Overview of existing collective redress schemes in EU Member States

BRIEFING NOTE

Abstract

The briefing paper presents rationale and relevance of collective redress schemes with recent developments in this area at the EU level; an overview of collective redress schemes existing in EU Member States; a summary of similarities and differences between collective redress schemes in Member States; and finally some considerations on cross-border use of collective redress mechanisms in Europe. The paper identifies significant differences in approach of Member States towards collective redress with important consequences for equal access of European consumers to justice and cross-border use of collective redress.
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CONTENTS

EXECUTIVE SUMMARY

1. INTRODUCTION
   1.1. Main tasks
   1.2. Approach - definition
   1.3. Rationale and relevance of collective redress schemes
      1.3.1. Institutional choice
      1.3.2. Relevance of collective redress
   1.4. Recent developments at EU level
      1.4.1. Sectoral approach of the European Commission
      1.4.2. Horizontal approach of the European Commission

2. OVERVIEW OF EXISTING COLLECTIVE REDRESS SCHEMES IN EU MEMBER STATES
   2.1. Austria
   2.2. Bulgaria
   2.3. Denmark
   2.4. Finland
   2.5. France
   2.6. Germany
   2.7. Greece
   2.8. Hungary
   2.9. Italy
   2.10. Lithuania
   2.11. Netherlands
   2.12. Poland
   2.13. Portugal
   2.14. Spain
   2.15. Sweden
   2.16. UK
3. SIMILARITIES AND DIFFERENCES BETWEEN COLLECTIVE REDRESS SCHEMES IN MEMBER STATES

3.1. Similarities allowing for typology of collective redress instruments

3.2. Similarities and differences in construction of collective redress schemes

3.3. Similarities and differences in functioning of collective redress schemes

4. CROSS-BORDER USE OF COLLECTIVE REDRESS MECHANISMS

4.1. Relevance of the issue of cross-border use of collective redress

4.2. Outline of basic applicable legal provisions and difficulties that arise in relation to them

4.3. Examples of specific national regulations of cross-border issues


5. CONCLUSIONS

REFERENCES
EXECUTIVE SUMMARY

The main costs in market transactions, in the political process and in adjudication before courts are those of information and organisation. Improving access to information may limit transaction costs and improve market outcomes for consumers (e.g. by setting an EU level single window electronic platform providing information on products and services, feedback and complaint systems capable to aggregate complaints automatically, warning alerts, etc.). Adjudication outcomes may be improved by facilitating organisation between consumers through aggregating their dispersed interests through collective proceedings. Effective redress schemes allow restoring the efficient allocation of resources and achieve other social goals such as justice and equal treatment, and levelling the playing field between the defaulting enterprise and its competitors.

Collective redress schemes exist in 16 Member States of the EU: Austria, Bulgaria, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Lithuania, the Netherlands, Poland, Portugal, Spain, Sweden and UK (in England and Wales).

There are significant differences in approach of Member States towards collective redress schemes. National collective redress schemes differ with respect to such important issues as universality of instruments, scope of application, right to sue and to be sued, type of available remedies and legal culture of awarding damages, competent courts, opt-in versus opt-out mechanism, costs of proceedings and their funding, admissibility of contingency fees. These differences point to disparities between the accessibility of collective redress to European consumers in different countries and sectors. European consumers are confronted with a complex legal patchwork of solutions which are applied by some Member States but not by others.

While in general collective redress schemes provide added value and cost savings for consumers and businesses, they are not effective due to disparities and low participation rates (except for schemes running opt-out model).

While the first wave of reforms in the area of collective redress crossed Europe with numerous Member States introducing collective redress systems after year 2000 (e.g. Bulgaria - 2006 and 2008, Denmark - 2005, 2008, and 2010, Finland 2007, Hungary - 2009, Italy - reform in 2009, Lithuania - 2003, Netherlands - 2005, Poland - 2010, Sweden - 2003), many of them plan currently reforms in this area (France, Germany, Lithuania, the Netherlands, UK [England and Wales]) while other Member States consider introduction of such systems (Belgium, Malta, UK [Scotland]).

Around 10 percent of collective redress cases involve cross-border litigation. European legal landscape concerning cross-border collective redress involves complex issues of the choice of forum (court), procedure and substantive law.

This leads to forum shopping where European plaintiffs try to use US courts to resolve European disputes or choose one of European jurisdictions where they can effectively pursue their claims. It involves significant risks of inconsistent or varying determinations and adjudication in different jurisdictions. Some of these difficulties could be resolved by moving cross-border litigation of collective redress cases to the EU level.
1. INTRODUCTION

KEY FINDINGS

- Collective redress is a mechanism that may accomplish the cessation or prevention of unlawful business practices which affect a multitude of claimants or the compensation for the harm caused by such practices.

- Ideally, for consumers and for businesses, when a consumer suffers damage the redress should be available fully and timely and at minimal costs. This allows restoring the efficient allocation of resources and achieving other social goals such as justice and equal treatment, and levelling the playing field between the defaulting enterprise and its competitors.

- These objectives may be achieved through improved market conditions: more transparency of market transaction, comprehensive single window platforms for consumers regarding online product and services assessment, transparent and visible certification schemes for consumer services, ECC networks, Rapex, etc.

- Market outcomes may be efficiently corrected by government or courts provided that access information and organisation are facilitated and kept at minimum cost to avoid creating externalities.

- Since a number of years the European Commission is making efforts to collect information on expectations citizens and businesses have concerning improvement of the quality of market transactions and ways to correct defaulting transactions.

1.1. Main tasks

This briefing note aims at providing an overview of the existing collective redress schemes in all EU Member States based on recently published studies, indicating differences and similarities between the Member States and cross-border use.

1.2. Approach - definition

Collective redress is defined in this paper as a concept encompassing any mechanism that may accomplish the cessation or prevention of unlawful business practices which affect a multitude of claimants or the compensation for the harm caused by such practices. There are two main forms of collective redress: by way of injunctive relief, claimants seek to stop the continuation of illegal behaviour; by way of compensatory relief, they seek damages for the harm caused. Collective redress procedures can take a variety of forms, including the entrustment of public or other representative entities with the enforcement of collective claims. This paper will analyse collective redress systems mainly in their compensatory relief aspect.¹

1.3. Rationale and relevance of collective redress schemes

1.3.1. Institutional choice

Ideally, for consumers and for businesses, when a consumer suffers damage the redress should be available fully and timely and at minimal costs. This allows to restore the efficient allocation of resources and achieve other social goals such as justice and equal treatment, and to level the playing field between the defaulting enterprise and its competitors.

In a perfect market (with perfect information), any damage inflicted on a consumer would be voluntarily redressed by defaulting enterprise fearing that a negative feedback will deter other consumers from its products or services. Markets traditionally failed by providing limited information on defaulting products and companies (information asymmetry), asymmetric power where strong enterprises confront week consumers and asymmetry of interests where enterprises run high aggregated risks of causing relatively small individual damage to consumers.

In order to reduce power and interests asymmetry, a government agency or an independent institution sponsored by government may be set up to pursue dispersed interests of consumers versus concentrated interest of enterprises. However, such agencies have a number of limitations, e.g.: 1) budgetary constraints, 2) limited resources (leading to cherry picking among complaints), 3) vulnerability to pressures from concentrated interests (lobbying).

Another response to market failure or government failure may be judicial intervention. However, courts have their limitations as well, proceedings are expensive, time-consuming, and principally individual. The idea of justice is that of a balance, not only in adjudicating the case but also in equality of legal arms and interests. Courts are best equipped to hear disputes between equals. However, there is hardly any equality of legal arms and interests in case of a dispute between a consumer and a company or a State.

Consumers with dispersed interests and low individual stakes need special protection in market transactions, in political process and in adjudication. While market, government and judiciary may be seen as alternatives or as a system of checks and balances that together lead to an efficient allocation of resources at minimum costs, in case an additional protective mechanism needs to be applied to consumers.

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2 Justice and equal treatment are the more important the higher the individual damage. If the damage is sufficiently significant the consumer will have an incentive to demand redress and will pursue his case despite difficulties depending on the level of economic and emotional investment, and level of consumer confidence/personality and/or local culture (in regard to complaining or knowledge of consumer protection and redress rights). If the damage is relatively small then the consumer will weight if it is reasonable to claim redress and may abandon his claim, thus absorbing the damage. See: Qualitative study on Consumer redress in the European Union: Consumer experience, perceptions and choices, http://ec.europa.eu/consumers/redress_cons/docs/cons_redress_EU_qual_study_report_en.pdf, p. 25.

3 Levelling the playing field is more important with increase of the aggregated amount of the damage. Even with very small individual damages that will be absorbed by consumers, the overall profit realised by a defaulting enterprise may be big enough to distort competition, it may put the defaulting enterprise in a privileged situation and drive competition in the direction of profiting from abusing rights of consumers until being punished, with fair enterprises driven into difficulties or even out of business in case of no prosecution of defaulting enterprises.


The main costs in market transactions, in political process and in adjudication are information costs and costs of organisation. While improving access to information seems to be more apt to limit transaction costs and improve market outcomes (e.g. by setting an EU level single window electronic platform providing information on products and services, feedback and complaint systems capable to aggregate complaints automatically, warning alerts, etc.), adjudication outcomes may be improved also by facilitating organisation between consumers through aggregating their dispersed interests in collective proceedings.

1.3.2. Relevance of collective redress

The European Commission has underlined in its staff working document entitled “Towards a Coherent European Approach to Collective Redress” that “[g]iven the diversity of existing national systems and their different levels of effectiveness, a lack of a consistent approach to collective redress at EU level may undermine the enjoyment of rights by citizens and businesses and gives rise to uneven enforcement of those rights. A coherent European framework drawing on the different national traditions could facilitate strengthening collective redress (injunctive and/or compensatory) in targeted areas. In any event, such a framework should contain common principles which any possible EU initiatives on collective redress in any sector would respect. The objective is to ensure from the outset that any possible proposal in this field, while serving the purpose of ensuring a more effective enforcement of EU law, fits well into the EU legal tradition and into the set of procedural remedies already available for the enforcement of EU.”

1.4. Recent developments at EU level

The possibility to introduce a harmonised collective redress mechanism has been analysed by the European Commission for many years. Initially the Commission took a sectoral and fragmented approach which did not lead until now to the establishment of any new legal instrument. Recently, the Commission looks at a possibility to introduce a comprehensive reform in this field introducing a horizontal approach.

1.4.1. Sectoral approach of the European Commission

Applying the initial sectoral approach, the European Commission looked at the issue of collective redress principally from the perspective of consumer protection and competition policy.

Consumer protection

In 2005, researchers from Leuven University were commissioned to research the existence of alternative means of consumer redress across the EU, other than conventional litigation proceedings. Their report was published in January 2007. Following the report, in its Consumer Policy Strategy for 2007-2013, published in March 2007, the European Commission indicated that one of its key priorities was to take action to improve access to justice by creating measures which simplify and help access to courts, particularly in cross-border cases. A series of studies have been undertaken to gather further information about the current position.

The so-called ‘Evaluation Study’ looked at the effectiveness and efficiency of existing collective redress mechanisms throughout the EU.\(^9\) The study found that the average benefit to consumers ranged from €32 in Portugal to €332 in Spain, but overall mechanisms were rarely used. The Commission has concluded that this patchwork of different laws and procedures creates a “justice gap” where consumers and businesses have different rights depending on where they are located, which is particularly acute in the case of cross-border claims.

A separate ‘Problem Study’ looked at the problems faced by consumers who wanted to pursue a claim.\(^10\) It has indicated general obstacles to all redress mechanisms (that is: a) lack of information among consumers on existing redress mechanism and on the fact that their rights have been violated, b) lack of motivation of consumers to file claims). In addition the study identified the following obstacles for judicial redress mechanisms in general: a) monetary costs of litigation, b) length of court proceedings, c) formal requirements of existing mechanisms, d) complexity of judicial procedures, e) actions not covered by consumers’ legal expenses insurance, f) inadmissibility of contingency/conditional fee; and obstacles specific for judicial collective redress mechanisms: a) non-availability of collective redress mechanisms, b) limits on types of entity that can bring collective actions, c) lack of public support and other mechanisms to finance collective redress, d) limited resources of consumer organisations, e) lack of expertise of intermediaries to bring actions, f) lack of judges experienced in case management, g) problems on the part of entities bringing collective actions in informing affected consumers, h) difficulties with the distribution of the awarded compensation.

A qualitative study looking at consumers’ experiences, perceptions and choices was also carried out in August 2009.\(^11\) In the light of these reports, the Commission concluded that a significant proportion of EU consumers who have suffered damage do not obtain redress.

The Commission has also drawn up a series of benchmarks against which to assess the adequacy of the existing legislative systems in different Member States in terms of the availability of collective redress, indicating that: 1) the mechanism should enable consumers to obtain satisfactory redress in cases which they could not otherwise adequately pursue on an individual basis; 2) it should be possible to finance the actions in a way that allows either the consumers themselves to proceed with a collective action, or to be effectively represented by a third party; 3) the defendant’s costs in defending proceedings should not be disproportionate to the amount in dispute; consumers should not be deterred from bringing an action due to the “loser-pays” principle; 4) the compensation should be at least equal to the harm caused by the incriminated conduct, but should not be excessive, or amount to punitive damages; 5) a preventative effect for potential future wrongful conduct by traders or service providers concerned is desirable; 6) the pursuit of unmeritorious claims should be discouraged; 7) sufficient opportunity for an adequate out-of-court settlement should be foreseen; 8) the information networking, preparing and managing of possible collective redress actions should allow for effective “bundling” of individual actions; 9) the proceedings should be of a reasonable length; 10) the proceeds of the action should be distributed in an appropriate manner amongst plaintiffs, their representatives and possibly other related entities.

Following on from these different initiatives, the Commission published a Green Paper in November 2008 (COM (2008)794 final), which concluded that all of the current redress systems operated in different Member States have their own strengths and weaknesses but


that no single mechanism is ideal for all types of claims and that “there is no easy answer to the problem” of providing consumers with adequate redress. 12 The Green Paper proposed four policy alternatives: 1) no EC action, 2) cooperation between Member States, 3) mix of policy instruments, 4) judicial collective redress procedure.

Following a consultation on the Green Paper the Consumer Policy Evaluation Consortium report was published in May 2009. A discussion paper taking account of those responses was also published in May 2009. The discussion paper presents a refined set of options for future legislative development which aim to provide accessible, affordable and effective redress “providing compensation for legitimate claims, preventing unmeritorious claims and taking into account the legal traditions in Member States”:

- Option 1 - no EC action;
- Option 2 - self regulation: this option envisages the introduction of two non-legislative measures, a standard model of collective alternative dispute resolution (ADR), together with a code of conduct for EU businesses, which would include a complaints handling system for managing mass claims;
- Option 3 - Non-binding setting up of collective ADR schemes and judicial collective redress schemes in combination with additional powers under the Consumer Protection Cooperation Regulation;
- Option 4 - Binding setting up of collective ADR schemes and judicial collective redress schemes with benchmarks in combination with additional powers under the Consumer Protection Cooperation Regulation;
- Option 5 - EU wide judicial collective redress mechanism including collective ADR. 13

13 The mechanism chosen would be a test case procedure with the following main features:

- Financing: the test case procedure constitutes the alternative which mitigates the funding problems which other types of procedures face. This is due to the fact that costs arise only for one case, i.e. the test case, and follow-up procedures for individual consumers for claiming the compensation should be less costly […]. Plaintiffs should be able to secure compensation for court and lawyers’ fees as well as indispensable preparatory costs, but not more. The threshold for the number of litigants to launch such a procedure should be low (e.g. 10).
- Standing: the test case procedure could be introduced by a consumer, a consumer organisation or a competent authority like an ombudsman on behalf of a number of harmed consumers. In order to balance the right of access with the risk of excessive litigation, consumer organisations should only be able to represent consumers if they fulfill certain certification criteria. Such organisations are mutually recognised by Member States.
- Avoid unmeritorious claims: in addition to the certification criteria for consumer associations, the court would be awarded a large discretion over the admissibility of such procedure and therefore would play the role of the gatekeeper by deciding whether a case is suitable for such a procedure.
- Effect of the judgement: the effect of the judgement could be extended to all other consumers in the EU which have been harmed by the same practice and who identified themselves after the judgement. This means in practice that the issue of establishing the illegal practice would be decided in the test case procedure. Consumers would only have to undertake in a second step individual follow-up procedures dealing with issues proper to their case, for example establishing that they have been harmed by this illegal practice (causal link), verifying the application of prescription rules and to calculate the individual compensation.
- Distribution of compensation: the court would order the trader to inform all possible victims if they are known to the trader and/or advertise the court decision and organise the way the compensation of consumers is determined and distributed, if needed via ADR. In order to achieve this, effective, dissuasive and proportionate sanctions for non-compliance would be needed. The consumer would always have the possibility to begin a follow-up procedure for individual compensation.
- Competent court: in order to facilitate the handling of the case, the competent court should be the court of the Member State where the defendant is domiciled or the court of the Member State where the market is most affected by the illegal practice for the test case and the court of the Member State where the consumer is domiciled for the follow-up procedure. An adaptation of the Brussels I Regulation would be necessary.
Overview of existing collective redress schemes in EU Member States

Competition issues

In April 2008, the European Commission published for public consultation a White Paper on damages actions for breach of EU anti-trust rules. This contained a set of proposals for the introduction of a range of new measures to make it easier for the victims of infringements of competition law to obtain compensation for any damage they have suffered.

The Commission found that existing means for obtaining redress were inadequate as potential claimants’ losses were often limited and claims were spread over a wide area. Overall, individual consumers and small businesses were often deterred from bringing an individual action for damages by the costs, delays, uncertainties, risks and burdens involved. As a result, the Commission concluded that competition law was an area where collective redress mechanisms can significantly enhance consumers’ ability to obtain compensation and thus access to justice. It proposed that EU legislation should be introduced to implement an “opt-in” collective action and representative actions, which could be brought by qualified entities such as consumer associations, state bodies or trade associations on behalf of identified or, in some cases, identifiable victims. Such entities would either be approved in advance by their Member State or designated on an ad hoc basis to deal with the particular anti-trust infringement and would automatically be granted standing in other Member States so that they could pursue damages claims in countries other than the one where they are located. It envisaged that such legislation would provide a minimum level of harmonisation, ensuring that businesses and consumers are afforded the same basic level of protection throughout the EU in respect of claims for breach of anti-trust laws.

1.4.2. Horizontal approach of the European Commission

Collective redress may cover a very broad range of issues such as: 1) mass tort class actions (concerning personal injury claims and property damage claims involving Agent Orange, asbestos, breast implants and other products), 2) securities & shareholders class actions, 3) financial injury class actions aiming at restitution of ill-gotten gains the defendants might have realised usually in the framework of existing contractual or business relations (such as employment cases, antitrust cases and consumer cases).

On 4th of February 2011 the European Commission has published a public consultation working document entitled "Towards a Coherent European Approach to Collective Redress" indicating change from a sectoral to a horizontal approach towards collective redress. The purpose of this consultation was, inter alia, to identify common principles on collective redress. The consultation should also help to examine how such common principles could fit into the EU legal system and into the legal orders of the 27 EU Member States.

The consultation included specific questions in the following domains: 1) potential added value of collective redress for improving enforcement of EU law, 2) general principles to guide possible future EU initiatives on collective redress, with specific questions on a) the need for

- Applicable law: in order to facilitate the handling of the case, the applicable law should be the law of the Member State where the market is most affected for the test case and the law of the Member State where the consumers have their habitual residence for the follow-up procedure. An adaptation of EU instruments of private international law would be necessary.

There would be significant legal implications to such a proposal, including a need to amend existing laws relating to jurisdiction (the Brussels I Regulation) and choice of law.


effective and efficient redress, b) the importance of information and of the role of representative bodies, the need to take account of collective consensual resolution as alternative dispute resolution, c) strong safeguards against abusive litigation, d) finding appropriate mechanisms for financing collective redress, notably for citizens and SMEs, e) effective enforcement in the EU, 3) scope of coherent European approach to collective redress.

The consultation was closed on 30 April 2011 with replies published on Internet. In the meantime on 5 April 2011 the European Commission held a hearing on the subject on the European Parliament premises. A follow up communication from the Commission indicating the policy line for collective redress is scheduled towards the end of the year.

17 Hearing was divided into three sessions concerning: 1) added value of collective redress for improving the enforcement of EU law: http://ec.europa.eu/consumers/redress_cons/files/CR_session1.mp3, 2) effective and efficient redress with safeguards against abusive litigation (incl. role of representative bodies and funding) http://ec.europa.eu/consumers/redress_cons/files/CR_session2.mp3, 3) other general principles (incl. role of collective consensual dispute resolution and effective cross-border enforcement) and scope of a coherent European approach to collective redress: http://ec.europa.eu/consumers/redress_cons/files/CR_session3.mp3
2. OVERVIEW OF EXISTING COLLECTIVE REDRESS SCHEMES IN EU MEMBER STATES

KEY FINDINGS

- There are significant differences in approach of Member States towards collective redress schemes. These differences point to disparities between the accessibility of collective redress to European consumers in different countries and sectors.

- A review of the current state of law has revealed existence of collective redress mechanism in 16 Member States: Austria, Bulgaria, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Lithuania, the Netherlands, Poland, Portugal, Spain, Sweden, and UK (in England and Wales).

- Member States that have introduced collective redress mechanisms apply different legal instruments in the framework of their collective redress scheme.

- European consumers are confronted with a complex legal patchwork of solutions which are applied by some Member States but not by others.

- While numerous Member States have introduced collective redress systems after the year 2000 (e.g. Bulgaria - 2006 and 2008, Denmark - 2005, 2008, and 2010, Finland 2007, Hungary - 2009, Italy - reform in 2009, Lithuania - 2003, Netherlands - 2005, Poland - 2010, Sweden - 2003), many of them plan currently reforms in this respect (France, Germany, Lithuania, the Netherlands, UK [England and Wales]) while others consider introduction of such systems (Belgium, Malta, UK [Scotland]).

The purpose of this section is to enumerate Member States which have existing collective redress schemes and outline the main characteristics of these schemes.

2.1. Austria

Types of collective redress mechanism existing in Austria:

- a) Representative test case action, and
- b) Collective redress actions of Austrian type.

Legal basis:

- a) Section 502 para 5 of Zivilprozessordnung ("Civil Procedural Act") in connection with section 29 of Konsumentenschutzgesetz ("Consumer Protection Act");
- b) Section 227 and 502 para 5 of Civil Procedural Act in connection with Consumer Protection Act section 29.

Areas covered by collective redress - scope of application

The procedure embraces transferred actions for performance and affirmative actions of any kind.
Standing

The associations mentioned in section 29 of Consumer Protection Act can initiate the procedure: the Austrian Economic Chamber, the Federal Chamber of Labour, the Council of Austrian Chambers of Agricultural Labour, the Presidential Conference of Austrian Chambers of Agriculture, the Austrian Trade Union Federation, the Verein für Konsumenteninformation (Consumer Information Association) and the Austrian Council of Senior Citizens).

Whenever the violation originates in Austria, an action may also be brought by any body or organisation of another European Union Member State notified in the Official Journal of the European Communities by the Commission pursuant to Article 4 (3) of Directive 98/27/EC on injunctions for the protection of consumers’ interests.18 provided that: any interests protected by such bodies are impaired in the Member State; and the purpose of the body as identified in the notification justifies bringing such action.

Court competent to hear the case

District court, or regional court if the amount in dispute above 10.000 EUR.

Main procedural rules

a) In a representative test case action the Consumer Information Association can represent a consumer who assigns claims to it; if such a procedure is brought by one of these institutions the consumer does not participate in the court proceedings; whatever procedure was filed, the final judgment has no legal effect beyond the consumer who suffered the respective damage; the main purpose of most of the collective procedures is to open the way to the Supreme Court, thereby achieving a broader effect than with litigation in the lower courts; each individually enforceable action to either claim a right or affirm a certain legal status may be brought though this procedure instead.

b) Through a combination of sec. 227, 502 para 5 of the Civil Procedural Act, the above-mentioned institutions, including the Consumer Information Association, can also act as a representative for more than one consumer and therefore bring a traditional representative action; the action aims at obtaining damages in one single court procedure, which are then distributed among the consumers who have assigned their claims; the consumers themselves do not participate in the court proceedings; the judgment has no legal effect beyond those consumer(s) who suffered the respective damage (opt-in).

On every stage of the proceedings a settlement may be reached. Collective redress actions Austrian type normally conclude in a settlement.

Type of remedies

If a judgment is issued the losing party may claim the usual remedies provided under Austrian law.

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18 Official Journal L 166 of 11 June 1998, p. 51
**Overview of existing collective redress schemes in EU Member States**

**Costs involved for the parties and funding – remuneration of attorneys and court’s fees**

The consumer bears no risk because the relevant association files the action as its own claim on behalf of the consumers.

The costs for the organisation representing them are hard to estimate. Court fees are degressive which constitutes a clear advantage for collective cases. In terms of lawyers fees if the lawyer does not negotiate his or her tariff with the intermediary, the costs depend on the Rechtsanwaltstarifgesetz.

Collective actions concerning an amount of 100,000 Euro and above are usually financed through a professional litigation financing company. If the case is successful the company gets 30% to 40% of the redress obtained. Collective actions for less than 100,000 Euro may be financed through the budget of the VKI, which is funded by the ministry responsible for consumer affairs (the Ministry for Consumer Protection).19

**Reform plans**

Due to the increasing number of cases where many plaintiffs combine their actions or assign their claims to one plaintiff against one and the same defendant, the Ministry of Justice has proposed a draft statute on class actions amending the Civil Procedure Code. The draft statute is currently being discussed. The concept of the draft is based on an ‘opt-in’ model.

### 2.2. Bulgaria

**Type of collective redress mechanisms existing in Bulgaria:**

a) Collective action for damages to the collective consumers’ interests,

b) Collective action for damages suffered by consumers, and

c) General group action mechanism.

**Legal basis:**

a) Art. 188 of the Law on Consumer Protection 2006;

b) Art. 189 of the Law on Consumer Protection 2006;

c) Chapter 33 of the new Code of Civil Procedure, entered into force on 01.03.2008.

**Areas covered by collective redress – scope of application**

Claims for collective redress may be brought respectively in the domain of:

a) Consumer protection, notwithstanding the fact that the number of affected consumers is neither definite nor definable, and regardless of whether collective consumers’ interests were damaged or exposed to peril.

b) Consumer protection, and

c) Any area of law.

**Standing**

With regard to above indicated mechanism, respectively:

a) Any consumer association may file an action for collection of damages to collective consumers’ interests;

b) A consumer association that has been explicitly granted by consumers with a power-of-attorney for bringing a claim for damages and for litigation representation, if consumers who suffered damage are identified and are in number of at least two or more and individual damage, suffered by consumers, has been caused by the same producer, importer, business person or retailer, and has derived from the same infringement;

c) Any harmed persons, or organizations established with purpose for protection of the collective interests, or organizations established with purpose for protection against the infringement referred to in art. 1 (art. 379, para. 2 and 3 of the Code of Civil Procedure 2008) on behalf of persons whose collective interests were damaged by the same infringement (art. 379, para.1 of the Code of Civil Procedure 2008).

Court competent to hear the case
A regional or a district state court, depending on the amount claimed.

Main procedural rules
With regard to group action mechanism, according to art. 382, para.2 of the Code of Civil Procedure 2008 the court specifies the manner in which the bringing of the collective action shall be publicly announced. Within a month after the announcement, any person who suffered damage from the same infringement, may either join the litigation or declare that they will bring an individual claim for damages. The court judgment has a binding force (res judicata) for the infringer, the plaintiffs, and for all persons who suffered damage from the same infringement and have not declared that they will bring individual claim for damages.

Possibility for settlement of the dispute is provided for in art. 384 of the Code of Civil Procedure 2008.

Type of remedies
The following are remedies in respective proceedings:
   a) Damages are granted to the consumer association (plaintiff) and have to be spent only for consumer protection purposes;
   b) Compensation for damage suffered by consumers;
   c) Compensation for damage suffered by victims.

Costs involved for the parties and funding – remuneration of attorneys and court’s fees
For different types of collective mechanism the costs are distributed respectively:
   a) Costs borne by association;
   b) and c) costs borne by consumers, where court fees amount to 4% of the claim, and further 2 % on the appealed part of the judgement; expertise remuneration; advocate fees amount to 4%-10% depending on the amount of the claim.

A "loser pays" rule applies.

There is no specific regulation on funding.
2.3. Denmark

Types of collective redress mechanisms existing in Denmark:
   a) General group action,
   b) The Consumer Ombudsman's representative action,
   c) Competition group action.

Legal basis:
The legal bases for the above mechanism are respectively:
   a) Chapter 23 a (§§ 254 a-254k) of the Administration of Justice Act as amended by Act 181/2008 (effective from 1.1.2008), and
   a) § 28, section 1, of the Marketing Practices Act (no. 1389/2005),
   b) § 26 of the Danish Competition Act, amended on 29 April 2010, the amendment entered into force on 1 October 2010.

Areas covered by collective redress – scope of application
The scope of application covers respectively:
   a) **All types of civil claims** if they arise from the same factual and legal basis, Danish courts have jurisdiction, the group action is the best manner to deal with claims, group members may be identified and notified in an appropriate way and a group representative may be appointed;
   b) **Contraventions of the provision of the Marketing Practices Act**, in particular misleading advertisement;
   c) Class actions concerning compensation for harm caused by **infringements of art. 101 and 102 TFEU**.

Standing
   a) Under section 254c of the Act, class actions are conducted by a **class representative on behalf of the class**; the class representative is appointed by the court and may be changed if requested by at least half of members of the group; for opt-in arrangements the representative may be (1) a member of the class, (2) an association, private institution or other organisation when the action falls within the framework of the organisation’s object, or (3) a public authority authorised for the purpose by law, e.g. the consumer ombudsman; however, for actions under the opt-out arrangement only a public authority may act as a class representative;
   b) The **Consumer Ombudsman** upon request from each individual consumer involved, can recover uniform claims of numerous consumers in the same case; individual consumers are parties to proceedings;
   c) **Consumer Ombudsman** is empowered to act as representative in class actions concerning compensation for harm to consumers and small businesses caused by infringements Articles 101-102 TFEU.20

Court competent to hear the case

a) **Local city court**, with the possibility to refer the case to two High Courts if of fundamental character;

b) and c) **Copenhagen Maritime and Commercial Court** (composed of 1 professional and 4 expert judges, two representing business and other two consumer interests) unless otherwise agreed by parties.

Main procedural rules

a) A group action available since 2008 is a new civil procedural mechanism with some specific concerns such as: additional elements accompanying the writ (description of the group, information on how group members can be identified and notified, and proposal for a group representative), deciding the scope of the action, notification of group members; the group action is in principle based on **opt-in** mechanism; exceptionally upon request of the group representative the court may decide to base group action on **opt-out** mechanism in case the damages are below DKK 2000 (equal to 300 EUR) and a group action based on the opt in model is considered to be an inexpedient way of dealing with the claims;

b) In essence the injunction civil procedure governed by the principle of negotiation in order to induce traders to observe good marketing practices;

c) The **Consumer Ombudsman** may be appointed as a **group representative for the consumers and small undertakings** to seek damages for the losses they have incurred as a result of an undertaking’s violation of the competition rules, subject to such appointment being in accordance with the law.

If questions of withdrawal or dismissal of the group action arise, group members participating in the action must in principle be notified and be given time to react. The court will approve the settlement unless the settlement involves non-objective differential treatment of group members, or the settlement is obviously unreasonable.

Type of remedies

a) **All civil law remedies** may be obtained in a group action proceeding;

b) In addition to injunction it may involve recovery of **uniform claims for damages**;

c) Declaratory measures, injunction and **monetary damages**.

Costs involved for the parties and funding – remuneration of attorneys and court’s fees

A "loser pays" rule is applicable with **high risk for representative**. The representative may be asked to provide a security of legal costs and be obliged to pay outstanding costs not covered by the group since the ceiling of costs to be covered by group members is decided at the beginning of proceedings. **For lawyers fees “no cure – no pay” agreements are legal, but it is illegal to fix fees as a certain share of the damages awarded.** Only under opt out model there is no risk for group members to pay legal costs. Due to limited resources of Ombudsman only few cases are dealt by this office.

Third party funding is permitted. However, such funding may have tax implications or be questionable if made with an illegal purpose.
2.4. Finland

Types of collective redress mechanisms existing in Finland:
Since 2007 a group action has been introduced into the Finish legal system.

Legal basis:

Areas covered by collective redress – scope of application
The scope of application is limited to consumer disputes.

Standing
Finish Consumer Ombudsman on behalf of a specified group of consumers. Ombudsman carries the case in his own name without even secondary right of action on the part of the group.

Court competent to hear the case
General courts in Turku, Vaasa, Kuopio, Helsinki, Lahti and Oulu, designated to hear group actions.

Main procedural rules
Group action can be started where the facts of individual cases are identical or almost identical, and it is sensible to handle disputes together in one trial. If the court decides after examination of the application for summons that conditions for group action are fulfilled it will serve a notice of the commencement of the group action with limit for class accessions. The Ombudsman will send a notice to known class members or if not possible publish it in newspapers. It is an opt-in system where a written letter of accession delivered within the time limit (exceptionally accepted later) is needed to belong to the class. Special provisions apply for resigning from the class during procedure. The court is binding on the class members whom the court has in the decision designated as such.

The Consumer Ombudsman may enter into a settlement agreement with the defendant on behalf of all the group members. Although not explicitly stated in the actual Class Action Act the government bill regarding the Act lays down that in order for the settlement to be binding on all group members, the settlement has to be confirmed by the court.21

Type of remedies
All civil law remedies are available as in normal traditional individual civil cases, e.g., compensation of damages, price reduction.

Costs involved for the parties and funding – remuneration of attorneys and court’s fees
Costs are covered by Ombudsman. Legal fees in Finland tend to be very high.

Payment systems similar to the American contingency fees or English conditional fees have in Finland been traditionally accepted, but not used in practice. The number of attorneys has always been at rather reasonable level, and also there is competition between the practicing lawyers, so there has never been any need to use these more customer-friendly payment systems.22

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2.5. France

Types of collective redress mechanisms existing in France:

French legal system knows three types of collective redress mechanism:

a) **Action for financial reparation of consumer collective interests**, 
b) **Joint representative action** for consumers,  
c) **Joint representative action** for investors.

Legal basis:

Collective redress instruments are regulated by the following legal provisions:

a) Art. L.421-1 of the Code de la consommation ("Consumer Code");  
b) Art. L. 422-1 of the Consumer Code;  
c) Art. L. 452-2 of the Monetary and Financial Code.23

Areas covered by collective redress – scope of application

The scope of the application of those instruments covers:

a) **Any claim in the interest of consumers** due to infringement of law; applied when an offence has been committed,  
b) and c) **all kinds of disputes** deriving from contract, delict, quasi-delict, real estate, etc.

Standing:

a) A **registered in France consumer non-profit association representative locally or nationally**, which was approved by public authorities; to obtain authorisation, an organisation must be a non-profit organisation and must declare its activity as the protection of collective consumer interests;  
b) **Any approved association** recognised as national representative **if instructed in writing by at least two customers**;  
c) **Any approved association of investors if instructed by at least two of investors** concerned, and a registered association of shareholders holding at least 5% of voting rights in a listed company if shares were registered at least two years before.

Court competent to hear the case

Criminal and civil courts are competent to hear these cases.

Main procedural rules

a) Where a criminal offence has been committed and it has harmed the collective interests of consumers this claim can be brought before a criminal court in addition to a public prosecution; where no criminal offence has been committed, art. L421-7 of the Consumer code allows such consumer associations to “join proceedings in civil court”; the action will be admitted only if the injury claimed differs from the injury suffered by the general public and injury personally suffered by the actual victims;

this instrument does not require the proof of any individual damage, and it has no effect on individual claims that consumers may wish to bring; the court may decide on consumers' individual claims and the association's claim at the same time; b) and c) an action may be brought by authorised non-profit association acting upon a special instruction (this is an "opt-in" procedure).

**Type of remedies**

a) Redress of collective injury which **does not correspond to aggregated damages** caused to victims;
b) and c) **all normal remedies including compensation** for damages, publication of the decision, etc.

**Costs involved for the parties and funding – remuneration of attorneys and court’s fees**

a) All costs are covered by an association (on average 15.000 EUR, but may be much higher);
b) and c) association bears responsibility for all costs of the procedure according to general procedural rules (generally integrity of court fees [dépens] while lawyers fees [frais irrépétibles] are attributed at judge's discretion).

**French law prohibits contingency fees as impeding competition.** However, legislation introduced more flexibility, when the rules authorised “complementary fees”. These added fees can be calculated on the results of the trial but, being complementary, they cannot exceed a reasonable proportion of the fixed fees. **In important litigations with large amounts at stake, lawyers generally ask for complementary fees, based on the results of the trial.**

No system of funding legal actions is developed in France.

**Reform plans**

There is a lively debate in France concerning class actions and their possible adaptation to French legal rules. Two draft bills were proposed in 2006 and 2007, which provided for the introduction of a ‘group action’ under French law. The French Competition Council issued an opinion on one of these draft bills, indicating that it was favourable to the introduction of class actions, but stressing the importance of preserving the effectiveness of leniency programmes.

**2.6. Germany**

**Types of collective redress mechanisms existing in Germany:**

While under the general rules of the German civil procedure there is no room for class actions or collective actions, there are several procedures in place that fall under a broad definition of "collective redress":

a) Model case;
b) Representative actions;
c) Skimming off the profits.

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Legal basis:

a) Kapitalanleger-Musterverfahrensgesetz (further referred to as “Capital Markets Model Case Act”), which went into effect in 2005; initially it was to be in effect only until 31 October 2010 but has been subject to prolongation till 31 October 2012, 25

b) Legal Services Act introducing a Musterklage (model claim) and a Sammelklage (representative action), 26

c) Art. 10 Gesetz gegen den unlauteren Wettbewerb (further referred to as “Law of Unfair Competition”).

Areas covered by collective redress – scope of application

a) False, misleading or omitted public capital market information and breach of contract based on the Securities Acquisition and Takeover Act (Wertpapiererwerbs- und Übernahmegesetz; “WpÜG”);

b) Consumer protection law;

c) Unfair competition law and violation of art. 101 and 102 of the TFUE.

Standing

a) Only individuals have standing;

b) In case of Musterklage a publicly sponsored centre for consumer protection or a consumer association on behalf of a consumer and in case of Sammelklage a consumer organisation on behalf of consumers;

c) Organisations whose purpose is to promote commercial or independent professional interests (fulfilling a number of additional criteria) and consumer associations that are either registered with the Federal Office for Justice (Bundesamt für Justiz) in Bonn or, in case of an organisation from another EU Member State, with the European Commission.

Court competent to hear the case

a) Higher Regional Court (Oberlandsgericht),

b) and c) the District Courts (Landgericht) have exclusive jurisdictions with the possibility to appeal.

Main procedural rules

a) A party to such a proceeding may apply to the court for the establishment of a model case when the sought-after entitlement or clarification of a legal question can be decided, and it will determine the outcome of the dispute; new electronic register of lawsuits has been established in order to publish and exchange relevant news and information; the application to the Higher Regional Court is publically announced in the electronic Federal Gazette; if, within four months, ten applications whose establishment objectives refer to the same subject matter are filed, the court trying the matter will effect by order a decision of the Higher Regional Court; while the proceeding is pending at the Higher Regional Court


thereafter, all proceedings at the lower courts, whose outcome is contingent on the ruling of the Higher Regional Court, are suspended; the ruling of the Higher Regional Court with respect to the model case is binding on the lower courts and issued by means of a “model notice”. However, each lower court will decide each matter pending before it separately on the basis of the model case ruling;

b) General procedural rules apply; there is no right of intervention by individual consumers;

c) General procedural rules apply.

**Type of remedies**

a) **Compensation** and performance of investment contract;

b) **Compensation** and specific performance;

c) **Recovery of ill-gotten gains to the public budget.**

**Costs involved for the parties and funding – remuneration of attorneys and court’s fees**

a) A complicated system of pro rata participation in costs according to the value of individual claims;

b) Represented consumers do not bear costs, they are borne by organisation that represents them;

c) The litigation costs depend of the amount of controversy.

In general, the court costs, and the costs for a party’s legal fees, are regulated by way of a statutory limit. These costs are preliminarily calculated on the basis of the value of the matter. The fees of most large German law firms are likely to exceed the statutory limit, meaning that, even if a party wins at trial, it is unlikely to recover all of its legal costs.

As of 1 July 2008, conditional fee arrangements – including **contingency fees** – are, in certain circumstances (normally if a client would be otherwise prevented from pursuing his claim), **permitted under German law.** However, the new legislation does not allow legal practitioners to bear the other side’s costs and/or court fees in the event that their client loses.29

**Additional considerations**

Additionally to the above solutions under German law it is possible to transfer damages claims to a third party, who may then enforce them collectively.

**2.7. Greece**

**Types of collective redress mechanisms existing in Greece:**

Greek legal system knows:

a) **Group action,** and

b) **Declaratory action for damages.**

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Legal basis:
Both instruments are based on art. 10 par. 16 of Law no 2251/1994 on Consumer Protection.

Areas covered by collective redress – scope of application
Provisions of the Law 2251/1994 regarding consumer protection (such as provisions on general contract terms, on advertising, on distance selling, etc.) or any other provision of the law relating to consumers (for example, timeshare rules).

Standing
A consumer association fulfilling criteria set by law (at least 500 active members and registered in the Registry of Consumer Association of the Ministry of Development for at least one year before the filing of the action) when the illegal behaviour harms the interests of at least thirty consumers.

Court competent to hear the case
Civil court of first instance with jurisdiction for the place of residence or establishment of the defendant.

Main procedural rules
a) The collective action has to be filed within six months of the illegal action last taking place, and is begins in the non-contentious jurisdiction at the earliest possible hearing session; the formalities that need to be served are the same as those for every court proceeding (such as deposition and service of the action, oral hearing, attendance at court by a lawyer, filing of pleadings in writing, etc.);

b) The declaratory action should be filed within five years of the consumer association having full knowledge of the damage and who the liable party to pay damages is. In any case, the action should be filed within 20 years of the time at which the action causing the damage has taken place. The formalities that need to be served seem to be the same as in every court proceedings (such as deposition and service of the action, oral hearing, attendance at court by a lawyer, filing of pleadings in writing etc.). However, the declaratory action on behalf of an indeterminate number of consumers relieves the consumer association of the burden to invoke and prove particular damages suffered by a consumer from the illegal behaviour of a supplier.

Type of remedies
a) The cessation of the illegal action or the omission of the illegal behaviour by a supplier, the confiscation, withdrawal or destruction of defective products that are dangerous for the safety and health of consumers, as well as the publication of the whole or part of the court decision or the rectifying declaration can also be sought, moral damages, and injunctive measures; the moral damages adjudicated by the court are characterised, according to the prevailing opinion, as punitive damages; compensation for moral damages deriving from the illegal behaviour of a supplier can be granted only once; the amount attributed is allocated for educational, information and general consumer protection purposes, after the legal costs have been deducted, proportionally: a) 35% to the plaintiff consumer
organisation, b) 35% to the consumer organisations of second degree and c) 30% to the State Budget.

b) The court may issue a judgment accepting in part or in whole the initial claim filed with the declaratory action by the consumer organisation; the judgment that accepts in total or in part the declaratory claim for compensation produces res judicata in favour of the consumers who have suffered damages, even if they have not been litigants to the procedure (mandatory opt-out).

Costs involved for the parties and funding – remuneration of attorneys and court’s fees

a) Individual consumers do not participate in the proceedings and do not bear costs; redress is not directed to individual consumers;

b) No costs are borne by consumers.

2.8. Hungary

Types of collective redress mechanisms existing in Hungary:

Group action under competition law.

Legal basis:
Article 92 of the Hungarian Competition Act as amended in 2009.

Areas covered by collective redress – scope of application

Infringements of provisions of Competition Act, or unlawful practices in relation to which the Hungarian Competition Authority has the power to proceed.

Standing

Hungarian Competition Authority

Court competent to hear the case

Local civil law court for disputes with value below 5 million HUF, and county court above this threshold.

Main procedural rules

The Hungarian Competition Authority is empowered to file the action only where it has commenced a competition supervision proceeding against the infringement in question. Where a competition supervision proceeding has been initiated, the court shall stay its proceeding, upon request of the Hungarian Competition Authority, until the competition supervision proceeding has been closed. This action may not be filed after the end of one year following the date when the infringement was committed, the time-limit being suspended for duration of the competition supervision proceeding.

The following are preconditions of the proceeding: the defendant is guilty as demanded by the statement of claim; the existence of a uniform legal basis of the claim which can be verified as a consequence of the fact that the consumers concerned by the claim are in an identical situation; in cases where damages are demanded, the amount of the damages can uniformly be determined and in cases where other demands are raised, means of satisfying those demands can uniformly be identified.
If the court admits the claim, it shall oblige by its judgment the undertaking to satisfy the demand raised by the claim; furthermore, it shall identify the group of consumers entitled to request the fulfilment of the obligation imposed by the judgment.

By its judgment, the court may authorise the Hungarian Competition Authority to publish the judgment in a national daily at the expense of the offender or to publish it in any other form justified by the nature of the infringement. The offender must satisfy the claim of the consumers entitled in accordance with the judgment. The enforcement of claims by the Hungarian Competition Authority under this Article does not prejudice the right of consumers to take further action by himself against the offender under the provisions of the civil law.

Hungarian law provides for general civil law mediation, which is also possible with respect to competition law issues. Judicial settlements require the court’s permission awarded if they comply with the parties will and provisions of law.

**Type of remedies**

**Compensation**, declaration of nullity of the given contract, injunctions and publication of the judgement in the press.

**Costs involved for the parties and funding – remuneration of attorneys and court’s fees**
Consumers do not bear costs of the proceeding.
Contingency fees in Hungarian procedural law are permitted, provided that the attorney bears a clear risk in respect of the claim.30

There are no provisions on third party funding in competition matters.

**2.9. Italy**

**Types of collective redress mechanisms existing in Italy:**
Italian system knows the mechanism of **group action**.

**Legal basis:**

**Areas covered by collective redress – scope of application**
Any breach of **contract or any delict**, including, inter alia, 'anti-competitive activities'.

**Standing**
Any **individual** who is acting for the purposes falling outside his trade, business or profession – either on his or her own or through associations mandated by him or her, or committees of which he or she is a member.

**Court competent to hear the case**
Heard by three-judge panel in **ordinary court** after the case has been prepared by a single investigating judge.

30 [http://www.iclg.co.uk/khadmin/Publications/pdf/3927.pdf](http://www.iclg.co.uk/khadmin/Publications/pdf/3927.pdf), p. 79
Main procedural rules

A member of a homogeneous class - also acting through associations or committees - may seek compensation for damages and/or restitution of undue payments. Consumers and users who intend to seek protection under this article may join the class action without the need of the assistance of a counsel and the decision on the class action shall also apply to them. Those who do not join the class action may act individually, whilst joining the class action shall cause the waiver of any individual action based on the same reason. No other class actions may be filed for the same facts and against the same defendant after the expiration of the terms for joining the action as set by the judge. In a preliminary stage, the court must decide on the admissibility of the action by way of a certification order, which may be immediately challenged before the court of appeal. By way of the same order, the judge will order the appropriate forms of advertisement for the proceedings so that the class members can join the class action; moreover, the judge will define the characteristics necessary for becoming a member of the class. With the final decision, if the plaintiff claim is upheld, the court orders the defendant to pay the final amounts due to those who joined the action or, alternatively, establishes the criteria for the calculation of the sums to be awarded.

Type of remedies

**Damages** under contract (actual damage and lost profit) and under delict (economic and non-economic damages), or declaratory relief.

Costs involved for the parties and funding – remuneration of attorneys and court's fees

The leading plaintiff is responsible before the court and the defendant for costs under the "loser pays" rule. However, cost sharing agreements between members of the class are possible. Courts have wide discretion in decisions on costs using legal tariffs to limit lawyers' fees. There are cost savings as joining class members do not need to be represented by a lawyer.

Third party funding is not previewed in Italy. However, art. 93 of the Code of Civil Procedure allows lawyers to sponsor their clients by anticipating all costs of the proceedings until its final outcome. If they win the case they are personally entitled to obtain reimbursement from the losing party.

Since 2006 contingency and conditional fee arrangements have been allowed in Italy, provided that any arrangement between lawyer and client is made in writing.31

**2.10. Lithuania**

Types of collective redress mechanisms existing in Lithuania:

Lithuanian legal system knows the following collective redress mechanisms:

- a) **Group action** (which is not operational due to lack of implementation measures);
- b) **Representative action**.

Legal basis:

- a) 5th part of Article 49 of the Lithuanian Civil Procedure Code,
- b) Article 30 of the Law on Consumer Protection.

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Areas covered by collective redress – scope of application

a) **Protection of public interest**;

b) Protection of public interest of **consumers** when seeking recognition or change of legal relationship, prohibition (termination) of certain actions (omissions) of a seller or service provider whereby legitimate common interests of consumers are being infringed upon and which are unfair from the consumers’ viewpoint, are not in compliance with fair business practices or are in conflict with the provisions of the Lithuanian Civil Code, the Law on Consumer Protection of Lithuania or any other legislative acts.

**Standing**

a) Lack of implementing provisions;

b) The **State Consumer Rights Protection Authority** as well as certain qualifying consumer associations registered in the Register of Legal Entities of Lithuania.

**Court competent to hear the case**

**District court.**

**Main procedural rules**

a) The court stated that because of this legislative gap currently there is no possibility to have a group action in Lithuania at all; neither Lithuanian Civil Procedure Code nor other Lithuanian statutes provide any rules specifying the procedure for handling a group action; the lack of regulation is not the sole problem for starting to use group actions in practice; the principle introducing the group action into Lithuanian legal system, conflicts with other rules of the Lithuanian Civil Procedure Code;

b) The State Consumer Rights Protection Authority shall announce on its web site that the claim related to protection of consumer rights will be heard by a court. Moreover, the State Consumer Rights Protection Authority has to publicise on its web site the effective court decisions in which infringements of public interest have been established.

**Type of remedies**

a) Lack of implementation provisions,

b) Recognition or change of legal relationship, prohibition (termination) of certain actions (omissions) of a seller or service provider.

**Costs involved for the parties and funding – remuneration of attorneys and court’s fees**

General rules on costs apply.

Article 50(2) of the Law on Advocacy allows an attorney to enter into arrangement with a client whereby the attorney’s fee is made dependant on the outcome of the case. Thus, since the enactment of the 18 March 2004 Law on Advocacy **contingency fees are permissible** under Lithuanian law.32

Reform plans
In September 2010 the government of the Republic of Lithuania has launched the public consultation on the draft of Conception on Group Action\(^\text{33}\); objective of this conception is to define the main principles of group action and in such a way to create conditions to enforce the right to group actions claim defined in the Article 49 of Civil Procedure Code. The Conception applies only opt-in mechanism. As concerns areas in which group actions could be applicable, two options are proposed:

- No limitations on the areas where group actions can be applicable; or
- Areas in which most often human rights are infringed should be identified as the ones where the group actions are applicable (e.g. consumers protection, environmental protection, workers' protection, protection of big groups of victims from breach of contracts or delict); subjects who would have right to make a group claim could be the prosecutor, state and municipal institutions, associations and ad hoc groups of private persons.

2.11. Netherlands

Types of collective redress mechanisms existing in the Netherlands:
Dutch system knows two types of collective redress mechanisms:

- a) **Group action**;
- b) **Mass-settlement**\(^\text{34}\).

Legal basis:

- a) Art. 3.305 of the Dutch Civil Code (further referred to as "DCC")\(^\text{35}\),

Areas covered by collective redress – scope of application

- a) Civil claims in **all areas of law**;
- b) Settlement **must pertain to damages** of several parties caused by one event or several similar events.

Standing

- a) A **foundation or an association** with full legal capacity that, according to its articles of association, has the objection to protect specific interests, may bring to court a legal claim that intents to protect similar interests of other persons; Article 3:305b DCC extends this right to **public legal entities**, article 3:305c DCC to

\(^{33}\)See the project at: http://www.lrs.lt/pls/proj/dokpaieska.showdoc_i?p_id=50718&p_query=&p_tr2=&p_org=8&p_fix=n&p_gov=n

\(^{34}\)The collective settlement legislation was designed primarily to apply to mass exposure and mass disaster personal injury claims (arising from the DES drug damage claims). The second case, the Dexia settlement, instead related to financial services (retail investment products) and the Royal Dutch Shell case, discussed in section on cross-border use of collective redress schemes, arose from a securities action due to the overstatement of the Company's oil and natural gas reserves between 1997 and 2003. The latter was submitted for court approval on 11 April 2007 and is of interest due to its cross – border nature (the settlement aims to achieve a worldwide settlement, excluding only US claimants). Europe – wide notification of the procedure was undertaken in May 2008 and a hearing took place in November 2008 before the Amsterdam Court of Appeal to consider the petition for a binding declaration.

\(^{35}\)http://www.dutchcivillaw.com/legislation/dccTitle331111.htm
foreign legal entities and authorities protecting consumer interests which have been listed pursuant to article 4.3 of directive 98/2736;

b) All parties to the settlement agreement; these must include a foundation or association with full legal competence that, pursuant to its articles of association, represents the interests of parties on whose behalf the agreement was concluded, and one or more parties agreeing to pay compensation.

Court competent to hear the case
The Amsterdam Court of Appeal.

Main procedural rules

a) A judgment rendered on a claim is binding on group members. However, individual members retain the right to opt-out pursuant to article 3:305a sub 5 DCC unless that would not be possible in light of the nature of the judgment;

b) If a settlement agreement has been concluded between a foundation or association and one or more other parties that have committed themselves by this agreement to pay compensation for the damage, the Amsterdam Court of Appeal may, at the joint request of the parties, declare this settlement binding on persons to whom the damage was caused. Therefore the settlement needs to be reached before a request to the court is made. However, a person entitled to compensation can notify in writing, within a certain period, that he or she does not wish to be bound by the agreement. In that case, the declaration that the agreement is binding shall have no consequences for such a person (opt-out).

Type of remedies

a) All sorts of relief except monetary damages; the Dutch Consumers Association sharply criticises the exclusion to claim for monetary compensation collectively in article 3:305a DCC and stated that this is the most important block in access to justice for a collective damages claim;

b) A court declaration that the collective settlement agreement is binding; the settlement will indicate that parties are entitled to compensation which in principle is monetary and exceptionally may have another form.

Costs involved for the parties and funding – remuneration of attorneys and court’s fees

a) Costs of litigation are very high, in particular revision in cassation of an unsatisfactory award is very expensive;

b) Individual consumers represented by a consumer organisation bear no costs; the costs related to the procedure at least include the costs of notifying interested parties, the costs of professional support, and the costs of publishing the court's declaration; they are normally dealt with in the settlement.

36 Further, the individuals can assign their claims to an organisation (association or foundation). This association or foundation can claim damages as holder of the individual claims, in its own name on behalf of the victims. The injured parties may also grant a power of attorney to a party to represent them during legal proceedings. This party would then bring a legal action against the party being sued in the name of those that had issued the power of attorney. Claimants can also jointly bring a legal action in their own name against the party being sued. This means that all victims are a party in the legal proceedings.
2.12. Poland

Types of collective redress mechanisms existing in Poland:
With effect as of 2010 a general group action mechanism has been introduced into the Polish legal system.

Legal basis:
Ustawa o dochodzeniu roszczen w postepowaniu grupowym (“Act on Class Actions”) of 17 December 2009, published in Dziennik Ustaw (Journal of Laws) of 18 January 2010, no 7, item 44 p. 1, entered into force six months after its publication.37

Areas covered by collective redress - scope of application
Claims for collective redress may be brought in the domain of: 1) consumer protection, 2) product liability and 3) delicts, except for claims related to protection of personal rights.

Standing
Claims can be brought by a group that consists of at least 10 persons if their claims are of the same kind and based on the same or similar factual grounds. The claims are subject to uniformisation by sub-groups composed of minimum two persons.
Natural and legal persons may sue through this instruments not only businesses but also State Treasury.

Court competent to hear the case
A regional court (instead of a local court) in a chamber composed of three professional judges hears collective claims. Judicial control is exercised at all stages, especially with regard to admissibility of the claim and the group.

Main procedural rules
The law provides for an opt-in procedure, so that all claimants have to be identified individually. The collective claim is brought by a representative of the group (a member of the group or a local consumer ombudsman). However only attorney or a legal advisor may present the case before the court.

After the claim has been brought, the court will first rule on its admissibility and subsequently the proceedings are suspended for a public announcement in prominent national newspapers, or exceptionally in the local press, for parties with an interest to join the group during two months. Joining requires a declaration indicating claims, underlying circumstances, membership in the group and evidence. The burden of proof is on the plaintiff with special powers for the representative. The composition of the group is subject to court’s decision. Parties that join are locked in the proceeding.

A withdrawal, waiver or reduction of the claim or a settlement and change of representative of the group can be made in case of approval by more than half of the members of the group. However, the court may declare inadmissibility of such actions if

they are contrary to provisions of law, good customs, if they circumvent law or manifestly violate interests of members of the group.

Type of remedies

*Any kind of damage* that can result from a given cause of action is recoverable through monetary or in-kind compensation.

Costs involved for the parties and funding – remuneration of attorneys and court’s fees

The law excludes public funding for claimants in group actions. The issue of third party funding is unregulated.

Remuneration for representation can be contractually fixed as depending on the amount of compensation rewarded. However, remuneration cannot comprise more than 20 percent of the compensation. The agreement on lawyers’ fee is subject to court’s scrutiny.

Defendant may ask the court to demand from plaintiffs a security deposit in cash not exceeding 20 percent of the amount subject to litigation.

2.13. Portugal

Types of collective redress mechanisms existing in Portugal:

Portuguese law knows *group action* (known as ‘people actions’ [acção popular]) since 1995.

Legal basis:

Law No. 83/95 of 31 August 1995.38

Areas covered by collective redress – scope of application

Any violation of general interests of *consumer protection, public health, quality of life and preservation of the cultural and environmental heritage*.39

Standing

Any citizen (legal entities or professionals are excluded) or associations and foundations that promote certain general interests. The Ministério Público and the Direccção-Geral do Consumidor.

Court competent to hear the case

*Administrative and civil courts.*

Main procedural rules

The process begins with the presentation of the initial petition in a court, which should conform to the general formal requirements imposed by the Civil Code (art. 467). Once the petition for the class action is received, the interested parties will be summoned to the proceedings, in order to, within the term fixed by the judge, be able to join the proceedings.

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39 Article 52(3) of Portuguese Constitution
and declare their consent to being represented by the claimant, or, otherwise, that they do not wish to be represented by the claimant. In the latter case, the decision will not be applicable to them. The interested parties’ silence will be considered as agreeing to be represented. According to subparagraphs 2 and 3 of the same article, this advertisement should be published in the media. Article 14 of Law 83/95 states that the claimant acts on behalf of all others with a right or interest, even without an explicit authority, except (pursuant to article 15), if someone expresses the intention of not being represented by the claimant, after either being notified of the claim or being aware of the claim through the media (opt-out). Pursuant to article 15(4), a person can inform the court, before the evidence is discussed, that she/he does not wish to be represented by the claimant and the effect of the court decision will not then affect her/him.

Type of remedies

Pursuant to the Civil Code and Law 24/96, consumers can claim material and immaterial damages. Punitive and exemplary damages are not available in Portugal.

Costs involved for the parties and funding – remuneration of attorneys and court’s fees

Although loser pays rule applies there are substantial limitations (10-50%) of court fees for claimants if the case is lost. Conditional and contingency fees are not allowed. Third party funding is not regulated.

2.14. Spain

Types of collective redress mechanisms existing in Spain:

Spanish law foresees collective redress intended to protect a series of individual interests (multi-party actions for damages) and collective redress to protect collective consumer interests (injunctions).

Legal basis

Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil (further referred to as "Civil Procedure Act").

Areas covered by collective redress – scope of application

Contractual and non-contractual liability of the professional.

Standing

Individual victims and consumer associations.

Court competent to hear the case

Civil and commercial courts (for unfair competition matters).

Main procedural rules

Ordinary procedural rules apply. The judge will summon all victims through the publication of the initial claim's admission in procedures initiated by consumer associations, entities created for the protection of the consumers’ interests or groups of victims. If victims are

individualized or can be easily individualized, the plaintiff must notify the claim to interested people before the presentation of the initial claim. In this case, consumers will be able to intervene in the procedure, but only to proceed with procedural acts that are not precluded. If victims are not individualized or it is difficult to individualize them, the announcement suspends the procedure during a period not longer than 2 months. The procedure will continue with the intervention of all consumers who decided to come forward.

If a professional is sentenced to act, or to retrain from acting, the decision will determine the affected consumers individually. If it is not possible, the decision will establish the necessary conditions to be able to benefit from its effects. If the decision indicates that certain activity or behaviour is not in compliance with consumer protection legislation, it will have non-limited procedural effects regarding the parties.

Type of remedies

**All types of damage** are recoverable (including bodily injury, mental damage, damage to property and economic loss).

Costs involved for the parties and funding – remuneration of attorneys and court’s fees

In order to encourage access to justice, for those consumers who have insufficient monetary resources to bring legal action, legal aid may be applicable both to individual victims and consumer organisations. However, the "loser pays" principle applies. Fees claimed are verified by the court.

**Contingency fees*/quota litis agreements are valid in Spain.*41

Third party funding is not regulated but also not used.

### 2.15. Sweden

Types of collective redress mechanisms existing in Sweden:

Swedish legal system adopted collective redress mechanism in the form of individual, organisational and public class action.

Legal basis:


Areas covered by collective redress – scope of application

**All claims in civil cases** amenable to out-of-court settlement can be brought in group proceedings. It is not confined to infringements of consumer and environmental law but applies potentially to all kinds of disputes where group action appears appropriate (for instance equality issues in labour law). For consumer disputes, most often the disputes are based on one of the multiple special consumer protection acts in Sweden regulating either contractual or non-contractual liability (e.g. Product Liability Act, Consumer Sales Act or Consumer Services Act). Claims can also be based on general delict law and contract law. Recently a possibility of compensation for pure economic loss resulting from negligent

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Overview of existing collective redress schemes in EU Member States

financial advice has been introduced through §§ 6 and 7 of the Act on financial advice to consumers (Lag 2003:862 om finansiell rådgivning till konsumenter).

Standing

a) **Any person or entity** provided that such person or entity has a claim of its own and is a member of the class;

b) **Certain organisations** without having claims of their own; such actions may be initiated by consumer and labour organisations and must, as a general rule, concern disputes between consumers and providers of goods or services;

c) **An authority authorised** by the government to act as plaintiff and litigate on behalf of a group of class members; this form of action is intended to allow authorities to pursue claims where the public interest, in a broad sense, suggests that action should be taken; for consumers disputes the government has designated the Consumer Ombudsman as the appropriate public authority.

Court competent to hear the case

**District courts** designed by the government, at least one per each county.

Main procedural rules

The following conditions must be met for lodging a group action:

1. The action is based on factual circumstances that are common or similar to the group;

2. A group action does not seem inappropriate due to considerable divergences in the claims;

3. The majority of the claims cannot be equally well conducted in separate proceedings of the group members;

4. The group is well defined in terms of value of the claims, delimitation, etc.;

5. The plaintiff is well-suited to represent the group (§ 8 of Class Action Act).

The group is defined through an **opt-in** procedure. If a plaintiff’s application is not dismissed, the court shall notify the group members as indicated in the application. The notification shall include certain important information on the nature of group proceedings in general and on the substance of the specific claim. The notification shall indicate the time-limit determined by the court for the members of the group to express consent for being part of the group. Those who do not notify their willingness to join the group preserve their opportunity to pursue their individual claim in separate proceedings. A member of a group must actively choose to be included in the group taking action. Only clearly identified group members who have given a written notice to the court and thus chosen to opt in will be allowed to participate in the proceedings.

Type of remedies

The Class Action Act does not set any limitation on the civil law remedies to be obtained. Typically the main remedy that would be relevant in group proceedings would be compensation for damages, on the basis of either contractual or non-contractual liability. A group action can also be employed for getting a court order obliging the defendant to perform an act (e.g. perform a mass contract, terminate a contract or impose a change in
standard contact terms) or for a declaratory order (e.g. declaring of whether or not a certain legal relationship exists), cf. Code of Judicial Procedure Chap. 13, § 1, and 2).

Costs involved for the parties and funding – remuneration of attorneys and court’s fees

Normal proceedings costs apply. The group representative assumes the risk of being ordered to pay the opponent's costs but a group member bears the opponent's costs only if he intervened as a party to the action, which is not normally the case.

The group representative must have the financial capacity to carry the collective claim, including paying an advance on them (but this is not a security for opponent's costs).

Reforms

Reforms have been proposed particularly as regards the issue of funding as well as the introduction in certain circumstances of an opt-out model.

2.16. UK

Types of collective redress mechanisms existing in the United Kingdom (applicable in England and Wales):

a) representative action;

b) Group Litigation Order;

c) competition action.

Legal basis:

a) Civil Procedure Rules Part 19 II;

b) Civil Procedure Rules Part 19 III, introduced in 1990;

c) S. 47 B Competition Act 1998.

Areas covered by collective redress – scope of application

a) Strictly interpreted “same interest” test practically excludes consumer area and limits this area to clarification of rights e.g. from shares or property;

b) Any claim, including personal injury, environmental liability, product liability and tax cases;

c) Claims not relating to claimants course of business concerning infringement of competition law confirmed by a ruling of the Office of Fair Trading, the European Commission or the Competition Appeal Tribunal.

Standing

a) The representative party having an interest in the case;

b) Any actual or potential party or on court’s own initiative;

c) Specified body acting on behalf of effected consumers with their permission and meeting criteria laid down by the Secretary of State such as demonstrating that they represent or protect the interests of consumers and that they can be expected to act independently, impartially and with integrity.

42 The description below and any reference in the text to UK concerns England and Wales.
Overview of existing collective redress schemes in EU Member States

Court competent to hear the case

a) Ordinary courts;
b) In practice managed by the Central Register of the High Court in London;
c) Competition Appeal Tribunal.

Main procedural rules

a) The main procedural rules bind all those represented even if they are not a party, but in such case are enforceable only with the permission of the court. Representatives can be appointed to represent the interests of classes within the claim or those that are unborn, cannot be found or are unascertained;
b) Procedure for a register of claims under the Group Litigation Order, significant powers of the court in case management, the judge determines which aspects of the case are to be treated as group litigation issues and which are to be left as individual matters, opt-in type;
c) Adversarial procedure with a hearing.

Type of remedies

a) and b) usual remedies in civil procedure;
c) Damages paid directly to represented consumers, or upon agreement to the specified body.

Costs involved for the parties and funding – remuneration of attorneys and court’s fees

a) Representative party bears all the costs; “losing party pays” principle applies;
b) The court identifies individual and common costs to be born individually or shared by parties; “losing party pays” principle applies;
c) The applicant bears its own costs; “losing party pays” principle applies.

Contingency fees not allowed but proposed in March 2009 report “Improved Access to Justice - Funding Options and Proportionate Costs”

Reform plans

In England and Wales where the above described system applies a reform was tabled but not implemented until now.43

The Scottish government has proposed the introduction of Class Actions to Scotland in their response to the Lord Justice Clerk, Lord Gill’s Civil Courts Review. Recently UK investors unsuccessfully attempted to file a class action against National Bank of Scotland before US court.

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3. SIMILARITIES AND DIFFERENCES BETWEEN COLLECTIVE REDRESS SCHEMES IN MEMBER STATES

KEY FINDINGS

- Generally four types of instruments are used in the 16 Member States which apply collective redress schemes: group and representative actions, test case procedures and procedures for skimming off profits.

- Although general classification is possible every Member State regulates these instruments independently. This leads to significantly different legal solutions. Every national system introduces collective redress by a different blend of instruments. As a consequence, every national system of compensatory redress is unique and no two national systems are alike in this area.

- National collective redress schemes differ with respect to such important issues as universality of instruments, scope of application, right to sue and to be sued, type of available remedies and legal culture of awarding damages, competent courts, opt-in versus opt-out mechanism, costs of proceedings and their funding, admissibility of contingency fees.

- National collective redress schemes show functional similarities. They provide for added value, cost savings for consumers and businesses but fail on full effectiveness test, except for schemes running opt-out model.

3.1. Similarities allowing for typology of collective redress instruments

Collective redress mechanisms existing in EU may be grouped in the following way:\n
Group actions: group actions are the most common collective redress mechanism in the EU. They are available in Bulgaria, Denmark, Finland, France, Germany, Hungary, Italy, the Netherlands, Poland, Portugal, Spain, Sweden, and the United Kingdom. They may be divided into: a) group actions in which individual actions are grouped into one procedure, b) actions brought by groups of victims and c) group actions brought by ombudsman, a consumer organisation or a leading plaintiff.

Representative actions: in which a person acting on behalf of others obtains a judgment that he can enforce (which is the main difference with all forms of group action, where after a decision in favour of the group all members of the group have the right to enforce their rights separately). There are two types of these actions: a) traditional representative actions in which the representative can bring the action on behalf of consumers who will receive the damages themselves and b) collective representative actions in which the representative receives the damages. Representative actions are available in Austria, Bulgaria, France, Germany, Greece, Lithuania and the United Kingdom.

Test case procedures: only a few of these countries have introduced provisions that give a judgment in a test case effect over and above the parties to the test case itself. Test case mechanisms are used in Germany, Austria and Greece.

Procedures for skimming off profits: A special procedure for skimming off the profits gained from unlawful conduct in the field of the law of unfair competition has so far only been introduced in Germany. It does not aim at compensating consumers who have been the victims of such unlawful conduct but instead tries to re-establish fairness in competition by taking illegal profits from the wrong-doers.

3.2. Similarities and differences in construction of collective redress schemes

While general solutions applied in different Member States may be classified according to different criterions, existing mechanisms to compensate a group of victims harmed by illegal business practices which have been introduced in majority of Member States vary widely throughout the EU. Every national system of compensatory redress is unique and there are no two national systems that are alike in this area. 45

The main areas of similarities and differences may be summaries in the following way:

- Single instrument versus a bundle of instruments:
  Some Member States use a single instrument of collective redress (Finland, Hungary, Italy, Poland, Portugal, Spain, and Sweden) while others use a multitude of those instruments bundled in different ways (Austria, Bulgaria, Denmark, France, Germany, Greece, Lithuania, the Netherlands [although practically only one instrument is used], UK);

- Horizontal versus sectoral scope of application of the national collective redress schemes:
  Some Member States apply collective redress instruments that have a very broad scope of application (Bulgaria, Denmark, Italy, the Netherlands, Poland, to some extent Portugal, Spain, Sweden and UK) while others apply collective redress instruments only to specific sectors such as misleading public capital market information and breach of contract concerning securities (Germany), consumer protection (Austria, Finland, France, Germany, Greece, Lithuania) or competition (Germany, Hungary);

- Legal standing:
  In terms of legal standing in compensatory redress proceedings: some Member States have vested only public authorities with the power to institute proceedings in certain areas (e.g. Finland [Ombudsman], Hungary [Hungarian Competition Authority]), others grant standing only to national private organisations such as consumer associations (e.g. France, Greece) and private organisations from other Member States (e.g. Austria); or to individuals acting on behalf of a group (e.g. Poland). Many Member States have a combination of several rules on standing: public authority and private persons (Denmark [Ombudsman], Lithuania [State Consumer Rights Protection Authority]), private organisations and harmed persons (Bulgaria, Italy, Spain, UK); public authorities, organisations and individuals (e.g. Germany, Portugal, Sweden); public authorities and associations (e.g. the Netherlands);

Different categories of victims can make use of compensatory collective redress. While most of the national systems allow for compensatory redress for consumers, only a few allow for compensatory redress for other victims such as small businesses (e.g. competition group action in Denmark) or allow for general standing (e.g. Poland).

On the issue of who may be sued, the majority of Member States indicate defaulting businesses but others open the litigation in a general way allowing also for the State Treasury and individuals to be sued (e.g. Poland).

- **Types of available remedies:**
  
The remedies in some cases go to the national budget or to associations (Bulgaria - collective action for damages to the collective consumers' interests, France - action for financial reparation of consumer collective interests, Germany - skimming off the profits) while in others to victims (e.g. Austria, Bulgaria with respect to other instruments, Denmark, Finland, France and Germany with respect to other instruments, Greece, Hungary, Italy, Lithuania, the Netherlands, Poland, Spain, Sweden, UK).

With respect to remedies, although all of the Members States that apply collective redress schemes allow for broad forms of damages (except for Dutch group action which is not used in practice) there are strong differences in the culture of determination and calculation of damages between different national courts.

- **Competent courts:**
  
  Collective redress cases are heard by ordinary courts (e.g. in Austria, France, Germany, Greece, Italy, Lithuania, Poland, Portugal, Spain); ordinary or designated courts (e.g. Denmark, UK); or by designated courts (e.g. the Netherlands, Finland, Hungary, Sweden);

- **Opt-in versus opt-out mechanism:**
  
The effects of a judgment on the members of the group concerned differ: in most Member States, the decision only binds those who have expressly consented to the proceedings ("opt-in", e.g. Austria, Finland, France, Germany, Italy, Poland, Spain, Sweden, and UK). In a few Member States, the decision becomes binding for all members of the group unless they opted out (Portugal, Denmark, Netherlands); however, several Member States consider opt-out mechanisms to remedy general low participation resulting from opt-in;

- **Identification of the class:**
  
The moment at which those entitled to claims are individually identified varies as well. In some Member States, the identification must take place when the representative action is brought (e.g. the United Kingdom), whilst in others, it can take place at a later stage (e.g. Poland and Spain);

- **The "loser pays" principle:**
  
  In general Member States apply the "loser pays" principle. National courts have a number of measures to limit financial impact of losing the case on private individuals and associations, as well as measures to deter unnecessary litigation by flexible attribution of costs; however these measures are subject to courts' discretion leading to scarce scrutiny and unpredictability;
Overview of existing collective redress schemes in EU Member States

- Conditional and contingency fees:
Conditional and contingency fees are admitted in some Member States even if not in a pure US version (e.g. Germany, Italy, Lithuania, Poland, Spain - although courts' scrutiny may look into their validity), while prohibited in others (e.g. Portugal, UK - they are prohibited in England and Wales, but allowed in Scotland); Denmark allows for conditional fees but not contingency fees;

- Funding:
There are significantly different solutions governing the funding of collective redress actions; in some Member States third party funding is clearly permitted (e.g. in Austria there is an established practice in funding with financing companies that may collect significant portion of damages [30-40%]), while in majority of Member States this matter is unregulated (e.g. Bulgaria, France, Poland, Spain);

3.3. Similarities and differences in functioning of collective redress schemes

Clearly similarities and differences have an impact on functioning of collective redress schemes. This aspect has been analysed by Evaluation study in areas of added value, efficiency and effectiveness of collective redress schemes with the following conclusions:

- generally all collective redress mechanism add value compared to individual redress and ADR schemes, by facilitating access to justice in all Member States where they exist, even where individual litigation and ADR is easily accessible,
- collective redress systems did produce savings for consumers and were not too burdensome on businesses,
- in general national collective redress mechanisms were less effective than expected because they did not meet objectives such as full redress, significant reduction of consumer detriment (in fact the study indicated at low levels of reduction of consumer detriment), assuring high percentage of participation, working as a significant deterrent to potential wrongdoers; users of national schemes encountered significant difficulties in terms of funding; opt-in schemes failed to provide incentives to participate; however, as an exception, the Netherlands was highly praised for providing "significantly higher direct benefit to affected consumers" due to more frequent use and larger groups of consumers involved; positive indication has been made towards Portugal and Denmark both operating opt-out schemes as well.46

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4. CROSS-BORDER USE OF COLLECTIVE REDRESS MECHANISMS

KEY FINDINGS

- Around **10 percent of collective redress cases involve cross-border litigation**. However, cross-border element is present in significantly higher percentage of mass claims.

- The European legal landscape concerning collective redress involves complex issues of the choice of forum (court), procedure and substantive law leaving much space for forum shopping and involving significant **risks of inconsistent or varying determinations and adjudication in different jurisdictions**.

- Procedural limitations and restrictions particular to Member States have an impact on the possibility to bring a cross-border claim.

- In cases where consumers are from different Member States, **different national laws may apply before the same court** either exclusively or in their mandatory aspect adding to legal complexity.

- In case of torts, delicts and quasi-delicts, procedural limitations lead to situations where victims need to sue in each Member State in which the event occurred but only with regard to damaged suffered in that state (**multiplication of fora**).

- Rules on standing **limit access of organisations and bodies from other Member States** to courts.

- Additional difficulties stem from **lack of knowledge of legislation and available mechanisms** in other Member States; **lack of information about collective claims filed** in other Member States; **difficulty to identify a defendant** in other Member State; **language barriers, travel expenses, and difficulties in obtaining adequate representation**.

- Cross-border use of collective redress may be affected by **forum shopping**.

4.1. Relevance of the issue of cross-border use of collective redress

In its Consultation Paper, the European Commission has formulated a problem whether any action at EU level should address the specific cross-border dimension of collective redress.\(^{47}\)

\(^{47}\) The European Commission has stressed also importance of:

- ensuring its effective enforcement of EU law on the Union’s level, often initiated on the basis of complaints filed by citizens or businesses,

- cooperation between Member States as facilitated by Regulation (EC) No 2006/2004 on Consumer Protection Cooperation providing for a general framework for the cooperation of national public enforcement authorities; and in the area of competition law, a European Competition Network was initiated at the coming into force of Regulation 1/2003 on the implementation of the rules on competition laid down in art. 101 and 102 TFEU. See: http://ec.europa.eu/dgs/health_consumer/dgs_consultations/ca/docs/cr_consultation_paper_en.pdf, p. 2.
further extended by question 5 asking if: "[...] it be sufficient to extend the scope of the existing EU rules on collective injunctive relief to other areas; or would it be appropriate to introduce mechanisms of collective compensatory redress at EU level?"\(^{48}\)

The relevance of the problem is put in evidence by the Evaluation Study indicating that around 10 percent of collective redress cases involve cross-border litigation.\(^{49}\) However, this figure refers only to cases collected in 13 Member States applying collective redress systems and may not be representative due to numerous obstacles that prevent collective redress systems to gain a cross-border dimension. Problem Study indicates, with some reservations, that cross-border element concerned 40 percent of collected mass claims/issues.\(^{50}\)

The "Problem Study" has identified the following specific obstacles relevant for cross-border claims: 1) lack of knowledge of legislation and available mechanisms in other Member States, 2) conflict among national legislation, 3) no information about collective claims filed in other Member States, 4) difficulty to identify a defendant in other Member State, 5) no standing of bodies to bring claim in other Member State or inability to join claims brought in another Member State, 6) language barriers, travel expenses, and difficulties in obtaining adequate representation.\(^{51}\)

The Example of the US system shows significant costs and complexity of multi-state litigation and points at clear benefits of litigation on federal level in case of complaints potentially to be filed in different states.\(^{52}\) The reform of American system contained in the Class Action Fairness Act of 2005 clearly aims at introducing improved procedures for interstate class actions to avoid risks of inconsistent or varying determinations and adjudication.

**4.2. Outline of basic applicable legal provisions and difficulties that arise in relation to them**

The complexity of cross-border litigation encompasses issues of identifying competent courts, procedural and substantive law among 27 different judicial systems of the Member States. Rules on enforcement, not discussed here, add additional complexity to this landscape.

**Competent courts**

In the case of EU citizens, Brussels Regulation (EC) No 44/2001 would generally indicate at courts of a Member State where the defendant is domiciled as having jurisdiction in collective redress matters\(^{53}\). However, in disputes concerning consumer contracts, consumers could also file in the courts of a Member State where consumers are domiciled (however, not if represented by ombudsman or consumer association). For contracts special rule provides for the possibility to sue in the place of performance of obligations. Importantly, according to article 6 a person domiciled in a Member State may also be sued,

\(^{48}\) Ibidem, p. 6


\(^{53}\) Brussels Regulation (EC) No 44/2001 dated 22 December 2000 which applies to EC residents for collective redress disputes falling under category of “civil and commercial matters”
where he is one of a number of defendants, in the courts for the place where any one of
them is domiciled, provided the claims are so closely connected that it is expedient to hear
and determine them together to avoid the risk of irreconcilable judgments resulting from
separate proceedings.

Rules that apply to torts, delicts and quasi-delicts stipulate for a possibility to sue in the
place where harmful event occurred or may occur. Limitations of this system are evident
from Sheville case where the ECJ held that a victim of tort could sue in each Member State
in which tort occurred (injury to reputation) but only with regard to damaged suffered in
that state.54

For non-EC residents, international agreements such as Lugano Convention on Jurisdiction
and the Enforcement of Judgments in Civil and Commercial Matters dated 16 September
1988 may apply if Member States are their signatories.

Applicable procedural law

The competent court applies in general national procedural law of the Member States where
it is located with all particular procedural limitations and restrictions which may have an
impact on the possibility to bring a cross-border claim. Among these limitations are rules
on standing limited to national organisation or bodies (under Finnish Group Action Act only
Finnish consumer ombudsman has legal standing, under sec. 47B of the UK Competition
Act only British consumer association may bring an action, under art. L 421-1 of the Code
de la consommation only consumer organisations registered in France can bring action) and
selective character of specific instruments.55

Applicable substantive law

From the point of view of substantive law the legal landscape in the EU is very complex.
Issues of contractual obligations are the Rome I Regulation (EC) No 593/2008 and non-

If we leave aside other contractual relations and focus on consumer contracts, Rome I
allows for a choice of law if such choice does not deprive the consumers of the protection
afforded to them by national mandatory provisions. In the absence of choice of law,
national law of the country where the consumer has his habitual residence applies. This
means, in cases where consumers are from different Member States, that different national
laws will apply either exclusively or in their mandatory aspect.56

For non-contractual obligations the law of the Member State where damage occurred
applies (law of the country of consumer's habitual residence for product liability). This
again points at different legal orders for consumers residing in different Member States.
However, a choice of law is allowed even after injurious event.57

54 Judgment of the Court of 7 March 1995, C-68/93 Fiona Sheville, Ixora Trading Inc., Chequepoint SARL,
Chequepoint International Ltd and Presse Alliance SA.
55 See: Rott. P. Cross-border collective damage actions in the EU, in Cafaggi, F and Micklitz, Hans-W.
(eds.) (2009) New frontiers of consumer protection, The interplay between private and public enforcement,
56 Ibidem, p. 391.
57 Ibidem, p. 393.
4.3. Examples of specific national regulations of cross-border issues

The following examples from the Leuven study illustrate solutions that limit or broaden applicability of national regulations to cross-border litigation:

- The Sammelklage nach österreichischen Recht is impossible against a foreign company. Austrian law does not apply when consumers act through an organization against a foreign business, as it found that in such a case it is not the State of the consumer that has jurisdiction. The rationale given by the Court was that Austrian law is similar to Article 14 Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. With regard to the corresponding regime of the Brussels Convention, the predecessor of Regulation 44/2001, the ECJ ruled that a party, like a debt collecting company to whom a consumer had assigned his or her claim, could not benefit from the special provisions on jurisdiction (the competence of the judge of the residence of the consumer) since these provisions only affect a private final consumer, not engaged in trade or professional activities. However, it should be observed that the plaintiff in this case was a firm whose business it was to collect debts. The judgment may have been different in the case of a claim brought by a non-profit organization (such as a consumer association).

- The Dutch law applies to foreign victims. For unknown foreign EU victims, the publication rules of the Dutch law have to be fulfilled. If their identity is known, article 14, 2 of Council regulation (EC) No 1348/2000 of 29 May 2000 on the service in the Member States of judicial and extrajudicial documents in civil or commercial matters has to be taken into account (i.e. the conditions under which the Member State will accept service of judicial documents by post should be checked). For non-EU victims, an unlimited period to opt-out exists, according to legal theory.

- Under Swedish law, consumers suffering from damage caused by a foreign company can be brought against the Swedish parent company. Moreover, in accordance with Article 15 of Regulation 44/2001, where a Swedish consumer enters into a contract with a party who is not domiciled in Sweden, but has a branch, agency or other establishment in Sweden, that party shall, in disputes arising out of the operations of the branch, agency or establishment, be deemed to be domiciled in Sweden. Non-EU citizens are also allowed to act as plaintiffs in Swedish group actions, but have to pay a guarantee to cover the cost of proceedings.58


The country reports completing the Evaluation Study indicate a rather limited amount of European collective redress cases with cross border aspects. Collective redress cases with cross border aspects were identified only in six of thirteen Member States subject to analysis. In a number of cases the foreign element was limited to the place where service was rendered or to foreign nationality of service provider, with all other elements having national character.

Taking into account the above indicated general difficulties on national level and the absence of effective pan-European collective redress scheme, collective redress plaintiffs search for other solutions.

One of the possibilities is to present collective redress case before U.S. courts.\(^{59}\) Broad rules on jurisdiction allow U.S. courts a lot of flexibility in filling their dockets. For instance under § 1332 (d) (2) of the U.S. Code the federal district courts have original jurisdiction over any civil action where the amount in controversy exceeds $5,000,000 and any of any member of a class of plaintiffs is a citizen of a State different from any defendant. U.S. courts will also serve information on foreign members of the class if they are known, although for procedural reasons any judgment served may not be recognised in Europe. However, recently Amsterdam District Court decided that ruling of United States District Court for Maryland approving the U.S. class action settlement in Royal Ahold N.V. should be recognised in the Netherlands, due to similarity between U.S. and Dutch class settlement system.

A different development took place in a case where UK investors filed with the same court a collective redress claim against Royal Bank of Scotland. Their claim was turned down on the basis of Morrison v. National Australian Bank ruling in which the U.S. Supreme Court has refused the possibility of "foreign cubed class actions" (where foreign plaintiffs are suing a foreign issuer in an American court for violations of American securities laws based on securities transactions in foreign countries) to be reviewed by U.S. courts.

Another possibility to pursue collective redress case before Dutch courts is offered by Dutch mass settlement as illustrated by Shell case filed with Amsterdam Court of Appeal in 2007.

On 9 January 2004, Shell announced that it would re-categorize a large number of its oil and gas reserves. The re-categorizations reduced the estimated value of future revenue by more than $100 billion, leading to a fall in the price of Shell's shares.

Several government authorities, among which the United States Security and Exchange Commission (SEC), launched investigations into circumstances surrounding the re-categorizations, which – among other things – led to a $120 million civil penalty imposed on Shell by the SEC.

Apart from the government investigations, fourteen securities class actions were filed in the United States. These actions were consolidated before a single US federal judge.

Additionally, a number of European-based institutional investors filed two securities actions in the United States, which have been stayed in anticipation of the proceedings in the consolidated class action.

Outside the United States, no actions have been filed against Shell in connection with the re-categorizations.

With regards to compensation of non-US shareholders, Shell entered into negotiations, resulting in the establishment of a settlement agreement and the incorporation of the Shell Reserves Compensation Foundation (representing the interests of affected shareholders) in April 2007. The settlement agreement provides compensation to all shareholders who resided or were domiciled outside of the United States, and who purchased certain shares between April 1999 and March 2004. In return for such compensation, the shareholders participating in the agreement ("participating shareholders") will release all claims against Shell and its affiliates regarding the re-categorizations.

In March 2008, Shell announced settlement in principle under which non-U.S. Shell shareholders would receive 352 million USD. The agreement was contingent on the U.S. District Court of New Jersey declining jurisdiction over the non-U.S. investors and subject to approval by the Amsterdam Court of Appeal. 60

Importantly, in this case Amsterdam Court of Appeal amassed all claims under its jurisdiction on the basis of the above mentioned art. 6 of Brussels Regulation (EC) No 44/2001 extending its jurisdiction from shareholders domiciled in the Netherlands to shareholders domiciled in the EEA and further on the basis of art. 3 of the Dutch Code of Civil procedure, which similarly to US federal provisions, extends Dutch jurisdiction if at least one of the parties requesting declaration or one of the defendants is domiciled in the Netherlands. 61

Both examples indicate significant possibilities of forum shopping and potential competition between jurisdictions.

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5. CONCLUSIONS

Review of the current state of law has revealed existence of collective redress mechanism in 16 Member States: Austria, Bulgaria, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Lithuania, the Netherlands, Poland, Portugal, Spain, Sweden, and UK (in England and Wales).

The briefing paper indicates significant differences in approach of Member States towards collective redress schemes. These differences point to disparities between the accessibility of collective redress to European consumers in different countries and sectors. Member States that introduced collective redress mechanisms apply different legal instruments in the framework of their collective redress schemes. European consumers are confronted with a complex legal patchwork of solutions which are applied by some Member States but not by others.

In general collective redress schemes provide added value and cost savings for consumers and businesses. However, they are not effective due to disparities and low participation rates, except for schemes running opt-out model.

Around 10 percent of collective redress cases involve cross-border litigation. European legal landscape concerning cross-border collective redress involves complex issues of the choice of forum (court), procedure and substantive law. This leads to forum shopping where European plaintiffs try to use U.S. courts to resolve European disputes or choose one of European jurisdictions where they can effectively pursue their claims. It involves significant risks of inconsistent or varying determinations and adjudication in different jurisdictions.

Additional difficulties in cross-border litigation stem from lack of knowledge of legislation and available mechanisms in other Member States; lack of information about collective claims filed in other Member States; difficulty to identify a defendant in other Member State; language barriers, travel expenses, and difficulties in obtaining adequate representation. Some difficulties in cross-border litigation of collective redress cases could be resolved by moving adjudication to the EU level.

While the first wave of reforms in the area of collective redress crossed Europe with numerous Member States introducing collective redress systems after year 2000 (e.g. Bulgaria - 2006 and 2008, Denmark - 2005, 2008, and 2010, Finland 2007, Hungary - 2009, Italy - reform in 2009, Lithuania - 2003, the Netherlands - 2005, Poland - 2010, Sweden - 2003), many of them plan currently reforms in this area (France, Germany, Lithuania, the Netherlands, UK [England and Wales]) while other Member States consider introduction of such systems (Belgium, Malta, UK [Scotland]). This could indicate a need and create a momentum for harmonisation at the European level.
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