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Towards a coherent European approach to collective redress

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► European Parliament resolution of 2 February 2012 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- having regard to the draft guidance paper entitled ‘Quantifying harm in actions for damages based on breaches of Article 101 or 102 of the Treaty on the Functioning of the European Union’,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(1) ,
- 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(2) ,
- 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(3) ,
- 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(4) ,
- 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 the courts(5) ,
- 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(6) or to seek out-of-court settlement by way of mediation(7) ;

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 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(8) , 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;
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(9) , 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 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⁽¹⁰⁾, 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;

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⁽¹¹⁾ 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, Pfeiderer , 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;

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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.

(1) OJ L 110, 1.5.2009, p.30.

(2) OJ C 117 E, 6.5.2010, p.161.

(3) Texts adopted, P7_TA(2011)0023.

(4) Texts adopted, P7_TA(2011)0449.

(5) Texts adopted, P7_TA(2011)0361.

(6) Regulation (EC) No 861/2007 establishing a European Small Claims Procedure (OJ L 199 , 31.7.2007, 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, 30.4.2004, p. 15).

(7) Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters (OJ L 136, 24.5.2008, p. 3).

(8) Wal-Mart Stores Inc. v. Dukes et al. 564 U. S. xxx (2011).

(9) OJ L 364, 9.12.2004, p. 1.

(10) 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 et seq.

(11) Judgment of 18 March 2010 in Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, Alassini , not yet reported

in the ECR.

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