



**Contribution to the EC public consultation –  
Towards a coherent European approach to collective redress**

April 30, 2011

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## The pressing need for the EU framework

Collective redress covers a specific situation where the (same) illegal behaviour (fraudulent or not) of a company harms several individuals. Those individuals should be able to gather their claims to act against the company for compensation of the damage they have suffered individually.

One of the most widespread individual complaints in the field of software is the need for a “Windows tax refund”: it is currently virtually impossible for consumers to buy PCs and laptops without a pre-installed Microsoft Windows operating system, even if they wish to do so. There have been cases where individuals have successfully returned a license and obtained a refund after intense negotiations and even legal proceedings. But this clearly places an undue burden on consumers, who are stuck with unwanted goods by default, having to pay for a product that they do not want and that is of no value to them. This also allows the dominant operating system vendor, convicted of anticompetitive behaviour in the European market and subjected to a record-breaking fine of EUR 899 million, to get away with a marketing and distribution policy that is a massive impediment to competition in the software market.

The availability of judicial collective redress for various breaches is very much fragmented in the EU now. Even where it is available, the effectiveness of the mechanisms varies significantly. This leads to a significant **discrimination in access to justice** to the detriment of citizens. Consequently, cross-border redress is currently hard to implement and the confidence of citizens in the internal market is put in doubt.

Lack of compensation is a major loophole in a legal system and allows for unjustified profit to be retained by business. In the EU anti-trust situations alone, unrecovered damages are estimated to surpass €20 billion each year<sup>1</sup>. High levels of unrecovered damages can also be estimated for a wide range of other areas where collective compensatory redress is needed – use of financial services, data protection, infringements of employment law, environmental damage etc.

Beyond these figures, the current situation is not only unacceptable from the point of view of the aggrieved consumers, but also imposes unequal market conditions on those businesses who abide by the rules. Therefore we believe that the introduction of collective redress for mass damages in the EU would help not only individuals, but business also.

Our key demand is for a **binding instrument at Community level**. A collective redress mechanism should be available to every European citizen for both national and cross-border cases irrespective of the value of the claim, in all the situations where mass damages have the potential to occur. We are convinced that the European initiative setting the main legal features of the action mechanism which must be respected by all parties is the way forward and the most efficient tool to improve the functioning of the market in favour of both individuals and law-abiding traders.

## The added value of the EU compensatory redress mechanism

In our mass production and mass consumption society, characterized by the harmonisation of standards, it is possible for suppliers to have access to a huge

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<sup>1</sup><http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/10/554&format=HTML&aged=0&language=EN&guiLanguage=en>

market. Within such a market, non-compliance with legal rules can easily **affect a very high number of individuals**. The collectivisation of damages justifies the collectivisation of redress claims.

Furthermore, the integration of European markets and the consequent increase of **cross-border activities** highlight the need for the EU-wide consistent redress mechanisms. Not only products and services are increasingly supplied cross-border, but also people are more mobile than before and can find themselves temporarily in another Member State. For instance, computers and mobile devices are often purchased and sold across borders. Therefore the problem of near-impossible license refunds exists throughout the European Union. It would clearly be beneficial for consumers if they were able to join an effective cross-border action aimed at collective redress. The slow progress and uncertain prospects of collective redress initiatives for software license refunds such as that driven by consumer association ADUC in Italy are a clear indicator that the European Commission needs to do more to uphold consumers' rights in the European single market.

Regulation of the substantial law at European level has already had long-term and successful traditions, therefore minimum/basic rules on redress mechanisms should also be adopted by the European Union to unify the practices of the Member States. Without redress mechanisms, even the best EU legislation cannot be implemented and enforced efficiently. When EU legislation was only embryonic, the question of redress mechanisms could be left to national law. However, this is not the case anymore. **The development of the substantive law should go hand in hand with the development of redress tools so that the individuals can make the real use of their rights.**

Various examples of recent legislation<sup>2</sup> prove that the EU has the competence to act on procedural rules. Notably, the IPR Enforcement Directive<sup>3</sup> harmonises the measures and remedies necessary to ensure the enforcement of copyrights, trademarks, patents, industrial property rights, both in cross-border and national context. Also, the on-going work in the Commission on Alternative Dispute Resolution (ADR)<sup>4</sup> does not seem to be limited to cross-border disputes.

European citizens suffering from a damage caused by the same supplier should be able to join their claims together into one single action in all the European Member States. Today, some European citizens are not able to obtain compensation while others residing in another Member State are, thus creating inequalities of treatment. **Collective redress mechanisms are being developed differently across the EU** (or even do not exist in some Member States) and as a result citizens are being treated unevenly, subject to their place of residence. The European measures setting minimum requirements for a collective redress judicial mechanism should, therefore, be put in place.

It is also very important to note that, in addition to the direct benefit for citizens, law-abiding businesses and the courts, the introduction of the European collective compensatory redress would be a **preventive measure** against potential infringements, since the existence of the judicial redress mechanism is an incentive for businesses to comply with the law.

### **Fundamental right, demanded by citizens**

<sup>2</sup> Regulation (EC) No 861/2007 of 11 July 2007 establishing a European Small Claims Procedure, Directive 98/27/EC of 19 May 1998 on injunctions for the protection of consumers' interests, Directive 2008/52/EC of 21 May 2008 on certain aspects of mediation in civil and commercial matters

<sup>3</sup> Directive 2004/48/EC of 29 April 2004 on the enforcement of intellectual property rights

<sup>4</sup> Legislative proposal foreseen for 4<sup>th</sup> quarter of 2011, Commission work programme 2011

The right to compensation and the right to access to justice (recognized at EU level<sup>5</sup>) should not remain only on a paper. In practice, many citizens are unable to exercise these rights because of the inadequacy of existing means of redress to mass claim situations. The right to act collectively should be recognized at EU level.

Notably, economic considerations should not prevail in refusing to grant the citizens access to their rights de-facto.

### **Relationship with public enforcement**

Regarding the strengthening of the public enforcement instead of providing for judicial collective redress available to private bodies, it has to be underlined that public enforcement does not itself enable individuals to be compensated for the damage suffered. Public authorities have limited jurisdictions and often do not have sufficient powers or means to seek for the compensation to aggrieved individuals, especially in cross-border cases. In addition, even when they would have adequate powers on national or local level, public authorities often would have limited resources or would not see it as their priority to engage into ordering compensation for suffered citizens. Therefore **private compensatory collective redress should never be subsidiary to enforcement by public bodies** – the two are complementary, but independent processes.

Compensatory collective redress should always be available to private representative organisations, regardless of whether public authorities are also entitled to claim compensation on behalf of aggrieved citizens or not.

However, we want to stress the importance of providing the sufficient resources to public enforcement authorities – private collective redress mechanisms should not be seen as an alternative to public enforcement.

### **Legally binding approach**

We call for a **binding instrument at the Community level**, setting the minimum features and safeguards of a collective redress mechanism and ensuring its availability in all Member states for both national and cross-border cases.

The adoption of a non-binding instrument will not solve the problems arising from the divergence of the current national systems, as its effectiveness will depend on the voluntary compliance by the Member States. It will also not sufficiently resolve the uncertainties regarding cross-border collective redress, as qualified entities will not be able to presume that the procedure in different Member States is based on the same features.

### **Scope of EU action**

Compensatory collective redress should cover **all sectors where the mass damage due to the breaches of law is possible** and not be limited to the areas of consumer law or competition. This would allow, for example, cases of license refunds, loss of personal data, damages to all kinds of financial services users, environmental damages, breaches of employment rights or cases of discrimination to be resolved via collective claims.

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<sup>5</sup> Article 6 of the European convention on Human rights, available at: <http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/EnglishAnglais.pdf>

It must be underlined that the European Parliament IMCO report 'On a Single Market for Europeans'<sup>6</sup> also calls on the Commission to consider the case for minimum standards in relation to the right to compensation for damage resulting from a breach of EU law more generally, not only in relation to infringements of competition law.

### **Relationship with consensual dispute resolution**

As one of the crucial principles, parties to a dispute should remain free to recourse to alternative means of dispute resolution, before or simultaneously with the submission of the complaint to the court. However, for collective Alternative Dispute Resolution to be efficient and allow a fair settlement for the aggrieved party, there must be a 'back-up' in the form of a judicial collective redress mechanism. The longstanding experience has shown that the **ADR alone is not sufficient** and does not provide enough incentive for businesses to participate.

### **Strong safeguards against abusive litigation**

We believe that it is possible to have collective redress in a 'European way', avoiding the abuses of the US system. The legal traditions in the EU, combined with appropriate safeguards, would prevent abuses and allow for the respect of legitimate interests of both parties.

In this respect, the 'loser pays' principle and the active role of the court will have the main role in ensuring the avoidance of the spurious litigation. The court has a full capacity to decide on the admissibility of the claim, credentials of the claimant, the ways to inform plaintiffs and, throughout the procedure, to ensure the effectiveness of the action. The judge should also determine how the compensation is to be paid.

### **Standing of representative bodies**

Regarding the **designation of the representative bodies** which are granted to stand in collective actions, we believe that these bodies might be either officially designated in advance according to the criteria laid down by the Member States or certified by courts on an *ad hoc* basis. It is important to note that collective redress should be possible in wide scope of areas and available both to citizens and SMEs, therefore it will not be possible to establish a full list of entities, designated in advance. Therefore there should always be a possibility for an *ad hoc* certification by the court, that will check the credentials of the claimant, taking into account the specificities of the case.

Also, the representative bodies should be granted a cross-border standing in collective redress cases, meaning that the representative entity should be entitled to represent both the aggrieved citizens of other Member States in its Member State and the aggrieved individuals in proceedings in another Member State.

### **Allowing both opt-out and opt-in procedures**

In order for the European collective redress to be efficient and manageable, it should allow both for an opt-out and an opt-in procedures. It should be up to the court to decide, on the basis of objective criteria, which approach is best suited for each case.

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<sup>6</sup> IMCO report (2010/2278(INI)) of 24.3.2011

Recent experience in Europe of the opt-in procedure in consumer claims showed that the rate of participation is very low (less than 1%). On the contrary, under opt-out regimes, rates are typically very high (97% in the Netherlands and almost 100% in Portugal)<sup>7</sup>.

It is claimed that opt-out may sometimes be more difficult to combine with the freedom to take legal action. Yet, if the procedure provides for the efficient information measures, it does not limit the plaintiff's freedom since people are able to withdraw from the group. Moreover, opt-out usually becomes opt-in at some stage as the individuals have to come forward to claim the compensation. It is important not to require that everyone signs up before commencing the action.

## **Funding**

In collective claims, several types of costs have to be borne. Some of them are inherent to collective actions, such as the preparatory costs for identifying the aggrieved citizens and gathering the claims (spread of the information, collection and checking of claims, coordination). The others apply to all judicial redress mechanisms (collecting evidence, making copies, certification, legal, court and expert fees), but can be increased due to the specificities of collective actions (high number of the aggrieved citizens, complexity of evaluating damages, proving the infringement).

The total cost of this type of action varies widely from one country to another, since Member States are free to set the amounts of their litigation fees. However, it may reach several dozens of thousands of euros, even hundreds of thousands, particularly in countries where litigation fees are generally very high.

The issue of funding **is crucial**; without appropriate funding, group action mechanism will not work in practice. In order to make collective actions practically possible, **Member States should ensure that adequate mechanisms for funding of group action proceedings are available**. Different solutions can be envisaged, among which, for instance, establishing the Group Fund to finance access to justice (and the certain conditions on the use of it to avoid abusive litigation), 'capping' the lawyers' fees and their control by the court, derogation from the 'loser pays' principle regarding the court fees, or allowing for legal insurance to cover costs of proceedings. Once again, it is important that the court would have control over the funding arrangements to ensure that there is no conflict of interest or abuse.

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<sup>7</sup> Professor Rachael Mulheron, study on «the reform of the collective redress in England and Wales: a perspective of need», Civil Justice Council of England and Wales, 2008.