



EUROPEAN PARLIAMENT

2009 - 2014

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*Committee on Legal Affairs*

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**2011/2089(INI)**

15.7.2011

# **DRAFT REPORT**

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

Committee on Legal Affairs

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**CONTENTS**

	<b>Page</b>
MOTION FOR A EUROPEAN PARLIAMENT RESOLUTION.....	3
EXPLANATORY STATEMENT .....	8

## 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, Public Consultation ‘Towards a Coherent European Approach to Collective Redress’ (SEC(2011)0173),
  - having regard to the Draft Guidance Paper ‘Quantifying harm in actions for damages based on breaches of Article 101 or 102’, Brussels, June 2011,
  - having regard to the Commission Consultation Paper for discussion on the follow-up to the Green Paper on ‘Consumer Collective Redress’, Brussels, 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>1</sup>,
  - having regard to the Commission Green Paper of 27 November 2008 on ‘Consumer Collective Redress’ (COM(2008)0794),
  - 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 Commission Communication of 30 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 ... on alternative dispute resolution in civil, commercial and family matters<sup>2</sup>,
  - having regard to its resolution of ... on the implementation of the directive on mediation in the Member States, its impact on mediation and its take-up by the courts<sup>3</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 (A7-0000/2011),
- 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,

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<sup>1</sup> OJ C 117 E, 6.5.2010, p.161.

<sup>2</sup> Texts adopted, P7\_TA(2011)0000.

<sup>3</sup> Texts adopted, P7\_TA(2011)0000.

- B. whereas recently adopted EU legislation is designed to enable parties in cross-border situations either to enforce their rights effectively<sup>1</sup> or to seek out-of-court settlement by way of mediation<sup>2</sup>,
- C. whereas national and European authorities play a pivotal role in the enforcement of EU law, and private enforcement can only supplement, but not replace, public enforcement,
- D. 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 the abuse of the US class action system<sup>3</sup>, and stresses that Europe must refrain from introducing a US-style class action system or any system which would lend itself to similar abuse;
  3. Welcomes the efforts of Member States to strengthen the rights of victims of unlawful behaviour by introducing legislation aimed at facilitating redress while avoiding an abusive litigation culture; stresses in this context that the Commission has still not put forward convincing evidence that, pursuant to the principle of subsidiarity, action is needed at EU level in order to ensure that victims of unlawful behaviour are compensated for damage or loss;
  4. Reiterates that the Commission has still not indicated what legal basis it considers appropriate for any measures in the field of collective redress;

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

5. Notes that enforcement mechanisms already exist at EU level and believes that, in particular, Regulation No 861/2007 establishing a European Small Claims Procedure provides efficient and effective access to justice by simplifying cross-border litigation involving claims for a sum of less than EUR 2 000;
6. Takes the view that injunctive relief 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>4</sup>, as well as

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<sup>1</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>2</sup> Directive 2008/52/EC on certain aspects of mediation in civil and commercial matters, OJ L 136, 24.05.2008, p. 3.

<sup>3</sup> Wal-Mart Stores Inc. v. Dukes et al. 564 U. S. xxx (2011).

<sup>4</sup> OJ L 364, 9.12.2004, p. 1.

Directive 2009/22/EC on injunctions for the protection of consumer interests<sup>1</sup>, can be significantly improved so as to foster cooperation and injunctive relief in cross-border situations;

7. Considers that injunctive relief should focus on the protection of the individual interest and not the public interest, and calls for caution when widening access to justice for organisations since these should not enjoy easier access to justice than individuals;

### **Horizontal instrument and safeguards**

8. Takes the view that disputes frequently cover different industry sectors and different areas of law and that victims of unlawful behaviour face the same difficulties in obtaining redress in different sectors, and is concerned that any 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; in the event that it is decided after due consideration that a Union scheme of collective redress is needed and desirable, asks that any proposal in the field of collective redress should take the form of a horizontal instrument providing uniform access to justice within the EU;
9. Stresses that any horizontal instrument must cover all 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, whereas limited sectoral rules, dealing with matters such as the potential binding effect of decisions adopted by national competition authorities in the field of EU antitrust law, should be laid down, for instance, in a separate chapter of the horizontal instrument itself;
10. Believes that the individual damage or loss suffered plays a pivotal role when deciding to file an action, and takes the view that in line with Regulation No 861/2007 on a European Small Claims Procedure, collective redress under a horizontal instrument could be available where the value of each individual claim does not exceed EUR 2 000;
11. Considers that collective action under a horizontal instrument should be permissible 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);
12. Reiterates that safeguards have to be put in place in order to avoid unmeritorious claims and misuse of a horizontal instrument, so as to guarantee equality of arms in court proceedings, and stresses that such safeguards must cover, inter alia, the following points:
  - only a representative body may bring an action on behalf of a clearly identified group, and identification of the group members must have taken place before the claim is brought ('opt-in procedure');
  - Member States should designate organisations qualified to bring representative actions, and European criteria are needed which clearly define these qualified entities; these criteria could be based on Article 3 of Directive 2009/22/EC on injunctions for the

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

protection of consumer interests<sup>1</sup> but need to be further specified in order to ensure that abusive litigation is avoided; such criteria should cover, inter alia, the financial and human resources of qualifying organisations;

- an opt-out system has to be rejected on the grounds that it is contrary to many Member States' constitutions and violates the rights of any victim who might participate in the procedure unknowingly and yet would be bound by the court's decision;
  - victims must in any case be free to seek the alternative of individual compensatory redress before a competent court;
  - only the actual damage sustained may be compensated: 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 must be rejected;
  - collective claimants must not be in a better position than individual claimants, 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 be rejected at European level;
  - there can be no action without financial risk and Member States are to determine their own rules on allocation of costs according to which the unsuccessful party must bear the costs of the other party;
  - the Commission must not set out any conditions or guidelines on the funding of damages claims, as it is mostly unknown in Member States' legal systems to seek third-party funding, for instance, by offering a share of the damages awarded;
13. 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>2</sup>, and asks the Commission to identify the EU legislation in respect of which it is difficult to obtain compensatory redress;
14. Considers that this legislation should be identified so as to allow the horizontal instrument to provide for collective compensatory redress for breach of this 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)**

15. 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 calls for a legal obligation for the parties involved first to seek a collective consensual resolution of the claim before launching collective court proceedings; believes that the

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<sup>1</sup> OJ L 166, 11.6.1998, p. 51.

<sup>2</sup> Study regarding the problems faced by consumers in obtaining redress for infringements of consumer protection legislation, and the economic consequences of such problems, Part I, Main report, 26.08.2008, p. 21 ff.

criteria developed by the Court<sup>1</sup> should be the starting point for the establishment of this obligation;

### **Jurisdiction and applicable law**

16. Stresses that a horizontal instrument should itself lay down rules to prevent a rush to the courts ('forum shopping') and believes that forum shopping cannot be excluded by establishing that the courts where the majority of victims of the infringement of Union law are domiciled or where the major part of the damage occurred are to have jurisdiction, as these flexible rules would leave open the possibility of abusive litigation; considers therefore that the courts with jurisdiction in the place where the defendant is domiciled should have jurisdiction;
17. Also favours a horizontal instrument that provides for unified rules on the applicable law and calls for further examination of how the conflict-of-law rules can 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;

### **Ordinary legislative procedure**

18. 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;
19. 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 Community level.

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<sup>1</sup> Judgment of 18/03/2010 in Joined Cases C-317/08, C-318/08, C-319/08 and C-320/08, Alassini, 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.