions, allow for the largest number of victims to seek compensation and ensure simple, affordable and effective access to justice for EU citizens, thereby avoiding excessive litigation and subsequent unnecessary individual or collective actions concerning the same infringement; calls on the Member States to put in place efficient mechanisms ensuring that as many victims as possible are informed and made aware of their rights and obligations, in particular when they are domiciled in several Member States, whilst avoiding unduly harming the reputation of the party concerned, in order to respect the principle of the presumption of innocence;
- a collective redress system where the victims are not identified before the judgment is delivered must be rejected on the grounds that it is contrary to many Member States' legal orders and violates the rights of any victims who might participate in the procedure unknowingly and yet be bound by the court's decision;
- Member States should ensure that a judge or similar body continues to have discretionary powers taking the form of a preliminary admissibility check of any potential collective action in order to confirm that the qualifying criteria have been met and that the action is fit to proceed;
- Member States should designate organisations qualified to bring representative actions, and European criteria would be useful in order to clearly define these qualified entities; these criteria could be based on Article 3 of Directive 2009/22/EC on injunctions for the protection of consumer interests, but need to be further specified in order to ensure both that abusive litigation is avoided and that access to justice is granted; such criteria should cover, inter alia, the financial and human resources of qualifying organisations;
- victims must in any case be free to seek the alternative of individual compensatory redress before a competent court;

### **Full compensation for actual damage**

- the horizontal framework should cover compensation only for the actual damage caused, and punitive damages must be prohibited; by virtue of the concept of compensation the damages awarded must be distributed to individual victims in proportion to the harm they sustained individually; by and large, contingency fees are unknown in Europe and should



not form part of the mandatory horizontal framework;

### **Access to evidence**

- collective claimants must not be in a better position than individual claimants with regard to access to evidence from the defendant, and each claimant must provide evidence for his claim; an obligation to disclose documents to the claimants ('discovery') is mostly unknown in Europe and must not form part of the horizontal framework;

### **Loser pays principle**

- there can be no action without financial risk, and Member States are to determine their own rules on the allocation of costs, under which the unsuccessful party must bear the costs of the other party in order to avoid the proliferation of unmeritorious claims in an EU-wide collective redress mechanism;

### **No third-party funding**

- the Commission must not set out any conditions or guidelines on the funding of damages claims, as recourse to third-party funding is unknown in most Member States' legal systems, for instance, by offering a share of the damages awarded; this does not preclude Member States setting out conditions or guidelines on the funding of damages claims;
21. Suggests that, should the Commission submit a proposal for a horizontal framework governing collective redress, a principle of follow-on action should be adopted where appropriate, whereby private enforcement under collective redress may be implemented if there has been a prior infringement decision by the Commission or a national competition authority; notes that establishing the principle of follow-on action does not generally preclude the possibility of providing for both stand-alone and follow-on actions;
  22. Calls on the Commission to explore ways of raising consumer awareness of the availability of collective redress mechanisms and facilitating cooperation between the entities qualified to bring collective actions; stresses the key role that consumer organisations and the European Consumer Centres Network (ECC-Net) can play in passing on the information to as many victims of infringements of EU law as possible;
  23. Stresses that many of the infringements of Union law identified by the Commission in the field of EU consumer protection measures call for the strengthening of injunctive relief<sup>1</sup>, while acknowledging that injunctive relief is not sufficient when victims have suffered damage and have the right to compensation; asks the Commission to identify the EU legislation in respect of which it is difficult to obtain compensatory redress;
  24. Considers that this should be done in order to pinpoint the areas where the horizontal framework could provide for collective compensatory redress for breach of such legislation, as well as for breach of EU antitrust law; calls for the relevant EU legislation to be listed in an annex to the horizontal instrument;

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<sup>1</sup> Study regarding the problems faced by consumers in obtaining redress for infringements of consumer protection legislation, and the economic consequences of such problems, 26 August 2008, Part I: Main Report, p. 21 ff.

## **Alternative dispute resolution (ADR)**

25. Notes that ADR mechanisms often depend on the trader's willingness to cooperate, and believes that the availability of an effective judicial redress system would act as a strong incentive for parties to agree an out-of-court settlement, which is likely to avoid a considerable amount of litigation; encourages the setting-up of ADR schemes at European level so as to allow fast and cheap settlement of disputes as a more attractive option than court proceedings, and suggests that judges performing the preliminary admissibility check for a collective action should also have the power to order the parties involved to first seek a collective consensual resolution of the claim before launching collective court proceedings; believes that the criteria developed by the Court<sup>1</sup> should be the starting point for the establishment of this power; stresses, however, that these mechanisms should remain, as the name indicates, merely an alternative to judicial redress, not a precondition therefor;

## **Jurisdiction and applicable law**

26. Stresses that a horizontal framework should itself lay down rules to prevent a rush to the courts ('forum shopping') whilst not jeopardising access to justice, and that Brussels I should be taken as a starting point for determining which courts have jurisdiction;
27. Calls for further examination of how the conflict-of-law rules might be amended; believes that one solution could be to apply the law of the place where the majority of the victims are domiciled, bearing in mind that individual victims should remain free not to pursue the opt-in collective action but instead to seek redress individually in accordance with the general rules of private international law laid down in the Brussels I, Rome I and Rome II regulations;
28. Emphasises that following the judgment of the Court in Case C-360/09, *Pfleiderer*, the Commission must ensure that collective redress does not compromise the effectiveness of the competition law leniency system and the settlement procedure;

## **Ordinary legislative procedure**

29. Insists that the European Parliament must be involved, within the framework of the ordinary legislative procedure, in any legislative initiative in the field of collective redress and that any proposal must be based on a detailed impact assessment;
30. Instructs its President to forward this resolution to the Council, the Commission, the governments and parliaments of the Member States, and the social partners at EU level.

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<sup>1</sup> Judgment of 18 March 2010 in Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, *Allassini*, not yet reported in the ECR.



## EXPLANATORY STATEMENT

The rapporteur welcomes the horizontal consultation of the Commission, its openness to a European approach to collective redress and its commitment to strong safeguards against abusive litigation. The recent decision of the US Supreme Court in a class-action bias case<sup>1</sup> shows once more that the US legal system itself is fighting against abusive and unmeritorious class actions resulting from excesses of the US system that were certainly not envisaged when such actions were introduced decades ago. Europe must stand firm against any intention to changing EU legal traditions by incorporating alien procedural elements allowing for abusive collective action.

The rapporteur understands that the EU legal tradition is directed towards solving disputes between individuals rather than through a collective entity. However, in some instances it might, on the one hand, be in the interest of victims of unlawful behaviour to bundle their claims which they would not otherwise pursue individually and, on the other, it might be in the interest of companies to obtain one single settlement or court action bringing legal certainty to the matter. To this extent, many Member States have in recent years introduced collective instruments allowing for some kind of collective access to justice. These instruments vary widely, taking, for instance, the form of a representative action, group action or test case. It was impossible to find exhaustive information about the relevant national law and in particular its application and functionality, as several Member States have only recently introduced these mechanisms and reliable information is not always available. The rapporteur is therefore not surprised that the Commission has so far failed to show the need for EU action. Which article of the TFEU can be taken as the legal basis for a horizontal instrument still needs to be examined in detail. Certainly, the rejection of EU action by national governments has to be taken seriously<sup>2</sup>.

The rapporteur believes, nevertheless, that in the European area of justice citizens and companies must be able to enforce their rights under EU legislation effectively and efficiently. In case of mass or dispersed damages victims of unlawful behaviour might indeed abstain from claiming compensation as the costs of seeking individual redress might be disproportionate to the damage sustained. However, enforcement of EU law by European and national authorities must remain in the foreground, since these authorities have public-law investigative instruments at their disposal which cannot be made available to private parties; to this extent, private enforcement continues to be complementary.

### Existing EU Legislation and Injunctive Relief

In recent years, the EU has sought actively to improve access to justice. For instance, Regulation No 861/2007 on European Small Claims allows for efficient and effective access to justice by simplifying cross-border litigation of claims for less than EUR 2000. Further

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<sup>1</sup> Wal-Mart Stores Inc. v. Dukes et al. 564 U. S. xxx (2011).

<sup>2</sup> See for instance the negative responses of the French and German governments to the consultation at [http://ec.europa.eu/competition/consultations/2011\\_collective\\_redress/french\\_authorities\\_fr.pdf](http://ec.europa.eu/competition/consultations/2011_collective_redress/french_authorities_fr.pdf) and [http://ec.europa.eu/competition/consultations/2011\\_collective\\_redress/germany\\_ministry\\_of\\_justice\\_de.pdf](http://ec.europa.eu/competition/consultations/2011_collective_redress/germany_ministry_of_justice_de.pdf), respectively.

evaluation of the regulation is needed in order to establish whether or not the intentions of the EU legislator have been realised.

The rapporteur acknowledges the importance of injunctive relief. In many cases, such as misleading advertising, lack of transparency of contracts, etc. damages might not occur and priority should be given to stopping any further unlawful behaviour. The Commission itself has indicated how Regulation (EC) No 2006/2004 on Consumer Protection Cooperation<sup>1</sup> as well as Directive 2009/22/EC on injunctions for the protection of consumer interests (Injunctions Directive)<sup>2</sup> can be improved in order to strengthen cooperation and injunctive relief<sup>3</sup>.

However, the rapporteur is concerned about a wide interpretation of national procedural rules which, according to the case law of the Court of Justice, must 'not be less favourable than those governing similar domestic actions (principle of equivalence) and must not make it in practice impossible or excessively difficult to exercise rights conferred by EU law (principle of effectiveness).'<sup>4</sup> The rapporteur believes that, while respecting those principles, organisations must not enjoy privileged access to justice and EU legislation should focus on the protection and enforcement of the interests of the individual rather than the interests of the general public.

### **Horizontal Instrument and Safeguards**

Bearing in mind the diversity of national procedural laws, the rapporteur believes that any initiatives in the field of collective redress will result in a fragmentation of Member States' damages and procedural laws. A European approach cannot confine itself to coordinating the different Commission initiatives as coordination does not prevent different outcomes in the legislative procedures.

Indeed, any initiative in the field of collective redress would address the same procedural and private international law questions. For instance, identical strong safeguards, relating to aspects such as the standing of a representative entity and the criteria for authorisation, access to evidence or the application of the loser pays principle, are needed irrespective of the sector concerned. Those questions are raised not only in the current horizontal consultation but also in the preceding White and Green Papers.

The rapporteur presumes that the Commission already envisages a horizontal approach. The different sectors identified by the Commission's Green Paper on Consumer Collective Redress indicate that this instrument is to apply to different sectors, e.g. financial services, telecommunication, etc<sup>5</sup>. Hence, the connecting factor is not the sector anymore but only the claimant, i.e. the consumer. This clearly demonstrates that a horizontal instrument is the best way forward in order not to introduce different sectoral legislation resulting in fragmented national procedural laws.

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1 Cited above.

2 Cited above.

3 See Biennial Report 2009, COM (2009) 336, and Report from the Commission concerning the application of Directive 98/27/EC, COM (2008) 756.

4 See for instance the judgment of 12 May 2011 in Case C-115/09, Trianel Kohlekraftwerk Lünen, not yet reported in the ECR.

5 Green Paper of 27 November 2008 on 'Consumer Collective Redress' (COM(2008) 794 final), p. 4.

Fragmentation of national laws would not only disrupt the functioning of judicial systems but also increase legal uncertainty, which would be at odds with the aim of improving access to justice. Procedural law determines the rules applicable to the proceedings within the court itself and seeks to promote access to justice. In general, these rules do not distinguish between different industrial sectors and different areas of law. Consequently, a European approach to collective redress must not introduce such a distinction but allow for a horizontal approach. As far as limited sector-specific rules are needed, these can be laid down in the horizontal instrument itself, for instance in a separate chapter.

The rapporteur believes that collective redress should be possible where an individual victim abstains from seeking compensation because he considers that the damage is not in proportion to the costs of court proceedings. Studies indicate that the financial threshold lies between EUR 101 and 2 500<sup>1</sup>. Limiting collective redress to individual losses of up to EUR 2000 would align the horizontal instrument with Regulation No 861/2007 on a European Small Claims Procedure and ensure consistency of EU legislation. The rapporteur would like to initiate a discussion on the question whether a lower threshold would be more appropriate.

The rapporteur considers that a horizontal instrument should be available in cross-border cases where EU law is infringed. The cross-border element would be fulfilled where the victim and the defendant are not domiciled in the same Member State. The horizontal instrument might also apply where victims are not domiciled in the same Member State.

Any horizontal instrument must be based on the principle that anyone who has suffered damage must have the right to receive compensation but that those bringing collective actions must not be in a better position than individual claimants. This principle would entail incorporating a number of safeguards in any horizontal instrument.

The rapporteur asks for qualified entities to be entrusted with representative actions. European criteria need to be developed according to which Member States can authorise qualified entities to file a claim. Article 3 of Directive 2009/22/EC on injunctions for the protection of consumer interests could serve as a starting point for developing these criteria, which must be the first barrier to exclude misuse of a horizontal instrument. According to these criteria, authorisation could be granted to consumer organisations, ombudsmen, etc. Owing to the legal complexity of collective actions, it is however necessary to be represented by a lawyer. Consequently, there is no need for group actions under which victims can combine their claims in a single claim. The authorisation of qualified entities would provide Member States with a mechanism at hand which would allow for some control of the representative organisation and consequently of the horizontal instrument against misuse while this control would not exist in the case of a group action.

The rapporteur calls for only a clearly identified group of people to be able to take part in a representative action and identification must be complete when the claim is brought. The Constitutions of several Member States prohibit opt-out actions where a claim is brought on behalf of unknown victims as victims would not be free not to bring an action. An opt-out action would also be problematic in light of Article 6 ECHR.

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<sup>1</sup> See Special Eurobarometer 342, April 2011, p. 45; see also Commission staff working paper, Consumer Empowerment in the EU, SEC (2011) 469, Brussels, 07.04.2011, p. 5: EUR 1000.

Only damage actually suffered may be compensated and only the victims of an EU law infringement may be compensated. This also implies that no part of the compensation must remain in the hands of the representative organisation since this would not only conflict with the principle of compensation but would also significantly increase the financial incentive for filing unmeritorious claims.

The rapporteur calls for the prohibition of punitive damages so as in particular to avoid forum shopping. It is true that in *Manfredi* the Court recognised the permissibility of national provisions on punitive damages, but this judgment applies only *in the absence of Community rules governing the matter*<sup>1</sup>. The Union legislator may thus exclude the payment of punitive damages.

The rapporteur wishes to maintain the principle that the party alleging an infringement must prove it; thus, a defendant cannot be required to provide evidence for the claimant. It is of decisive importance that collective claimants should not be in a better position than individual claimants when it comes to evidence. Instead of introducing alien disclosure requirements at European level, the Member States should continue to regulate access to evidence in accordance with their procedural law. Disclosure requirements unnecessarily raise the cost of litigation and encourage unmeritorious claims and must therefore be rejected at European level.

The rapporteur wishes to maintain the national rules on allocation of costs, since the well established principle in the Member States that the loser pays is a safeguard against unwarranted claims. Neither should the Commission use soft law instruments to encourage the Member States to adjust their cost allocation rules.

The rapporteur rejects the funding of collective claims. Not only are funding mechanisms unknown in most Member States, but they also convert a claim into a tradable good. The Union should refrain from allowing market mechanisms to decide whether a claim can be brought or not. In this respect it should be borne in mind that many consumer associations, etc. enjoy public funding and that further thought should be given as to whether and to what extent public funding has to be increased in order to strengthen representative actions.

The rapporteur could not touch upon many other important questions relating to safeguards owing to drafting constraints, for instance how to deal with documents in the hands of public authorities. Bearing in mind that in areas such as competition law private actions for compensation will most likely be pursued after the breach of EU law has been established by a competition authority, further thought should be given to the question of access to documents. The rapporteur believes that access to documents retrieved in public investigations should be granted, but that specific criteria need to be developed in order to identify when access to documents can be denied so as to protect legitimate interests of the defendant or a third party and any other overriding interests. It should be borne in mind that with regard to private damages in the competition field and the interaction with the leniency programme, the Court recently ruled that it is '*for the courts and tribunals of the Member States, on the basis of their national law, to determine the conditions under which such access*

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<sup>1</sup> Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-6619, para. 92.

*must be permitted or refused by weighing the interests protected by European Union law*<sup>1</sup>.

In addition, it could also be considered to allow for a representative action to be brought only after the breach of EU law has finally been established by the competent national or European authority or court against whose decisions there is no remedy under national law.

In this context but not within the horizontal instrument, specific criteria need to be developed which allow for fines or other public sanctions to be deducted after damages have been awarded in order not to put disproportionate financial burdens on the defendant. In the field of antitrust law, Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty<sup>2</sup> would need to be amended accordingly.

Finally, the rapporteur believes collective redress should not be possible for a general breach of EU law, in particular EU consumer protection law, as such a vague clause would increase legal uncertainty: it would have to be established in each instance whether the rights infringed derive from EU or national legislation. It would also not be sufficient to identify particular sectors, such as financial services and telecommunications<sup>3</sup>, insofar as it would not be clear which rights granted under EU law are at stake. Instead, legal certainty will be increased by identifying the exact pieces of EU legislation where problems regarding the enforcement of rights of victims exist. Once this identification has taken place, the horizontal instrument should apply to damages actions in case of breach of the relevant legislation indicated as well as of EU antitrust rules. As in the Injunctions Directive the relevant EU legislation should be listed in an Annex to the horizontal instrument so as to allow for the correct determination of the infringements against which collective redress is available under the horizontal instrument.

### **Alternative Dispute Resolution (ADR)**

ADR generally provides for a quick and fair settlement and should be more attractive for resolving the dispute than court proceedings. It therefore should be made obligatory to seek out-of-court settlements before bringing collective action. The introduction of a legal obligation for a mandatory settlement procedure must observe certain criteria developed by the Court in order to be compatible with the right to effective judicial protection<sup>4</sup>. A Commission proposal on ADR is expected in autumn 2011 and this proposal should be the starting point for developing such a mechanism.

### **Jurisdiction and Applicable Law**

The rapporteur believes that questions of jurisdiction and the applicable law are of the utmost importance in order to prevent forum shopping. Clear, strict rules are therefore needed to avoid a rush to the courts. Rules on jurisdiction and the applicable law in cross-border situations favour the weaker party, e.g. the consumer. However, when it comes to collective redress, the victims do not bring a single claim but a collective claim. The need for protection

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<sup>1</sup> Judgment of 14 June 2011 in Case C-360/09 Pleiderer, not yet reported in the ECR.

<sup>2</sup> OJ L 1, 4.1.2003, p. 1.

<sup>3</sup> Commission Green Paper on Consumer Collective Redress, COM (2008) 794, p. 4

<sup>4</sup> Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, Alassini, para. 48 ff.



of the weaker party is therefore no longer absolute, which allows for the introduction of specific rules on jurisdiction and the applicable law in the horizontal instrument itself instead of changing the relevant EU rules.

With regard to jurisdiction, a special clause in the horizontal instrument should provide that the courts for the place where the defendant is domiciled should have jurisdiction. The rapporteur considers that any other solution would be impractical. Providing that the courts for the place where the major part of damage was caused should have jurisdiction could be problematic since in many cases it is difficult if not impossible to determine where the major part of the damage was caused. In addition, providing for the courts to have jurisdiction where the majority of victims are domiciled might at first sight seem easy in an opt-in procedure as the victims have to be clearly identified. However, this clause would leave room for forum shopping, as there would be no way of avoiding situations in which a critical mass of victims from jurisdictions where the procedural law was perceived as being more claimant-friendly were encouraged to join the action

The rapporteur also believes that clear, strict rules on the applicable law are needed but understands that this would be difficult to achieve. Further examination is therefore needed to evaluate whether it might not be possible to provide for the applicability of the law of the place where the majority of the victims are domiciled. Alternatively, the rapporteur considers that the applicable law could also be aligned with the rules on jurisdiction, i.e. the applicable law could be the law of the place where the defendant is domiciled. This would have the advantage that the court would give its ruling on the basis of a single law with which it is familiar.

In the absence of full harmonisation of most areas of national law, such a rule could not exclude situations in which the applicable law grants fewer rights than the material laws of other Member States in which some of the victims that opted in are domiciled. However, the victim would remain free not to pursue the opt-in collective action and seek individual redress in his Member State.

In case the question of the applicable law is not dealt with, the court would have to deliver its judgment on the basis of different national laws. One way out could be to form subgroups consisting of groups of victims formed in accordance with the different substantive laws having to be applied. This might reduce the complexity of the claim but nevertheless would require the competent court to apply up to 28 different laws.

### **Ordinary Legislative Procedure**

The rapporteur strongly insists that Parliament has to be involved, under the ordinary legislative procedure, in any legislative initiative. Past experience shows that Parliament will not accept any proposal where this right is not respected.

20.10.2011

## **OPINION OF THE COMMITTEE ON ECONOMIC AND MONETARY AFFAIRS**

for the Committee on Legal Affairs

on Towards a Coherent European Approach to Collective Redress  
(2011/2089(INI))

Rapporteur: Andreas Schwab

### **SUGGESTIONS**

The Committee on Economic and Monetary Affairs calls on the Committee on Legal Affairs, as the committee responsible, to incorporate the following suggestions in its motion for a resolution:

1. Welcomes the Commission's work towards a coherent European approach to collective redress; recalls its resolution of 26 March 2009 on the White Paper on damages actions for breach of the antitrust rules and considers that any new initiative in the field of collective redress in competition policy should be coherent with the contents of both this resolution and the 2009 resolution;
2. Believes, as regards the competition sector, that public enforcement is essential to implement the provisions of the Treaties, to fully achieve the goals of the EU and to ensure the enforcement of EU competition law by the Commission and national competition authorities;
3. Recognises, however, that in an increasingly integrated single market in which online trade is growing rapidly, there is a need for an EU-wide approach in the area of collective redress;
4. Notes that private enforcement through collective redress could facilitate EU-level compensation for harm caused to consumers and undertakings and help to ensure that EU competition law is effective;
5. Notes that forms of private enforcement already exist in many Member States, but that the national systems are widely divergent and that many Member States do not have clear and

explicitly established specific rules on collective redress, including judicial redress;

6. Emphasises that, with a view to completing the internal market, there should be greater consistency in consumer rights across the Union; points out that a well-designed system for collective redress can contribute to consumer confidence and thus to the smooth functioning of the internal market and online trade, boosting the competitiveness of the European economy;
7. Notes also that relatively few private actions for damages are brought before national courts;
8. Underlines, therefore, the need to increase the effectiveness of both the right of access to justice and EU competition law, since individual actions may not always be sufficient and efficient;
9. Recalls that, currently, only Member States legislate on national rules applicable for quantifying the amount of compensation that can be awarded; notes, furthermore, that the enforcement of national law must not prevent the uniform application of European law;
10. Adds that any EU collective redress system may take into account national best practices in the area of collective redress;
11. Stresses, furthermore, that any horizontal EU instrument on collective redress should outline common minimum standards on obtaining damages collectively, in line with the principles of subsidiarity, speciality and proportionality, possibly including general procedural and private international law issues;
12. Believes that the specific issues arising in the competition field should be taken into account appropriately and that any instrument applicable to collective redress must take full and proper account of the specificities of the antitrust sector;
13. Recalls that these specific issues include the leniency policy, which is an essential tool for uncovering cartels; emphasises that collective redress should not compromise the effectiveness of the competition law leniency system and the settlement procedure;
14. Points out, moreover, that damages actions for breach of EU competition law have special characteristics that set them apart from other damages actions in that they might affect powers conferred directly by the Treaties on public authorities, allowing them to investigate and punish infringements, and, on the other hand, they relate to behaviour that disrupts the smooth functioning of the internal market and might also affect relations at different levels among companies and consumers;
15. Stresses that there is comparative experience on the basis of which to evaluate, and abundant literature on the basis of which to address, the many specific and important issues that do not exist in other fields;
16. Points out that the experience gained to date in those EU Member States where such redress mechanisms are already in place shows that there have been no abuses or liquidations of businesses;



17. Reiterates that, as regards collective redress in competition policy, safeguards need to be put in place in order to avoid a class-action system with frivolous claims and excessive litigation and to guarantee equality of arms in court proceedings, and stresses that such safeguards must cover, inter alia, the following points:

- the group of claimants must be clearly identified before the claim is brought (opt-in procedure);
- public authorities such as ombudsmen or prosecutors, as well as representative bodies, may bring an action on behalf of a clearly identified group of claimants;
- the criteria used to define the representative bodies qualified to bring representative actions need to be established at EU level;
- a class-action system must be rejected on the grounds that it would promote excessive litigation, may be contrary to some Member States' constitutions and may affect the rights of any victim who might participate in the procedure unknowingly but would still be bound by the court's decision;

(a) individual actions allowed:

- claimants must under all circumstances be free to make use of the alternative of individual compensatory redress before a competent court;
- collective claimants must not be in a better position than individual claimants;

(b) compensation for minor and diffuse damages:

- claimants of minor and diffuse damages should have appropriate means of access to justice through collective redress and should secure fair compensation;

(c) compensation for actual damage only:

- compensation may be awarded only for the actual damage sustained: punitive damages and unfair enrichment must be prohibited;
- each claimant must provide evidence for his claim;
- the damages awarded must be distributed to individual claimants in proportion to the harm they sustained individually;
- by and large, contingency fees are unknown in Europe and must be rejected;

(d) loser pays principle:

- there may be no action if the claimant is defenceless as a result of a lack of financial means; moreover the procedural costs, and hence the risk, involved in legal action are to be borne by the party which loses the case; it is a matter for the Member States to lay down rules on the allocation of costs in this context;

(e) no third-party funding:

- proceedings should not be pre-financed by third parties, with, for example, claimants agreeing to surrender to third parties possible subsequent entitlements to compensation;

18. Calls on the Commission to thoroughly and objectively analyse whether these safeguards can genuinely be ensured in a collective redress system;

19. Calls on the Commission to clearly lay down the conditions under which an action may be allowed and to provide for the Member States having to ensure that any potential collective action undergoes a preliminary admissibility check to confirm that the qualifying criteria have been met and that the action is fit to proceed;

20. Stresses that any horizontal framework must ensure two basic premises:

- Member States will not apply more restrictive conditions to the collective redress cases arising from the infringement of EU law than those applied to cases arising from the infringement of national law;
- none of the principles laid out in the horizontal framework will prevent the adoption of further measures to ensure that EU law is fully effective;

21. Suggests, should the Commission submit a proposal for a legislative instrument governing collective redress in competition policy, that a principle of follow-on action be adopted, whereby private enforcement under collective redress may be implemented if there has been a prior infringement decision by the Commission or a national competition authority, so as to protect the leniency system and ensure that the Commission and national competition authorities are able to take effective action to enforce EU competition law;

22. Notes that establishing the principle of follow-on action does not preclude the possibility of providing for both stand-alone and follow-on actions for the field of competition and for other fields in any legal instrument; points out that, in the case of stand-alone actions, it is necessary to ensure that any private action can be frozen until a public-enforcement decision regarding the infringement has been taken by the competent competition authority under EU law;

23. Supports the development of strong EU-wide alternative dispute resolution mechanisms as voluntary, quick and low-cost extra-judicial dispute settlement procedures, as well as of self-regulatory instruments such as codes of conduct; stresses, however, that these mechanisms should remain, as the name indicates, merely an alternative to judicial redress, not a precondition;

24. Believes that an effective system of collective redress could in fact stimulate the development of alternative dispute resolution mechanisms by creating an incentive for the parties to solve their disputes quickly out of court;

25. Believes that each individual damage or loss suffered plays a pivotal role in decisions to file an action, and takes the view that national procedural rules in Member States could

use Regulation (EC) No 861/2007 establishing a European Small Claims Procedure<sup>1</sup> as a reference for the purposes of collective redress in cases where the value of the claim does not exceed that regulation's scope;

26. Emphasises that any legislative instrument proposed by the Commission pertaining to collective redress in the field of competition should be adopted without further delay and only under the ordinary legislative procedure;

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<sup>1</sup> OJ L 199, 31.7.2007, p. 1.

## RESULT OF FINAL VOTE IN COMMITTEE

<b>Date adopted</b>	17.10.2011
<b>Result of final vote</b>	+: 33 -: 1 0: 0
<b>Members present for the final vote</b>	Burkhard Balz, Udo Bullmann, Pascal Canfin, Nikolaos Chountis, George Sabin Cutaş, Leonardo Domenici, Derk Jan Eppink, Diogo Feio, Ildikó Gáll-Pelcz, Jean-Paul Gauzès, Sven Giegold, Sylvie Goulard, Liem Hoang Ngoc, Gunnar Hökmark, Wolf Klinz, Jürgen Klute, Philippe Lamberts, Werner Langen, Astrid Lulling, Arlene McCarthy, Alfredo Pallone, Anni Podimata, Antolín Sánchez Presedo, Peter Simon, Peter Skinner, Ivo Strejček, Kay Swinburne, Marianne Thyssen
<b>Substitute(s) present for the final vote</b>	Sophie Auconie, Philippe De Backer, Saïd El Khadraoui, Olle Ludvigsson, Thomas Mann, Andreas Schwab, Theodoros Skylakakis
<b>Substitute(s) under Rule 187(2) present for the final vote</b>	Diana Wallis

12.10.2011

## **OPINION OF THE COMMITTEE ON THE INTERNAL MARKET AND CONSUMER PROTECTION**

for the Committee on Legal Affairs

on Towards a Coherent European Approach to Collective Redress  
(2011/2089(INI))

Rapporteur: Sylvana Rapti

### **SUGGESTIONS**

The Committee on the Internal Market and Consumer Protection calls on the Committee on Legal Affairs, as the committee responsible, to incorporate the following suggestions in its motion for a resolution:

- A. whereas consumers affected by a legal infringement who wish to pursue a court case in order to obtain redress on an individual basis often face significant barriers in terms of accessibility, effectiveness and affordability owing to sometimes high litigation costs, potential psychological costs, complex and lengthy procedures, and lack of information on the available means of redress;
- B. whereas, when a group of citizens are victims of the same infringement, individual lawsuits may not constitute an effective means to stop unlawful practices or to obtain compensation, in particular if the individual loss is small in comparison with the litigation costs;
- C. whereas, according to the Special Eurobarometer survey 'European Union Citizens and Access to Justice' of October 2004, which was carried out in the EU-15 Member States, one out of five consumers, and one out of two consumers, will not go to court for disputes amounting to less than EUR 1 000 and EUR 200 respectively;
- D. whereas, according to the Flash Eurobarometer 'Consumer attitudes towards cross-border trade and consumer protection' of March 2011, 79 % of European consumers state that they would be more willing to defend their rights in court if they could join a collective action, as this would be beneficial in terms of costs and effectiveness;

- E. whereas in some Member States the overall performance of the existing consumer redress and enforcement tools designed at EU level is not deemed satisfactory, or such mechanisms are not sufficiently well known, which results in their limited use;
- F. whereas public enforcement by way of stopping infringements and imposing fines does not in itself enable consumers to be compensated for damage suffered;
- G. whereas sixteen Member States have so far introduced collective redress mechanisms in their legal systems, with wide differences in terms of scope, procedural characteristics (legal standing, categories of victims, type of procedure (opt-in/opt-out), financing or the role played by alternative dispute resolution mechanisms in parallel to judicial redress) and effectiveness, creating a true legal patchwork at EU level;
- H. whereas bundling of the claims in a single collective redress procedure, or allowing such a claim to be brought by a representative entity or body acting in the public interest, could simplify the process and reduce costs for the parties involved;
- I. whereas a system based on collective legal actions can usefully supplement, but is no substitute for, individual legal protection;
- J. whereas the integration of European markets and the consequent increase in cross-border activities highlight the need for a coherent EU-wide approach to address cases where consumers are left empty-handed as the procedures for the collective claim of compensatory relief which have been introduced in a number of Member States do not provide for cross-border solutions;

#### **The need for an EU framework**

1. Stresses that, as a consequence of the weaknesses of the current redress and enforcement framework in the EU and the lack of information, a significant proportion of consumers who have suffered damage may not defend their right to obtain redress, and continued illegal practices are causing significant aggregate loss to society;
2. Calls therefore on the Commission to reinforce and increase the effectiveness of existing instruments such as Directive 98/27/EC on injunctions for the protection of consumers' interests and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, in order to ensure appropriate public enforcement of consumers' rights in the EU; insists nonetheless on the fact that neither Directive 98/27/EC nor Regulation (EC) No 2006/2004 allows consumers to be compensated for the damage suffered;
3. Recalls furthermore that Regulation (EC) No 861/2007 establishing a European Small Claims Procedure, Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters and Regulation (EC) No 805/2004 creating a European Enforcement Order for uncontested claims are designed to improve access to justice, simplify cross-border small claims litigation and reduce costs, but have not so far been sufficiently used because of lack of awareness; notes, however, that those instruments only address

individual cases;

4. Underlines that the current situation is not only detrimental to consumers who are the weaker party in market transactions but also imposes unequal market conditions on those businesses that abide by the rules as a result of unfair competition; there is, moreover, currently no effective legal system governing the payment of compensation for damage caused by violations of competition law to individuals in most of the EU countries; notes that the competition authorities punish breaches of competition law and fines are paid to the state, whilst consumers directly affected by such breaches do not receive compensation;
5. Notes with concern that the current lack of compensation is a major loophole in the legal system as it allows for illegal profit to be retained by traders;
6. Points out that, given the diversity of existing national systems, the lack of legal certainty and of a consistent approach to collective redress at EU level may undermine the enjoyment of rights by citizens and gives rise to uneven enforcement of such rights;
7. Emphasises that this situation is leading to significant discrimination in access to justice, to the detriment of the internal market, as consumers are being treated differently depending on their place of residence;
8. Notes that, according to a study carried out for DG SANCO in 2008 ('Evaluation of the effectiveness and efficiency of collective redress mechanisms in the EU'), none of the existing collective redress mechanisms within the EU have generated disproportionate economic consequences for the businesses concerned;
9. Notes that consultations have suggested that there are gaps in the existing regulatory framework; stresses, therefore, the added value of a coherent EU action for the establishment of a common framework in the field of collective redress to address the shortcomings and lack of effectiveness of the existing EU legal instruments, the diversity of situations at national level, the potential evolution and reforms of existing national collective redress systems or the introduction of collective redress systems in Member States where such instruments do not yet exist;
10. Calls on the Commission, therefore, to submit measures, including possibly a legislative proposal establishing an EU-wide coherent collective redress mechanism in the field of consumer protection, applicable to cross-border cases, on the basis of a set of common principles and safeguards inspired by the EU legal tradition and the legal orders of the 27 Member States, and in accordance with the principles of subsidiarity and proportionality enshrined in Article 5 of the Treaty on European Union;
11. Suggests including in such a proposal measures to enhance the coordination and exchange of good practices among Member States; stresses, in this connection, that national experience gained in the area of collective redress has highlighted the mistakes to be avoided in order to achieve an effective collective redress mechanism at European level;
12. Stresses that momentum for a coherent EU action for the establishment of a common framework in the field of collective redress is also arising because certain Member States



are currently considering possibilities for introducing substantial reforms concerning their collective redress schemes, while others are currently considering introducing such schemes;

#### **General principles – strong safeguards against abusive litigation**

13. Stresses that a European approach to collective redress must not give any economic incentive to bring abusive collective actions, and should provide for strong and effective safeguards to avoid unmeritorious claims and disproportionate costs for businesses, particularly in this period of financial crisis;
14. Emphasises that early settlement of disputes through dialogue among the parties concerned must be strongly encouraged where possible, and that court litigation must be viewed as the last resort; calls on the business community to recognise that it is in their best interests to take voluntary initiatives to effectively compensate consumers in order to avoid entering into litigation procedures; stresses that mechanisms of alternative dispute resolution (ADR) may provide parties with a faster and cheaper solution and play a role complementary to, and not mutually exclusive of, judicial redress; notes, however, that there are currently significant – sector-specific and geographical – gaps in the existing ADR systems in the EU;
15. Recognises the need to avoid certain abuses or fraudulent use of collective redress mechanisms which have occurred in non-European countries, in particular the US with its ‘class actions’ system;
16. Underlines that an effective collective redress system should be capable of delivering legally certain, fair and adequate outcomes within a reasonable timeframe, while respecting the rights of all parties involved; considers that the EU approach to collective redress should include the possibility to appeal the Court’s decision within a specific timeframe;
17. Emphasises that features which encourage a litigation culture such as punitive damages, contingency fees, third-party financing, the lack of control over the representative entities standing in court, the possibility for lawyers to canvass potential victims and the discovery procedure for bringing evidence to court – without prejudice to powers granted to courts and national authorities in accordance with national law – are not compatible with the European legal tradition and should be forbidden; stresses that all necessary measures should be taken to forbid forum-shopping;
18. Insists on the need to build the European approach to collective redress on the opt-in principle, whereby victims are clearly identified and take part in the procedure only if they expressly indicated their wish to do so, in order to avoid potential abuses; underlines the need to respect existing national systems in accordance with the principle of subsidiarity; calls on the Commission to consider a system which will provide relevant information to all potential consumers involved, increase the representativeness of collective actions and ensure simple, affordable and effective access to justice for EU citizens, thereby avoiding excessive litigation and subsequent unnecessary individual or collective actions concerning the same infringement;



19. Calls on the Member States to put in place efficient mechanisms ensuring that a maximum of victims are informed and made aware of their rights and obligations, in particular when those are domiciled in several Member States, whilst avoiding unduly harming the reputation of the party concerned, in order to scrupulously respect the principle of the presumption of innocence;
20. Emphasises that, in order to ensure the efficiency of collective redress and to avoid potential abuses, the EU approach to collective redress should only include representative action by entities duly recognised at national level (public authorities such as Ombudsmen or consumer organisations); calls on the Commission, in consultation with the Member States, to define a common set of criteria that consumer organisations must fulfil in order to be able to stand in court; stresses that national competent authorities should be responsible for verifying that consumer organisations comply with such criteria;
21. Stresses that, in the case of cross-border disputes, the representative entity (public authority or authorised consumer organisation) should be able to represent victims from other Member States who have joined the collective redress procedure in any Member State;

#### **The role of the Court and the importance of information**

22. Maintains that the court has a crucial role to play in deciding on the admissibility of the claim and the representativeness of the claimant, in order to ensure that only well-founded complaints are examined and guarantee a proper balance between preventing abusive action and protecting the right to effective access to justice both for EU citizens and businesses;
23. Considers that the court should also ensure that the compensation is fairly distributed and check if funding arrangements are fair; stresses that court control mechanisms and proportionality requirements would protect defendants against abuse of the system;
24. Insists on the need to respect the 'loser pays' principle, according to which the losing party pays for the costs of the proceedings in order to avoid the proliferation of unmeritorious claims in an EU-wide collective redress mechanism, allowing the judge to reduce at his discretion the court fees paid by the losing party or the state to provide legal aid, in accordance with national law respecting the principle of subsidiarity;
25. Emphasises that the provision of information about collective actions plays a major role in the accessibility and the effectiveness of the procedure as consumers need to be aware that they have been the victims of the same illegal practice and that there is a collective action launched, including in another Member State; stresses the key role that consumer organisations and the European Consumer Centres Network (ECC-Net) can play in passing on the information to as many people as possible, in particular the most vulnerable consumers;
26. Suggests that, in order to facilitate cooperation between the entities qualified to take collective actions, especially in cross-border cases, an EU-wide on-line register of launched and ongoing cases should be established; stresses that such a single European window would serve as a useful instrument for qualified entities planning to seek judicial

collective redress as a means of identifying whether a similar action is being launched in another Member State; stresses the importance of exchanging best practices and applying the best available technologies to facilitate exchange of information, filing and grouping of cases;

#### **Financing collective redress**

27. Affirms that, in order to make collective actions practically possible, Member States should ensure that adequate funding mechanisms are made available in accordance with national arrangements and designed in such a way as, on the one hand, not to encourage the bringing of actions that are not well-founded and, on the other hand, to prevent citizens from being denied access to justice because they do not have sufficient financial resources;
28. Is conscious that some representative entities may be unable to pursue collective actions and that owing to a lack of resources only a very limited number of cases may be taken; calls on the Commission, therefore, to consider thoroughly the possibility of creating a European fund financed by a share of the fines imposed to sanction companies infringing EU competition law; proposes that such a fund could be used to cover the costs of cross-border collective actions having a European dimension, provided that the representative entity proves that the funds will be used for that purpose; stresses that such an option would provide additional resources to fight against fraudulent behaviour, but that it would be also a fair way to finance consumer collective redress, since part of the fines would indirectly be returned to the victims; considers that, in any event, compensation cannot be used to finance collective redress procedures since only the damage actually suffered by the claimants must be compensated; insists, lastly, on the necessity to avoid third-party funding in order to prevent abuses and the creation of a 'litigation market';

## RESULT OF FINAL VOTE IN COMMITTEE

<b>Date adopted</b>	6.10.2011
<b>Result of final vote</b>	+: 30 -: 2 0: 1
<b>Members present for the final vote</b>	Adam Bielan, Lara Comi, António Fernando Correia De Campos, Jürgen Creutzmann, Christian Engström, Evelyne Gebhardt, Louis Grech, Małgorzata Handzlik, Iliana Ivanova, Edvard Kožušník, Kurt Lechner, Toine Manders, Hans-Peter Mayer, Phil Prendergast, Mitro Repo, Robert Rochefort, Zuzana Roithová, Christel Schaldemose, Andreas Schwab, Emilie Turunen, Bernadette Vergnaud, Barbara Weiler
<b>Substitute(s) present for the final vote</b>	Marielle Gallo, Anna Hedh, Constance Le Grip, Emma McClarkin, Sylvana Rapti, Oreste Rossi, Wim van de Camp
<b>Substitute(s) under Rule 187(2) present for the final vote</b>	Alexander Alvaro, Monika Hohlmeier, Axel Voss, Pablo Zalba Bidegain

## RESULT OF FINAL VOTE IN COMMITTEE

Date adopted	20.12.2011
Result of final vote	<div><div>+: 21</div><div>–: 0</div><div>0: 0</div></div>
Members present for the final vote	Raffaele Baldassarre, Luigi Berlinguer, Sebastian Valentin Bodu, Françoise Castex, Christian Engström, Marielle Gallo, Lidia Joanna Geringer de Oedenberg, Klaus-Heiner Lehne, Antonio López-Istúriz White, Antonio Masip Hidalgo, Alajos Mészáros, Bernhard Rapkay, Evelyn Regner, Francesco Enrico Speroni, Alexandra Thein, Diana Wallis, Cecilia Wikström, Tadeusz Zwiefka
Substitute(s) present for the final vote	Jan Philipp Albrecht, Jean-Marie Cavada, Luis de Grandes Pascual, Kurt Lechner, Eva Lichtenberger