

**Response to the public consultation  
on a coherent European approach to collective redress**

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## Introduction

In recent years the European Commission promoted in-depth discussions on whether a EU initiative on compensatory collective redress is needed both in the field of EU competition law and in the field of consumer law<sup>1</sup>.

The current consultation responds to the request by stakeholders for consistency in the initiatives the Commission may take on collective redress. Therefore, it follows a horizontal approach and aims at pointing out common principles which should guide any possible EU initiative on collective redress.

The Commission Staff Working Document rightly takes as a starting point the following statement: “where substantive EU rights are infringed, citizens and businesses must be able to enforce the rights granted to them by EU legislation”.

In competition law, it is well established that articles 101 and 102 produce direct effects and create rights for the individuals concerned which the national courts must safeguard<sup>2</sup>. According to the case-law of the Court of Justice, the right to damages is necessary to guarantee the useful effect of EU competition rules; therefore, any individual can claim compensation for the harm suffered where there is a causal relation between that harm and a conduct infringing EU competition rules<sup>3</sup>. National rules governing actions for safeguarding rights which individuals derive directly from EU law should not render practically impossible or excessively difficult the exercise of rights conferred by EU law (principle of effectiveness). Interestingly, the Court of Justice pointed out that punitive damages are not required to ensure the effectiveness of EU rules<sup>4</sup>.

The need for an effective legal protection is also acknowledged by article 47(1) of the Charter of Fundamental Rights of the EU, which now has the same legal value as the Treaties (everyone whose rights and freedoms guaranteed by the law of the EU are violated has the right to an effective remedy) and by the new article 19(1) TEU (“Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union Law”).

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<sup>1</sup> *Green Paper on antitrust damages actions*, COM(2005)672; *White Paper on damages actions for breach of EC antitrust rules*, COM(2008)165; *Green Paper on Consumer Collective Redress*, COM(2008)794.

<sup>2</sup> Case 127/73, *BRT and SABAM*, 1974 ECR 61, paragraph 16.

<sup>3</sup> Case C-453/99, *Courage and Crehan*, [2001] ECR I-6297, paragraph 26; joined cases C-295/04 to C-298/04, *Manfredi*, [2006] ECR I-6619, paragraph 61.

<sup>4</sup> Joined cases C-295/04 to C-298/04, *Manfredi*, [2006] ECR I-6619.

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In principle, it is up to Member States to ensure an effective legal protection of the rights granted by EU legislation. Any initiative at the EU level should be strictly justified in terms of subsidiarity and proportionality.

To this aim, before promoting a EU initiative on collective redress in any field of EU law, the Commission should consider the whole range of instruments available to ensure redress in case of an infringement of EU rules. Moreover, it should also consider whether the initiatives taken at the national level to grant an effective legal protection could be significantly improved by a EU measure.

The Commission is well aware of the need not to introduce in the EU models of collective compensatory redress which foster unmeritorious litigation with huge costs for the undertakings involved and, in meritorious cases, are unable to provide effective compensation of the individuals who have been harmed<sup>5</sup>.

The task of designing a system of collective compensatory redress which avoids the risk of pathology is not an easy one.

Interestingly, as the Commission underlines, several Member States have recently adopted procedures for the collective claim of compensatory relief in certain areas, which can be viewed as attempts to develop European alternatives to the US model. The solutions which have been adopted are different, but variety is not a problem in itself. It can be extremely useful to give Member States the time necessary to test their national models in order to let the best practices emerge, in terms of both effectiveness and guarantees. It is only on the basis of these best practices that it will be possible to develop a solid EU approach to collective compensatory redress. A top-down approach, superimposing a EU model on Member States, would seem inappropriate and not respectful of the subsidiarity principle.

On the other hand, since collective litigation for compensatory redress entails in any case costly and lengthy procedures, it seems desirable that the European Commission continues to devote efforts to promote the use of the alternative systems which can ensure redress more rapidly and less expensively. It has been argued that the system of collective compensatory redress which is emerging in Europe is based on different pillars which should be considered sequentially: only when the voluntary, more direct and less costly instrument does not work properly, a more complex instrument should be considered.

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<sup>5</sup> "The Commission firmly opposes introducing 'class actions' along the US model into the EU legal order, or creating incentives for abusive litigation", IP/11/132, 4 February 2011.

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Initially, redress should always be looked for through systems of direct **management of complaints** by the undertaking concerned.

If this first channel does not work, **alternative dispute resolution systems**, including mediation, should be considered. There are a number of sectoral developments in ADR in Member States which provide good examples of how redress can be provided effectively, impartially and with very small costs. A good example in Italy is the “Arbitro bancario finanziario”, established with the support of the Bank of Italy, which ensures an impartial decision in a short time and with negligible costs for complainants (both consumers and undertakings), for claims whose value is below 100 000 euros. As the recent consultation on ADRs promoted by the European Commission clearly pointed out, there are some interesting developments also in the area of collective ADR systems.

**Litigation**, either individual or collective, should represent the instrument of last resort.

In our answers to the questions contained in the Commission Staff Working Document, we **focus on collective compensatory redress**, which raises different and more complex issues than injunctive redress. For collective injunctive redress, the sectoral approach followed so far by EU institutions (in consumer law, environment etc.) seems fully satisfactory.

***Q1. What added value would the introduction of new mechanisms of collective redress have for the enforcement of EU law?***

Effective enforcement of the rights granted to citizens and businesses by EU legislation is a fundamental objective of EU policy. In the choice of the instruments aimed at pursuing this objective, it is important to respect the proportionality and subsidiarity principles. On this basis, we believe that the European approach to redress should consider, as a first pillar, the direct management of complaints by the involved undertakings and, as a second pillar, ADR systems, either individual or collective. Judicial procedures, being more lengthy and costly, should be the instrument of last resort.

Recently several Member States have adopted models of collective judicial redress. The main aim of these models is twofold: to ensure an effective protection of rights in cases where individuals would not have the incentive to ask for redress since costs would exceed the benefits and to make judicial procedures more efficient in case of multiple claims.

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It seems undesirable to substitute these quite recent systems with a uniform EU model. It would be better to let Member States develop significant experiences in order to pick out, among them, the best practices in terms of effectiveness and guarantees.

**Q2. Should private collective redress be independent of, complementary to, or subsidiary to enforcement by public bodies? Is there need for coordination between private collective redress and public enforcement?**

It is important to preserve a clear distinction between the role of public enforcement and the role of private enforcement of EU rules. This guiding principle has been rightly endorsed by the European Commission in its White Paper of 2008 on damages actions for breach of EU antitrust rules.

Public enforcers act in the public interest: they may initiate proceedings *ex officio* and, under the *Automec II* case law, they may decide not to act on the ground of lack of sufficient public interest. Moreover, public enforcers may impose fines, aimed at specific and general deterrence.

On the contrary, national courts are bound to decide on the cases which are brought before them, with the aim to protect the subjective rights under EU law. Only national courts may award damages to the victims of infringements. The Commission White Paper of 2008 rightly states that the direct objective of damages actions is full compensation of the actual loss incurred<sup>6</sup>. As Commissioner Almunia puts it, “this is not about punishment, it is about justice”<sup>7</sup>.

Therefore, public and private enforcement can be viewed as independent channels, although in practice they play a complementary role.

However, some coordination is important. The issue has been widely discussed in the responses to the consultation on the Commission White Paper of 2008. An important aspect, that we want to recall here, is that **public authorities, when setting fines in order to ensure proper deterrence (but not over-deterrence)** can take into account the amount that the undertaking has already given, or is committed to give, in compensation for damages as a **mitigating factor**.

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<sup>6</sup> The actual loss should be computed net of any amount that the subject who has been harmed has already received as redress.

<sup>7</sup> Joaquin Almunia, *Common standards for group claims across the EU*, 15 October 2010, speech 10/554.

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**Q3. Should the EU strengthen the role of national public bodies and/or private representative organizations in the enforcement of EU law?**

The role which national public bodies and/or private representative organizations can usefully play in the enforcement of EU law varies among Member States and depends on a number of factors linked to the national social and institutional environment. For instance, solutions based on Ombudsman-type arrangements fit more easily into the tradition of some Northern European countries than in other Member States. The choice of the most effective institutional arrangement to ensure redress should be left to the Member States.

**Q4. What in your opinion is required for an action at European level on collective redress to conform with the principles of EU law?**

As argued in the introductory remarks, before promoting a EU initiative on collective redress in any field of EU law, the Commission should consider the whole range of instruments available to ensure redress in case of an infringement of EU rules and whether the initiatives taken at the national level to grant an effective legal protection could be significantly improved by a EU measure. Several Member States have recently adopted procedures for the collective claim of compensatory relief in certain areas. Superimposing a EU model on Member States would seem not respectful of the subsidiarity principle.

On the other hand, since collective litigation for compensatory redress entails in any case costly and lengthy procedures, it seems desirable that the European Commission continues to devote efforts to promote the use of the alternative systems which can ensure redress more rapidly and less expensively.

**Q6. Would possible EU action require a legally binding approach or a non-binding approach (such as a set of good practices guidance)?**

For the reasons stated above, currently a non-binding approach aimed at pointing out good practices would be preferable to a binding measure.

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**Q7. Do you agree that any possible EU initiative on collective redress (injunctive and/or compensatory) should comply with a set of common principles established at EU level? What should these principles be? To which principle would you attach special significance?**

It is clear that possible EU initiatives (if any) on collective compensatory redress should comply with a set of common principles. It is more doubtful that these principles should be the same for compensatory and injunctive redress.

For injunctive redress the main issue is the need for effectiveness; moreover, public enforcement can provide an efficient alternative to litigation<sup>8</sup>.

For compensatory redress, the need for effectiveness and efficiency of compensation and the need for strong safeguards to avoid abusive litigation seem to be the most important general principles which should guide any initiative, both at the national and at the EU level.

**Q8-Q10. Could the experience gained so far by the Member States contribute to formulating a European set of principles? Are you aware of specific good practices in the area of collective redress in one or more Member States that could serve as inspiration from which the EU/other Member States could learn?**

The Italian model of class action, established by article 140-bis of the Consumer Code (Legislative Decree of 6 September 2006, no. 206) is a good attempt to ensure a balance between the need for effectiveness and efficiency of redress, on one hand, and safeguards against abusive litigation on the other. It requires, as a precondition for class actions, a sufficient **similarity** (commonality) between the individual claims. Indeed, in the absence of sufficiently similar situations, a collective compensatory proceeding is not an efficient solution. Court **certification** is provided to **filter out** cases in which either the action is manifestly unfounded, or there is conflict of interest, or the rights claimed by the class members do not appear to be identical, or the claimant does not seem able to safeguard the interests of the class.

The Italian class action is based on a **opt-in** system. The court establishes the necessary information requirements as well as the deadline for opting-in. After the expiry of the deadline, no further class actions can be brought against the same

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<sup>8</sup> For both injunctive and compensatory redress, the role of representative bodies is certainly an important issue, but not a principle in itself.

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defendant for the same facts. If several class actions have been brought before the deadline, they are unified in a single procedure. This approach is aimed at ensuring the efficiency of judicial proceedings, also from the viewpoint of undertakings. The **loser-pays rule** applies.

**Q15-Q16. Apart from a judicial mechanism, which other incentives would be necessary to promote recourse to ADR in situations of multiple claims? Should an attempt to resolve a dispute via collective consensual dispute resolution be a mandatory step in connection with a collective court case for compensation?**

Widespread information on the availability of ADR systems and their reputation as effective means for impartial, rapid, low-cost redress of meritorious claims are the best incentives to the use of such systems. In general, we favor an approach under which ADR remain a voluntary solution and do not become a mandatory step.

**Q20-21. How could the legitimate interests of all parties adequately be safeguarded in collective compensatory redress actions? Which safeguards do you consider particularly successful in limiting abusive litigation? Should the “loser pays” principle apply to collective actions in the EU?**

In order to limit the risk of abusive litigation in collective compensatory redress actions, it is essential to keep a **strict compensatory approach** in damages actions for breach of EU rules, i.e. not to shift to a system of punitive damages. The weaknesses of a system of punitive damages, especially in fields where public enforcement and private litigation coexist, have been clearly pointed out by the High Court of England and Wales in the *Devenish Nutrition* judgment<sup>9</sup>. Indeed, only a neat distinction of roles (deterrence/punishment versus compensation) avoids the risk of ineffective overlaps and of infringing the *ne bis in idem* principle.

The **loser-pays principle** provides a necessary disincentive to abusive litigation. When this principle is significantly weakened, there is evidence of an immediate rise in the number of unmeritorious actions. An example is given by the UK experience with legal aid in the Eighties-early Nineties, which led to a huge number of poorly justified collective actions<sup>10</sup>.

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<sup>9</sup> High Court of England and Wales, *Devenish Nutrition Ltd & others v. Sanofi-Aventis SA (France) & others* (2007), EWHC 2394 (Ch), upheld by the Court of Appeal (2008) EWCA Civ 1086.

<sup>10</sup> C. Hodges (2001), *Multi-Party actions: a European Approach*, Duke Journal of Comparative and International Law, no. 11, 321-351.

A **filter by the court** (see answer to Q8/Q10) is also essential to prevent bad claims.

***Q23. What role should be given to the judge in collective redress proceedings? Where representative entities are entitled to bring a claim, should these entities be recognized as representative entities by a competent government body or should this issue be left to a case-by-case assessment by the courts?***

The issue of assessing whether an entity is adequately representative in a collective compensatory redress proceeding should be left to the case-by-case assessment by the courts.

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