



EUROPEAN Justice Forum

Response of European Justice Forum to the Commission Staff Working Document Public Consultation: Towards a Coherent European Approach to Collective Redress (“the CR Consultation Paper”) – 29 April 2011

INTRODUCTION

European Justice Forum (EJF) is a not-for-profit organisation incorporated in Belgium¹. Its membership is a coalition of international companies and business organisations that wish to promote fair and balanced systems of civil justice in Europe. EJF’s priority is to support independent legal research and to use the output of that research as the basis for its recommendations.

EJF’s aim has always been to promote improved civil justice systems that enable rapid and effective redress for legitimate grievances and which at the same time filter out unmeritorious claims. It is in society’s interest as a whole that compensation is given where it is due, and that unjustified claims are rejected.

It is in this light that EJF welcomes the opportunity to respond to the CR Consultation Paper. We give first a general response to all the questions in the Consultation Paper, in which we suggest an overall model for improved means of resolving collective complaints, and second we give specific answers to all of the 34 questions in the Consultation Paper. Before doing so, we make the following two preliminary points:

- (a) In determining a ‘coherent European approach to collective redress’ there should be clarity of goals. Many of the questions in the CR Consultation Paper are directed at using collective redress to enforce public law. But in our view, the enforcement of public law is the business of the public authorities and not the purpose of private proceedings for redress, let alone of private litigation. Rather, ‘collective redress’ is concerned with the compensation of legitimate grievances. It is important to define the terms of debate.
- (b) While we recognise that the Consultation Paper is a step towards deciding the EU policy on collective redress and certainly does not seek to make specific proposals, we also note that the Commission gives no indication of the legal basis that would be employed by them if any measures concerning collective redress were eventually to be proposed. The Consultation Paper does contain references to the principles of subsidiarity and proportionality, but there is no discussion of the potential legal basis for action. Consequently, we include no discussion of this issue in our response. However, *if* following this consultation process, particular measures are put forward, it will be necessary to examine the threshold issue of legal basis and we would then return to this issue.

¹ Further information about EJF together with a list of its members is to be found on its website www.europeanjusticeforum.org EJF is registered on the Commission’s voluntary transparency register: 84617711913-70



EUROPEAN Justice Forum

EXECUTIVE SUMMARY

1. The Correct Approach to Collective Redress Prioritizes and Facilitates Alternative Solutions Over Litigation

Much of the “collective redress” debate over the years has been characterized by a focus on collective litigation as though it were the only means of securing compensation. In EJJ’s view, this has been a mistake that has led to an unnecessary polarisation of views. The phrase “collective redress” covers *all* the different mechanisms by which loss or damage suffered by a group of people (or organisations) may be remedied. “Collective litigation” is only one possible remedy, which in practice should be the last resort.

Instead, EJJ advocates more effective policies based on current empirical research on European civil justice systems and collective redress². This evidence supports an alternative model of redress that meets the common interest of both protecting consumer rights and ensuring an environment in which industry can prosper and society does not become over-litigious.

Specifically, EJJ advocates a model that comprises three main elements:

- (a) prioritising ADR over any litigation;
- (b) using public authorities to facilitate restitution of damage caused by breach of the laws and regulations; and
- (c) using the court not primarily as a forum for litigation, but as a means of overseeing ADR procedures to ensure due process and fairness, as well as the enforceability and finality of agreements reached.

Combined with the necessary principles and safeguards that we set out below and in our detailed response, in this holistic approach the three elements of ADR, public authorities and the courts work together to deliver rapid and effective redress at low cost and low risk. We look in turn at the three parts of this model.

2. Voluntary Dispute Resolution Offers the Speed, Low Cost and Low Risk that Litigation Cannot.

It is unusual for ADR proceedings to last more than a few months (average 90 days) whereas court cases take years. The great majority of ADR systems are free or of low cost (often below 50 Euros), and they are far more appropriate for claims of low individual value than costly and slow litigation. For this reason, among others, the Commission has already declared voluntary dispute resolution (‘ADR’) as its preferred basis for redress³.

² See in particular C Hodges, ‘*Collective Redress in Europe: The New Model*’ (2010) *Civil Justice Quarterly* 370; C Hodges, ‘Collective Actions’ in P Cane and H Kritzer, *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010); C Hodges, *The Reform of Class and Representative Actions in European Legal Systems: A New Framework for Collective Redress in Europe* (Hart, 2008); C Hodges, S Vogenauer and M Tulibacka (eds).

³ This is indicated in the parallel DG SANCO consultation on ADR. It was also emphasised in the tripartite Information Note on collective redress issued on 5th October 2010 by DGs COMP, SANCO, and Justice. In his speech to the Competition Day Conference of the Belgian Presidency in November 2010, Vice President Almunia also stated that a preference for ADR in the field of competition damages was one his five guiding principles for policy in DG COMP.



EUROPEAN Justice Forum

Europe has a far wider range of voluntary dispute resolution procedures than is commonly realised, and disputes (collective or otherwise) are resolved much more frequently by ADR than by litigation. DG SANCO's November 2009 Study⁴ identified more than 750 systems across the EU, and this probably underestimates the extent of those systems. DG SANCO's figures suggest that in 2006, some 410,000 cases were resolved by ADR in the EU. In 2008, this number had risen to 530,000. Nevertheless, one of the main shortcomings of ADR cited by DG SANCO in its recent ADR Consultation Paper is "the lack of consumer and business awareness". Greater awareness of the availability and benefits of ADR is the key to increasing its use.

ADR has already been increasingly used by the Commission in its consumer protection legislation, for example:

- the e-commerce Directive⁵
- the Postal Services Directive⁶
- the Markets in Financial Instruments Directive (MiFID)⁷
- a recommendation in 2001 on the principles of out-of-court bodies involved in consensual resolution of consumer disputes⁸; and
- the Mediation Directive⁹ which comes into force at latest from 21 May 2011.

The extent to which disputes are already settled by use of ADR or as a result of the role of public authorities is striking. Over 160,000 complaints are adjudicated each year by the London Financial Services ombudsman¹⁰. About 11,000 claims are processed each year by the 50 Business Sector Board in the Netherlands. These figures, together with the figures quoted above for the extent and increase of the use of ADR in the EU, confirm how much alternative means of resolving disputes are being used in preference to litigation. This is the case both in individual and in collective disputes. ADR and the public authorities are well adapted to handle group claims and they are in practice the preferred approach even in Member States that have established collective litigation mechanisms¹¹.

⁴ Civic Consulting Study done for DG SANCO and published on 16 October 2009 "Study on the Use of Alternative Dispute Resolution in the European Union. http://ec.europa.eu/consumers/redress_cons/adr_study.pdf 2 December 2009

⁵ Directive No 2000/31/EC; OJ, L 178, 17.7.2000

⁶ Directive No 2008/6/EC; OJ L 52 27.02.2008

⁷ Directive No 2004/39/EC; OJ L145/1. 30.04.2004

⁸ Commission Recommendation 2001/310/EC; OJ L 109,56-61

⁹ Directive 2008/52/EC of the European Parliament and the Council of 21 May 2008

¹⁰ It is important to recognise that an ombudsman is a public enforcement agency not an ADR process. It is also important to note that aspects of the way in which the Financial Services Ombudsman operates are subject to criticism. In particular, there should be strict adherence to procedural rules (for which the Nordic consumer ombudsmen are rightly applauded) and there should be greater opportunity to appeal decisions to the court. However, what remains clear is that an ombudsman is able both to eliminate unmeritorious claims and to deal with a workload that would be unrealistic for a court-based system.

¹¹ Sweden's Group Proceedings Act 2002 was passed because the government believed that consumers needed a collective litigation mechanism to pursue compensation claims against industry and commerce. In practice, over the past eleven years, some twelve cases have been launched. Only one has come to a conclusion, and of the total twelve cases only one was brought against private enterprise: the others were brought against the government.



Of course, it is important to recognise that there will be occasions when a party to a dispute cannot compromise the matter but needs instead to establish its legal rights and obligations through the certainty of a court procedure. It is essential that their right to do so is preserved and that they are not stigmatised when that approach is required.

However, by resolving the vast majority of cases, ADR – coupled with the role of public authorities – will relieve pressure on already overloaded the courts and enable them to concentrate on the cases that truly require their attention. Similarly, the increased use of ADR and public authorities will free resources in the courts to enable them at the request of the parties to oversee dispute resolution procedures to ensure they are conducted fairly and to endorse the agreements reached to make them both enforceable and final (see Section 4 below).

3. Europe’s Strong Tradition of Relying on Public Authorities Must be Preserved as Part of the Facilitation of Voluntary Solutions for Consumers and Industry.

One of the most divisive issues in the EU debate on collective redress has been the proposal that private litigation should be used to enforce public law. In particular, this has been the approach adopted by DG Competition, whose 2009 draft Directive on Competition Damages (withdrawn in October of that year) relied on collective litigation for consumers to obtain redress.

In EJF’s view, there was a confusion of purpose in this proposal. Although presented as a measure of consumer protection, the draft 2009 Directive would have done nothing directly to assist consumers. It would have simply left them to take potentially long, risky and expensive collective litigation to gain compensation in a field notorious for the complexity of such arguments. Moreover, the bulk of the preamble to the proposed Directive made clear that its main purpose was to enforce EU law and to deter breaches of the competition rules. EJF argued then and continues to argue now that consumer redress policy should not be used for this purpose.

DG COMP seems to have been influenced by the use of private enforcement of anti-trust law in America. In fact, the USA is almost unique in its strong emphasis on private litigation to enforce public law. Private individuals are incentivised to seek out and take action against breaches of public law, and in the process to seek damages for themselves. The mechanism by which they do so is the class action in which they are encouraged to act as ‘private attorney generals’.

In contrast, in Europe there is a strong tradition of using public authorities to enforce public laws, including those laws intended directly to protect private rights. In that enforcement role, the public authorities often facilitate the remediation of damage resulting from infringement. In our view, it would be a bold departure from this traditional European approach for a government to use private collective litigation to enforce public law in the way that DG Competition has proposed. Such a policy ignores the fundamental difference between the US private enforcement model and the European public enforcement model. It ignores the many initiatives already taken by the EU to improve public enforcement; and it assumes that the “abuse” so readily recognised by the Commission in the US system can be avoided in Europe. Above all, it ignores the aims of



restorative justice and responsive regulation that is either expressly adopted or implicitly present in the policies of a number of the EU Member States.

Public authorities and regulators cover an increasing number of areas of consumer commerce including utilities, transport, telecommunications and financial services. The purpose of regulating industry and commerce is to provide a balanced market that operates within accepted limits. If those regulations are broken, that balance is disturbed and needs to be restored by regulatory action. If the breach of regulation has caused third party loss or damage, the sensible approach is for a responsible public authority to encourage (but not dictate) the remediation of any third party loss caused by that breach and to take into account any such voluntary remediation by the infringer in assessing what if any penalties should be imposed¹².

Governments need to adopt an ‘enforcement policy’ for their regulators and public authorities. On the one hand, the policy may be purely punitive and concerned simply with sanctioning infringers in the hope this will deter future infringement. On the other hand, the policy may be designed to provide positive encouragement to the infringer to improve future behaviour. In this case, the enforcement authority will be responsive to genuine steps taken by the infringer to reform internal compliance procedures, take internal remedial and disciplinary action, and make restitution any third parties who have suffered loss.

In EJF’s view it is this second approach that is the more forward looking and that is increasingly being adopted in different forms by European governments. Examples are to be found in the Nordic countries (particularly through the consumer ombudsmen); in the Netherlands (with its extensive ADR structures) and in the UK (with its ‘restorative justice’ policy).

The UK government has expressed that ‘restorative justice’ policy as being a wish to ‘develop an enforcement culture that focuses first on compliance, second on restoring any damage done to consumers by breaches of the law, and only third on punitive prosecution.’ The government has stated:

‘Enforcement authorities should take into account any compensation awards by the business in their decision making. They should use the new powers to help persuade businesses to do the right thing, reserving formal action only for those who refuse to do so. But if businesses break the law and refuse to compensate, they should not be allowed to gain from this refusal.’

In arguing for the role of public authorities in collective redress, EJF is promoting this responsive approach, which by taking into account the actions of an infringer both encourages improved behaviour in the future and facilitates the immediate remediation of any genuine loss caused by the infringement. Public authorities should not act as judge or jury in forcing settlements on unwilling parties or dictating damages, and their actions must always be subject to the review of the courts. But, if properly used, the public authorities have an important role to play in identifying genuine claims and complementing ADR in their resolution.

¹² This approach has been set out by J Braithwaite in *Restorative Justice and Responsive Regulation* (Oxford, Oxford University Press, 2002)



EUROPEAN Justice Forum

Moreover, public authorities can ensure that a company is not paying disproportionate or duplicative amounts as penalties and compensation awards, which is a risk when public enforcement is privatised through litigation. If a company has voluntarily compensated legitimate claimants, then any penalties (if they are intended to encourage improved behaviour and not just to punish) should be moderated in response to genuine efforts by the infringer to make good. This is at the heart of the approach taken by the UK¹³. The policies adopted in the Nordic countries and the Netherlands have a similar effect by encouraging resolution of disputes. ADR and compensation are also reflected in the policy of the Italian government or requiring mediation of disputes – see, for example, the recent implementation in Italy of the Mediation Directive which makes mediation mandatory before certain types of litigation may be started. See also the examples given in our answers to the specific questions of the Consultation Paper, in particular at 8.4, 10.1 and 13.7 below

There is evidence that shows how effective ombudsmen can be in filtering out unmeritorious claims. Although no concrete statistics are kept by his office, the Danish consumer ombudsmen finds that a high proportion of claims has no basis in law are therefore dropped; the rest of the disputes are resolved voluntarily. In the UK, the Financial Services Ombudsman deals with over 160,000 complaints each year. Up to 40% of those complaints are withdrawn for the same reason – and the other complaints are resolved¹⁴. The ability to focus on justified complaints and to avoid the wasteful cost of unmeritorious actions is of considerable benefit to society.

Of course, the ombudsman's remit must be carefully delineated, and strict rules of procedure must apply together with oversight by the court to ensure fair play and to avoid any illegitimate pressure on either party. But an ombudsman can facilitate restitution of loss where it was merited. In that event, those seeking compensation do not need to take action (let alone bring litigation) to restore their loss and the risks of class actions in a highly sensitive field are avoided.

4. The Role of the Court is to Protect the Rights of the Parties by Both Ensuring that Voluntary Resolutions are Respected and that Legitimate Disputes are Heard.

The court provides the ultimate means of adjudicating between parties in dispute, and the right to refer matters to the court cannot be removed (Article 6 ECHR). However, while they recognise that there are cases which need the authoritative adjudication of the parties' legal rights and obligations, the courts normally also encourage parties to resolve disputes by non-judicial means wherever possible.

The court has a positive role to play in the process of dispute resolution. First, a dispute resolution procedure may be greatly assisted by parties referring the court to points of law over which they are in dispute. Second, where public authorities are involved in encouraging remediation of damage, the court must be available to ensure that they do not exceed their authority or apply undue pressure. Third, the court can provide oversight to ensure due process and fairness to make sure that no party abuses its position and there is no blackmail settlement.

¹³ Regulatory Enforcement and Sanctions Act 2008

¹⁴ Report of the Financial Services Authority in London



EUROPEAN Justice Forum

Fourth, at the request of the parties, the court may endorse agreements that have been reached by the parties and thereby make them legally enforceable and final. Once endorsed, no one may raise the same dispute again.

The Netherlands' Act on Collective Settlement of Mass Damage (2005) provides a useful precedent for this last role. Building on the comprehensive Industry Boards framework for the voluntary settlement of complaints, this law allows the parties jointly to request endorsement of a settlement reached by agreement. The court will first satisfy itself that the agreement is reasonable and secondly that all or substantially all the potential claimants were involved or at least aware of the settlement process. Provided these conditions are met, the court will endorse the agreement, with the result that neither party can walk away from it and that the same dispute cannot be raised again in the future¹⁵.

The Dutch law has been used in mass claims in which voluntary agreements had been reached amounting to billions of Euros and covering cases of adverse reactions from pharmaceuticals¹⁶; improper sale of financial investments¹⁷; and shareholder litigation¹⁸. In the latter case, compensation was delivered and disputes settled well before parallel class action litigation in America had been completed at the cost to the claimants of expensive contingency fee arrangements.

5. Because of the High Risk of Abuse in Collective Litigation, It Must be a Last Resort Only, and Adequate Safeguards are Essential in any Collective Procedure to Protect the Parties.

The Commission should also take note that national civil justice systems in the EU differ widely and are evolving rapidly. We do not think that a central binding EU measure on collective redress could be designed in such detail and enforced to such an extent that it had the same effect in all Member States. Moreover, *if* binding measures on collective litigation were to be taken by the EU, it would be essential to ensure that effective safeguards were identified and implemented with equivalent effect in all Member States in order to avoid potential abusive litigation and forum shopping. Collective redress is a field in which the EU should issue binding measures only to the extent that those measures can, together with the necessary safeguards, be enforced with equivalent effect in all Member States without disrupting existing laws or creating unintended consequences.

¹⁵ The Dutch law fits within the Dutch framework of dispute resolution and should not be seen as a template for all such legal mechanisms. But it does provide a very helpful precedent for a role national courts should be able to play in facilitating collective dispute settlement. The court will need to be persuaded that all interested parties are represented in the settlement. If there is a question that a minority may not have been represented, the court may require a short procedure of public announcement to give that minority the chance to identify themselves. It is important to note that all claimants must be individually identifiable. Although it is possible for individuals to decide not to take part in the collective settlement (and potentially pursue their remedy through other means), in practice this happens only in a very small minority of cases.

¹⁶ Claims relating to DES.

¹⁷ Dexia.

¹⁸ Shell Oil.



EUROPEAN Justice Forum

As we argue below, the already existing national laws on compensatory collective redress actions are so different and are so embedded in such different national legal traditions and rules that harmonisation of those existing laws would not be possible without great disruption to the countries involved. In that light, a binding EU measure to harmonise collective redress or to introduce compensatory collective redress actions throughout the EU is unrealistic and fraught with risk. Such a measure would also, frankly, miss the point that use of existing national compensatory collective redress actions is rare; that those countries have developed better mechanisms for delivering redress where it is merited; and that it is those mechanisms that are used in practice.

It is also important to remember that in those countries where class actions are extensively used (which is not the case in Europe) it has proved impossible to protect against abusive claims. In the USA and similar class action jurisdictions, once a claim has been certified by the court the pressure is on the defendants to settle the case regardless of the merits as a means of avoiding legal fees and reputational damage¹⁹.

In asserting that the ‘abuse’ of the US system cannot come to Europe, the Commission has repeatedly relied on the ban on contingency fees and the loser pays rule in Europe. EJF shares the Commission’s view that these rules are of absolute importance to avoid the importation into Europe of what the Commission itself has described as the same ‘toxic cocktail of ingredients’ that is seen in the USA²⁰. But we also see the ground rules changing in certain Member States; with the result that, unless positive steps are taken, it may not be safe in future to assume that bans on contingency fees and the application of the loser pays rule will always be there.

In any event, there are many other principles and safeguards that must be applied to collective litigation if abuse is to be avoided. It is essential that a ban on the use of contingency fees in collective litigation be maintained. Equally, the loser pays rule should always apply to any litigation including any collective litigation process. It is also critical that the other necessary principles and safeguards summarised below (and listed in more detail in particular in our responses to questions 4, 7 and 20 below) should be applied. The EU should make clear that it shares this position and issue strong guidelines accordingly.

There are some who point to the ‘lack of abuse’ in the collective litigation laws that already exist in certain Member States and therefore conclude that the EU can with safety impose collective litigation on an EU-wide basis. However, this is unconvincing. First, because there are much better means for obtaining redress in those countries, current European collective litigation laws are seldom used to obtain compensatory relief. Second, where national collective litigation laws have been passed, they answer particular needs in the relevant countries and are embedded in the detailed national legal traditions and rules of those countries. There is a world of difference between such circumscribed national laws and a possible binding EU-wide collective litigation law, in respect of which the Commission could not in practice take into account the complex

¹⁹ Almost all such cases do end in settlements, and because of confidentiality it is impossible to look behind the settlements to determine the actual merits of the case.

²⁰ See the Commission’s MEMO/07/741, p. 3.



EUROPEAN Justice Forum

differences between the civil justice systems of those States nor impose the necessary safeguards on all Member States in such a way that they had equivalent effect in every country. Accordingly, it is our view that any binding EU Measure on collective redress would not achieve its intended purpose but instead would open the door to abusive litigation.

In contrast, EJF's tripartite model outlined above – of ADR, the role of the regulators, and the oversight by the court – provides a far better means of providing collective redress. It is the use of such better redress policies that is not only the best protection of the consumer, but also – by marginalising the need for litigation – it is the best protection against abusive collective litigation.

All collective redress mechanisms need safeguards (see below our answers particularly to Questions 4, 7, and 20) particularly if they are court-based procedures²¹. At a very minimum, the following rules – which are also addressed in response to the questions below – should apply:

- (a) *Class Certification Procedures*: There must a thorough preliminary process of certification to establish that the class of persons bringing the claim is coherent; that their claims are capable of being heard in a single process; and that the claims have merit. Lack of commonality should result in the claim being disallowed.
- (b) *No Opt-out Actions*: All of the plaintiffs must be identified. So called “opt-out” actions must be forbidden. In such procedures, a case is brought by few named plaintiffs who claim to act on behalf of a large and unidentified cohort of persons who have allegedly suffered the same loss or damage. This is the basis on which claims in the USA are enlarged in order to increase the overall potential damages figure. Such case enlargement both increases the potential reward for contingency fee lawyers and places often unsustainable pressure on the defendant to compromise the claim and enter into a settlement whether or not the claim is justified.
- (c) *Filtering out Unmeritorious Claims*: A further reason for identifying the claimants is to help identify and reject unmeritorious or fraudulent claims. In the group action cases brought in London in the 1980s – 1990s, because claimants were identified, it was possible to determine whether or not they had indeed been exposed to the event that had allegedly caused the loss or damage suffered. Up to 40% of claims were found to be fraudulent in that no such exposure had taken place. If an “opt-out” procedure had been used, it would not have been possible to identify such false claims²².
- (d) *The Loser Pays Rule must Apply in all Cases*: As the Commission has recognised this is one of the most valuable safeguards against fraudulent or unmeritorious claims.
- (e) *No Punitive Damages*.
- (f) *No Contingency Fees, Third Party Financing or Purchasing of Claims*: There should be no contingency fees or third-party funding in collective litigation. Similarly, the sale and purchase of individual claims in order to create collective litigation should be forbidden.
- (g) *No Organisation should be allowed to bring Collective Litigation on behalf of Third parties if that Organisation itself stands to gain from doing so*: It is essential that any

²¹ Since ADR is a voluntary procedure, the parties can agree to the process and rules that suit them. This flexibility is not available to judicial proceedings.

²² Subsequent research in America into asbestos claims established similar incidence of false claims. In a number of cases, fraudulent medical certificates had been issued to up to 40% of the plaintiffs.



EUROPEAN Justice Forum

representative organisation should have no financial or other beneficial motivation to bring litigation. Recovery of its direct costs including the retention of professional legal representation is of course allowable. But there should be no potential to make a profit or indeed to subsidise the overheads or costs of other activities pursued by the same representative organisation. Representative organisations must also be able to show that they are independent and are not controlled by law firms or other particular interest groups.

- (h) *No Collective Actions for Personal Injury or Product Liability:* It is essential to bear in mind that a collective process (whether court or non-court based) is appropriate only if proper adjudication of the case does not require consideration of the individual characteristics of the individual claimants. Thus personal injury and product liability cases are not appropriate for collective mechanisms. They require detailed consideration of issues of causation and the pre-existing condition of the claimant to be reviewed. This cannot be done in a collective procedure. In the USA, although the rule does not explicitly forbid collective claims in the fields of product liability and personal injury, the courts have long recognised that class actions are inappropriate for such claims.



EUROPEAN Justice Forum

DETAILED ANSWERS TO QUESTIONS 1 – 34

Question 1: What added value would the introduction of new mechanisms of collective redress (injunctive and/or compensatory) have for the enforcement of EU law?

- 1.1 The Need for New EU Measures has Not Been Established. This and many other questions in the Consultation paper assume that there is a need for the EU to introduce “new mechanisms of collective redress”. This has not been demonstrated, and it is our understanding that one of the main purposes of the Consultation Paper is to enable the Commission to review this whole issue of redress and to determine whether in fact there is a need for new measures and, if so, whether and in what form the Commission should take an initiative in this respect. The answer to this underlying issue should not be prejudiced by the form of the questions. We emphasise that we do not see a demonstrated need for new EU judicial measures as contemplated by this question, particularly since the EU’s authority to introduce such measures would need to be based on cross-border problems and since (as shown below in our answer to Question 13) there are already well established and effective EU bodies that assist in cross-border disputes.
- 1.2 Any New EU Measures Should be based on ADR Not Court Proceedings. There is an underlying assumption in the Consultation Paper that any new mechanisms of collective redress must be primarily of a judicial nature – either “injunctive or compensatory”. ‘Collective Redress’ is equated in the Consultation Paper with ‘collective litigation’, but the two are not synonymous. The terms of debate in the Consultation Paper are distorted by an underlying assumption that if any meaningful measures are to be taken to improve consumer redress, they must necessarily be based on collective litigation. We reject such an approach. On the contrary, as we argue below, in cases of both individual and collective redress, ADR is the key to dispute resolution. Out-of-court mechanisms should be encouraged over judicial mechanisms, which should be used only as a last resort.
- 1.3 Indeed, it has been our understanding that the Commission has itself recognised that ADR should be prioritised over litigation. This is the assumption behind the parallel DG SANCO ADR Consultation Paper. It was also emphasised in the tripartite Information Note on collective redress issued on 5th October 2010²³ by DGs COMP, SANCO, and JUST. In his speech to the Competition Day Conference of the Belgian Presidency in November 2010, Vice President Almunia stated that a preference for ADR in the field of competition damages was one his five guiding principles for policy in DG COMP²⁴.
- 1.4 The approach of Member States to collective redress is increasingly to use voluntary dispute resolution mechanisms coupled with the role of the public authorities in both enforcing the law and – where relevant – encouraging (but not dictating) the voluntary restitution of loss caused by breach of that law²⁵. The Commission should support these

²³ The Commission’s Joint information Note issued by DGs COMP, JUSTI, and SANCO on 5 October 2010: SEC(2010) 1192

²⁴ Vice President Almunia’s speech in November 2010 at the Belgian Presidency Competition Day

²⁵ In arguing for the role of public authorities in collective redress, EJF is promoting a responsive approach, which by taking into account the actions of an infringer both encourages improved behaviour in the future and facilitates the immediate remediation of any genuine loss caused by the infringement. Public authorities should not act as judge and jury in forcing settlements on unwilling parties or dictating damages, and their actions must always be subject to the



EUROPEAN Justice Forum

national developments rather than seek to impose new mandatory EU collective redress measures on top of or in place of the approach being taken by the Member States.

- 1.5 There is a Need for Clarity of Purpose. The question assumes that ‘collective redress’ should be used for the enforcement of EU law. In our view this is not correct. Collective redress’ is concerned with fair compensation for legitimate collective claims for damages and the rejection of unmeritorious claims. *Collective redress is not and should not be about enforcement of EU law, which is a matter for EU and national regulatory and public authorities.* If as a consequence of a collective redress procedure a person is required to pay compensation for damage caused, and if (the damage having resulted from a breach of EU law) such restitution provides an incentive to obey EU law, that is a useful side effect, but it is not the main purpose of collective redress. Confusion as to the purpose of collective redress lies at the heart of the CR Consultation Paper, and it is important to remove it.

- 1.6 Enforcement of EU Law is a Matter for the Public Authorities Not for Private Litigation. Paragraph 2 of the CR Consultation paper recognises that enforcement of EU law is a matter for EU and Member State governments, not for private individuals. The European tradition is for regulators and other public authorities to enforce public law, including those laws intended to protect consumers or organisations such as SMEs. This enforcement role of the public authorities frequently also leads to infringers agreeing to compensate legitimate claims of third parties that have suffered loss as a result of the infringement (see also footnotes 28 and 29 below). There is a nexus between law enforcement and redress, but it is the opposite of what is assumed by this question and by many of the questions in the Consultation Paper. *The public authorities should work on behalf of the consumer, not the consumer do the work of the public authorities.*

In the past, we have become aware of EU proposals (particularly in the field of competition law) that were presented a means of providing consumer redress when their real purpose was to use private litigation as a means of enforcing public law but which in fact did nothing directly to provide compensation for genuine claims. We have strongly opposed such an approach, and we continue to do so. In developing a policy on collective redress, it is essential for the Commission to focus on the real purpose of redress and to leave public law enforcement to the public authorities.

- 1.7 There is a critical difference in this respect between the European and American approach to the enforcement of public law. In the USA, private individuals are encouraged to take action to enforce not just their own rights but also the provisions of public law, acting as ‘private attorney generals’. The US class action system has been developed into a system that serves this purpose, and such a policy is alien to Europe.

The emphasis in the CR Consultation Paper on private collective litigation may derive (particularly within DG Competition) from an incorrect assumption that the class action system is suited for use in Europe for the same purpose of public law enforcement for which it is in large part employed in America. The EU must avoid this approach if it

review of the courts. But, if properly used, the public authorities have an important role to play in identifying genuine claims and complementing ADR in their resolution.



EUROPEAN Justice Forum

wishes to develop a balanced collective redress policy. It should not, as the question implies, adopt “mechanisms of collective redress ... for the enforcement of EU law”.

Question 2: Should private collective redress be independent of, complimentary to, or subsidiary to enforcement by the public bodies? Is there a need for coordination between private collective redress and public enforcement? If yes, how can this coordination be achieved? In your view, are there examples in the Member States or in third countries that you consider particularly instructive for any possible EU initiative?

- 2.1 The Key to Collective Redress is ADR, Not Litigation. Claimants in collective redress processes should be encouraged to make bona fide efforts to resolve matters by ADR in order to avoid unnecessary litigation. The evidence shows that legitimate collective claims are best answered by voluntary dispute resolution mechanisms, complemented by the role of the public authorities in enforcing laws intended to protect consumers and thereby facilitating remediation of any damage caused to third parties²⁶. As noted in answer to question 1 above, public authorities should adopt a responsive approach, which by taking into account the actions of an infringer both encourages improved behaviour in the future and facilitates the immediate remediation of any genuine loss caused by the infringement. Public authorities should not act as judge and jury in forcing settlements on unwilling parties or dictating damages, and their actions must always be subject to the review of the courts. But, if properly used, the public authorities have an important role to play in identifying genuine claims and complementing ADR in the resolution of those claims by encouraging (but not forcing) infringers to compensate legitimate claims. In assessing any penalties, the public authority should take into account an infringer’s voluntary actions to make restitution and mitigate any sanctions accordingly. In addition, the court should oversee and support ADR processes. Information about ADR mechanisms and their success in resolving disputes must be widely disseminated, and advisers should be obliged to tell claimants about relevant ADR mechanisms and advise on the benefits of using ADR in preference to litigation.
- 2.2 In addition, *the court should oversee and support ADR processes.* Information about ADR mechanisms and their success in resolving disputes must be widely disseminated, and advisers should be obliged to tell claimants about relevant ADR mechanisms and advise on the benefits of using ADR in preference to litigation.
- 2.3 In such a policy of collective redress (which to a greater or lesser extent has been adopted or is being adopted by many of the Member States) the various elements complement each other. It is not a matter of private redress being subsidiary to public enforcement or the

²⁶ As noted in answer to question 1 above, public authorities should adopt a responsive approach, which by taking into account the actions of an infringer both encourages improved behaviour in the future and facilitates the immediate remediation of any genuine loss caused by the infringement. Public authorities should not act as judge and jury in forcing settlements on unwilling parties or dictating damages, and their actions must always be subject to the review of the courts. But, if properly used, the public authorities have an important role to play in identifying genuine claims and complementing ADR in their resolution by encouraging (but not forcing) infringers to compensate legitimate claims. In assessing any penalties, the public authority should take into account an infringer’s voluntary actions to make restitution and mitigate any sanctions accordingly.



EUROPEAN Justice Forum

other way around. Each element has an important role to play and each provides checks and balances to the other. It is important to recognise the interplay and synergy created in a holistic policy that combines private redress through ADR with the actions of public authorities to encourage and facilitate redress and with the oversight of the court.

- 2.4 We See No Evidence of Need for Formal “Coordination” between these elements, and we certainly see no need for or benefit from the Commission seeking to introduce “coordination” mechanisms into the Member States’ civil justice systems. What is important is that the Member States encourage the above approach to collective redress; that they provide clear remits to the public authorities; that the court supports voluntary dispute resolution; and that all necessary measures are taken to prevent abuse. Formal coordination mechanisms would be liable to create unnecessary bureaucracy and cost, and they might well have the unintended consequence of adversely affecting the development of effective and flexible redress mechanisms.
- 2.5 In applying sanctions for infringement of public law, the *public authorities should take into account the subsequent behaviour of the infringer and in particular any remediation by the infringer of any third party damage caused.* Proportionate sanctions can only be imposed if the authority has a clear idea of the aggregate cost of both remedying any damage done to third parties and of paying any sanctions imposed. But that does not mean that there is a need for formal coordination between private ADR procedures and public enforcement. Nor do we see any evidence in Europe or in third countries of the need or usefulness of formal coordination methods.

Question 3: Should the EU strengthen the role of national public bodies and/or private representative organisation in the enforcement of EU law? If so, how and in which areas should this be done?

- 3.1 The EU Should Not Seek to Use Private Representative Organisations in the Enforcement of Public EU Law. We repeat that it is for the public authorities to enforce public law, not private citizens or representative bodies. Nor is it the task of the EU to interfere with the development or role of national private representative bodies. In so far as measures are needed, they are a matter for the relevant Member States.
- 3.2 The EU already has extensive enforcement powers, and if it can establish that a Member State is failing to enforce EU law, there are already adequate powers whereby the EU can oblige that Member State to do so. We do not see any evidence of need to increase EU powers in these respects.

Question 4: What in your opinion is required for an action at European level on collective redress (injunctive or compensatory) to conform to the principles of EU law, e.g. those of subsidiarity, proportionality and effectiveness? Would your answer vary depending on the area in which action is taken?

- 4.1 Collective Litigation Should Not be the Principal Means of Obtaining Collective Redress. We repeat our opposition to this approach and point to the evidence that collective redress is best delivered by the complementary mechanisms of voluntary dispute resolution, self



EUROPEAN Justice Forum

regulation, the role of public authorities, and the power of the court to oversee redress procedures.

- 4.2 There should be no prior assumption that some form of collective litigation is needed at EU level. It almost seems that there is an underlying theme in the Consultation Paper that ‘something must be done’ and that ‘to do something means introducing EU collective litigation’. We reject such an assumption. Indeed, our understanding has been that the very purpose of the Consultation Paper is to determine whether or not the EU should take measures in the field of collective redress, and, if so, what those measures should be. Accordingly, it is unhelpful for the Consultation Paper to make any assumption that it is necessary for the EU to legislate in the field of collective redress let alone introduce EU collective litigation. The evidence is that collective redress is primarily a national matter, and existing EU entities such as ECC-Net already effectively facilitate cross border redress (see our response to Questions 13 below).
- 4.3 Clearly, *if* it were demonstrated that the EU needed to introduce measures on collective redress, those measures would have to conform to the principles of subsidiarity, proportionality and effectiveness which are referred to in the question. Any measure that did not do so would be of questionable validity. More important, the EU would have to be confident that it could introduce a single EU collective redress measure that would with equivalent effect fit each of the 27 national civil justice systems without unintended consequences, and that it could enforce the necessary safeguards to equivalent effect in all the Member States. We further discuss below the principles that should apply to collective redress (see Question 7) and the safeguards required (see Question 20). We also point out below (points 5.4 and 5.5) that there is little or no commonality between the 14 different national compensatory collective litigation mechanisms that have to date been introduced in certain Member States. Each of those mechanisms was introduced to meet specific national needs and is embedded in the specific legal traditions and rules of the particular Member State where it has been introduced. It would not be possible to harmonise the existing Member States’ collective litigation mechanisms without causing considerable disruption to the civil justice systems of those countries, and the existing national mechanisms certainly do not provide a basis for harmonisation across the EU.
- 4.4 Not All Claims Can Properly be Dealt With in a Collective Procedure. It is essential to recognise that there are claims that require individual examination of issues arising in respect of each individual claimant and that therefore cannot properly be considered in a collective process. In particular, collective proceedings cannot take into account issues of individual causation (whether any damage caused to a claimant was due to the alleged causal factor); or the individual claimant’s pre-existing condition (whether that individual already had a pre-existing condition that caused the alleged damage or was particularly susceptible to such damage). Where matters of this kind need to be taken into account (for example in personal injury and product liability claims) it is necessary to adjudicate the matter on an individual not a collective basis²⁷.
- 4.5 The above principles and (unless specifically stated otherwise) the views expressed elsewhere in this response apply to all areas of redress. Clearly, the more specific the

²⁷ It is noteworthy that, while the US has no specific rule to this effect, the US courts will normally refuse to hear such matters as part of a class action because of the need to take into account individual factors.



EUROPEAN Justice Forum

question, the more specific the answer would be, but the general principles remain the same. Please see also our response to Question 7 below.

Question 5: Would 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?

- 5.1 There Should be No Bias Towards Judicial Measures. The question again focuses on judicial remedies, and we repeat our opposition to this approach when the primary means of redress should be ADR complemented by the role of the public authorities in protecting consumers, and the power of the court to ensure due process and fairness.
- 5.2 The Injunctions Directive (2009/22 EC) provides a means to bring action for the cessation of infringements of consumer rights. The Directive sets out a common procedure to allow qualified (mainly public) bodies from one country to seek an injunction in another²⁸. Injunctions may be brought, for example, against infringements of national provisions transposing EU Directives in the fields of consumer credit and unfair terms in consumer contracts.
- 5.3 As the Consultation Paper points out, all the Member States have collective injunction mechanisms. If there is evidence of need to extend the Injunctions' Directive, the Commission should identify that need and propose changes to the Directive accordingly. We are unaware of any such need at present.
- 5.4 As stated in 4.3 above, fourteen of the Member States have also introduced national collective litigation mechanisms for some forms of compensatory actions. But, they have done so in response to a national need to introduce mechanisms to enable their courts to manage group complaints when these arise, and the laws are drafted to fit the specific different legal traditions and provisions of the country in question. We see no need for EU intervention in this area, and we have pointed out above the dangers of the EU seeking to do so. Without clear evidence of need, there should be no call for the EU to act in the way suggested. Assessment of need should also take into account the effect of measures recently introduced, including the Mediation Directive, which must be implemented by May 21st 2011 at the latest.
- 5.5 The existing national collective litigation laws are all different because they are designed only to fit specific situations and specific legal systems. They lack the commonality that would enable them to be harmonised. Moreover, because they are intended only for specific situations they are not generic. In each country, they operate in (different) particular situations, and in each of those countries alternative satisfactory mechanisms exist to deal with collective redress without litigation. That is another reason why the existing national collective litigation laws have been so little used in practice. They are very slow and very costly, and ADR is preferred.
- 5.6 EU policy should focus on how it can support and encourage voluntary dispute resolution processes in the Member States. We note on page 3 above and in our answers at 6.4 and 13.7

²⁸ The Directive envisages that private or public bodies may be designated. Different governments have made different choices as to which bodies may use the provisions of the Directive. In practice, if a public body takes action, no private entities will do so since it avoids them expense.



EUROPEAN Justice Forum

below that there are already areas in which the EU is doing this. For example, the Mediation Directive (2008/52 EC) will oblige Member States to provide information on how to contact mediators and mediation services.

5.7 ADR is also well able to deal with collective claims as we explain below.

Question 6: Would possible EU action require a legally binding approach or a non-binding approach (such as a set of good practice guidance)? How do you see the respective benefits or risks of each approach? Would your answer vary depending on the area in which action is taken?

- 6.1 New Binding EU Measures of Collective Redress Should Not be Introduced in the absence of clear empirical evidence that they are needed – and, with respect, no clear empirical evidence of need has yet been produced. More important, the Commission could not in our view introduce such measures and the safeguards needed with equivalent effect in all 27 of the different civil justice systems of the Member States.
- 6.2 As we understand matters, the principle of subsidiarity would prevent the EU being able to delve so deeply into Member States' civil justice systems as to enforce the detailed rules of procedures and the safeguards that would be needed to give equivalent effect to a binding EU measure in each Member State. Even the existing national compensatory collective litigation laws are so different and are embedded in such different legal traditions and civil justice systems that harmonisation of those laws would not be possible. The EU should not introduce binding measures that would cause disruption and would not in practice have equivalent effect in each of the Member States. Rather, the Commission should look to use its persuasive powers by issuing strong guidelines and recommendations to the effect that in any collective redress mechanism the necessary principles and safeguards should be applied – as set out in our answers to questions 4, 7 and 20.
- 6.3 In any policy of collective redress, the Commission should take the position that ADR mechanisms should be prioritised and claimants encouraged to use them prior to starting any litigation. The Commission should point to the fact that the great majority of redress is currently achieved through voluntary dispute resolution and the protection given to consumers and businesses by the public authorities. A focus on voluntary dispute resolution is not only consistent with the Commission's current emphasis on ADR as exemplified by DG SANCO's ADR Consultation Paper, but it is also consistent with past EU policy which among other things has:
- *encouraged* Member States to establish ADR in certain sectors (including E-commerce²⁹; Postal Services³⁰; and Markets in Financial Instruments³¹); and
 - *required* Member States to ensure ADR schemes exist in other sectors (including telecoms³²; energy³³; consumer credit³⁴; and payment services³⁵).

²⁹ Directive No 2000/31/EC; OJ, L 178, 17.7.2000 p. 1.

³⁰ Directive No 2008/6/EC ; OJ L 52 27.02.2008 p.3

³¹ Directive No 2004/39/EC; OJ L 145/1, 30.4.2004, p. 33

³² Directives No 2009/136/EC and No 2009/140/EC; OJ L337, 18.12.2009 p.11 & 37

³³ Directives No 2009/72/EC and No 2009/73/EC; OJ L 211, 14.8.2009 p. 55 & 94.

³⁴ Directive No 2008/48/EC; OJ L 133, 22.5.2008, p.66



EUROPEAN Justice Forum

- 6.4 It should also be noted that even where Member States have established systems for collective compensatory litigation, it is used only in a very small number of cases and is insignificant in comparison with the activities of the EEC-NET in encouraging dispute resolution outside the court system³⁵. See also our response to Question 13 below.
- 6.5 The EU should adopt a policy of collective redress that is based on the prioritisation of ADR processes and should provide good practice guidelines. We summarise below, particularly in paragraphs 8.4 and 10.1 below, examples of such good practice.
- 6.6 The EU should also publicise the risks to which collective compensatory litigation can give rise and take steps to ensure that the safeguards set out in answer to Question 20 below are present in any such systems.
- 6.7 The above principles and the safeguards summarised in answer to Question 20 below apply to all areas of collective redress. Clearly, the more specific the question, the more specific the answer would be, but the general principles remain the same.

Question 7: Do you agree that any possible EU initiative on collective redress (injunctive and/or compensatory) should comply with a set of common principles established at EU level? What should these principles be? To which principle would you attach special significance?

- 7.1 Court based procedures should be the last and not the main means of redress The question again wrongly assumes that collective redress will be based on court-based mechanisms and thus pre-judges the issues of (a) whether the EU should be taking any measures in the field of collective redress and if so (b) what type of measures should be taken.
- 7.2 In any policy of collective redress, the following principles should apply:
- (a) Any mechanism for collective redress must be quick, effective, low cost and low risk. These are not the characteristics of court-based mechanisms.
 - (b) Accordingly, out-of-court collective redress mechanisms should always be prioritised over judicial collective redress. As stated above, collective redress policy should be based on the use of voluntary dispute resolution and the role of public authorities in enforcing laws intended to protect people and encouraging (but not dictating) remediation of any damage caused by infringement of those laws³⁷. The court should at the request of the parties support and assure the integrity of this policy by ensuring due and fair process is followed in ADR procedures; by endorsing agreements

³⁵ Directive No 2007/64 /EC; OJ L319/1, 5.12.2007 p.32.

³⁶ DG SANCO's 2009 ADR report shows that because there are much better ways of resolving disputes, collective litigation is used very little in those Member States that have it. In contrast, between 2008 – 2009 the volume of cases going through the EEC-NET has been around 60,000 per year.

³⁷ In arguing for the role of public authorities in collective redress, EJJ is promoting a responsive approach, in which the authorities take into account an infringer's voluntary compensation of damage caused and mitigate any penalties imposed in light of such remediation. Such an approach both encourages improved behaviour in the future and facilitates the immediate remediation of any genuine loss caused by the infringement. Public authorities should not act as judge and jury or force settlements on unwilling parties nor should they dictate damages, and their actions must always be subject to the review of the courts. But, if properly used, the public authorities have an important role to play in identifying genuine claims and complementing ADR in their resolution. See section 3 of our general response page 5 above.



EUROPEAN Justice Forum

- reached (if requested to do so), and by ensuring that no party or public authority exceeds its remit or abuses its position.
- (c) There will, of course, be cases where the parties cannot reach a settlement, and their right to be heard in court on the merits must be preserved. However, once a law suit is started, considerable cost in terms of management time and money is incurred in the first stages of answering the claim. Such expense is needless if there are alternative methods of resolving the dispute that are acceptable to both parties³⁸, and it therefore makes sense for both parties to explore such alternatives before turning to litigation.
 - (d) Private collective redress must not be used as a means of enforcing public law. It is the task of the public authorities to enforce the law; and in doing so those authorities – without in addition to their current executive powers being allowed to act as judge or jury - can encourage and facilitate remediation of damage caused to third parties.
 - (e) All individual claimants participating in a collective process (whether court based or not) must be specifically identified. They must have expressly agreed to join the collective procedure within a short but reasonable time limit (“opt-in”). “Opt-out” collective procedures actions are not acceptable. In many countries, the representation of an individual in litigation without his or her knowledge and consent is unconstitutional. For an individual to be involved as a claimant in something as important as litigation without his consent also raises ethical issues and questions of infringement of Art.6 ECHR.
 - (f) In all collective procedures there must be appropriate mechanisms for ensuring that the ‘class’ of claimants is coherent and that they should properly be heard together. A key aspect of these mechanisms is that they filter out unmeritorious claims and focus only on those that are justified. Claims that require consideration of the individual circumstances and characteristics of individual claimants must not be submitted to a collective process – see paragraph 4.4 above.
 - (g) Representative claims should only be allowed on the basis of identifying all the individual claimants represented. They should only be brought by not-for-profit organisations that have been designated in advance by the relevant governments against objective criteria as being independent, impartial, competent and having the resources and expertise to represent claimants in collective processes – see further our comments in question 22 below.
 - (h) There must be no financial or similar rewards that may incentivise unmeritorious claims for collective redress beyond the legitimate pursuit of compensation for justified claims and the recovery of normal legal fees.
 - (i) The loser pays rule must be applied on all cases together with other disincentives to unmeritorious claims (see our answers below particularly to Questions 20, 21 and 22 below).
 - (j) Any redress must be compensatory only and go no further than remedying legitimate claims for damages. There must be no punitive element in any award of redress.

³⁸ Even if part or all of this cost is recovered under the loser pays rule, the waste has been incurred to the benefit of neither party.



EUROPEAN Justice Forum

7.3 Certain principles of collective redress policy have already been articulated by DGs JUST, COMP and SANCO in their joint Information Note issued of 5th October 2010. Those principles include:

- effective and efficient means of redress;
- collective consensual resolution of disputes;
- enforcement throughout the EU;
- avoidance of abuse;
- no economic incentives to bring abusive claims; and
- adequate means of finance.

We agree with those principles, but they are not sufficiently detailed, and the principles listed above and the safeguards listed below must be applied.

7.4 If contrary to our recommendations, the EU were to introduce judicial collective redress mechanisms, it is clear that any such measures should conform to a clear and concrete set of common principles that reflect the principles listed above and the safeguards listed below, in particular in our answer to question 20. If this were not the case, there would be no coherence in EU policy making. Indeed, one of the problems in the past has been the development of different measures by different Directorates adopting different underlying principles.

7.5 At national level, governments and the courts will not want to have to apply in the same courts different sets of rules to different collective litigation measures in different sectors. At national level, there would be a practical necessity for any collective litigation to be managed against the same overarching principles and in accordance with the same rules of procedure. Since each of the 27 national civil justice systems are different and since many are in a stage of rapid evolution, this again points to the problem of devising at EU level a one-size-fits-all solution.

Question 8: As cited above, a number of Member States have adopted initiatives in the area of collective redress. Could the experience gained so far by the Member States contribute to formulating a European set of principles?

8.1 Yes. We give examples of those practices; summarise those principles; and have sought to capture those principles in this response to the CR Consultation Paper.

8.2 It is on the experience of the Member States that we base our recommendation that collective redress can best be provided by a coherent system of voluntary redress, complemented by the role of the public authorities in encouraging (but not dictating) restitution, and overseen by the courts to ensure due process and the avoidance of abuse³⁹.

8.3 It is striking that even in those countries that have adopted national compensatory collective litigation mechanisms, they are little used and redress is gained normally through ADR. This is hardly surprising given the cost and length of judicial procedures coupled with the risk involved in commencing litigation.

8.4 Examples of national solutions are described more fully below (for example in answer to Question 10) but we draw attention particularly to:

³⁹ C. Hodges *The Reform of Class and Representative Actions in the European Legal System: A New Framework for Collective Redress in Europe* (Hart, 2008)



EUROPEAN Justice Forum

- (a) The policy of restorative justice adopted by the UK public authorities and reflected in the approach of many Member States (see page 5 above) ;
- (b) The use of consumer and sectoral ombudsmen in, for example, the Nordic countries and the UK;
- (c) The comprehensive systems of ADR established in the Netherlands with Business Sector Boards covering almost all areas of commerce and an overarching Dispute Resolution Committee that ensures compliance and high standards of competence and decision making. Sectoral resolution boards in the Nordic countries achieve the same result;
- (d) The opportunity for parties jointly to request a court to endorse the agreement by which they resolve their dispute – see the role played by the Appeal Court of Amsterdam in the Netherlands in overseeing dispute resolution processes and (if appropriate) endorsing the agreement reached by the parties;
- (e) The extent to which mediation processes are already encouraged or required in Member States even before the Mediation Directive comes into force;
- (f) The extent to which business codes of conduct, self-regulatory systems and industry sectoral ADR mechanisms have been established and successfully used in dealing with customer enquiries and complaints;
- (g) Statutory compensation schemes for claims arising from adverse effects of medical treatment or from the use of medicines that work well in Denmark, Finland Norway and Sweden and which deal with such emotive matters outside in a non-confrontational environment⁴⁰;
- (h) The extensive system of consumer arbitration in Spain, handled by national, autonomous community, provincial, or municipal panels depending on the amount of the damages sought⁴¹;
- (i) The Consumer Codes Approval Scheme operated by the Office of Fair Trading in the UK, under which trade associations establish sectoral codes of business conduct that include ADR mechanisms consisting of direct negotiation, conciliation by the trade association, and then mediation or even arbitration - normally outsourced to organisations such as IDRS (Independence/Integrity/Impartiality Dispute Resolution Systems – www.idrs.ltd.uk) or CEDR (Centre for Effective Dispute Resolution – www.cedr.com);
- (j) The negotiation of solutions facilitated by consumer organisations (for example in Italy and Portugal) or by the Offices of Consumer Protection in Poland and Portugal; and
- (k) The evidence of DG SANCO's recent ADR study⁴² as summarised in DG SANCO's recent consultation paper on the use of Alternative Dispute Resolution as a means to

⁴⁰ 'Nordic Compensation Schemes for Drug Injuries' C Hodges, J Cons Policy (2006)

⁴¹ Royal Decree 231/2008 of 15 February

⁴² Study on the Use of Alternative Dispute Resolution in the European Union of 16 October 2009

(ADR Study). For an overall overview of the existing ADR schemes in the Member States, see Annex 1, p.164 to 324. While this study is by no means perfect, it is a valuable source of information and indicates clear trends in the Member States.



EUROPEAN Justice Forum

resolve disputes related to commercial transactions and practices in the European Union (European Commission, January 2011)⁴³. That paper describes the situation as follows:

“15. More than 750 consumer ADR⁴⁴ schemes exist in the EU. They are highly diverse across the EU but also within Member States. ADR schemes may be established by public authorities, by industry or be set up in cooperation between the public sector, industry and consumer organisations. Their funding may be private (e.g. by industry), public or a combination of both. In most Member States, the geographical coverage of ADR can be national⁴⁵ rather than decentralised at regional or local level.⁴⁶ Both sector-specific and multi-sectoral ADR schemes exist in most Member States. The vast majority of ADR procedures are based on the willingness of the parties to engage in the process. Most ADR schemes are free for consumers or at moderate cost (below €50) and are settled within a short period of time (an average of 90 days⁴⁷). ADR decisions may be taken collegially (e.g. by boards) or by individuals (e.g. by a mediator or ombudsman) and the nature of their decisions may vary considerably (e.g. non-binding recommendations, decisions binding on the trader or on both parties, agreement of the parties). In other words, each ADR scheme is virtually unique.

“16. Recent studies⁴⁸ show that ADR cases in the EU have increased during the last years (from 410 000 in 2006 to 530 000 in 2008). ADR has, however, not yet achieved its full potential. In 2009, 6.6% of the cross border complaints received by the European Consumer Centre network were transferred to an ADR scheme⁴⁹. In 2009, only 3% of European consumers who did not get a satisfactory reply from the trader took their case to an ADR scheme.⁵⁰ Finally, only 9% of European retailers have used ADR schemes”.⁵¹

- 8.5 The number of ADR mechanisms and the rapid increase in their use is striking. They are chosen in preference to litigation whether or not collective litigation mechanisms are also available, because they offer the quick, simple and low cost procedures that collective litigation cannot.

⁴³ Available at http://ec.europa.eu/dgs/health_consumer/dgs_consultations/ca/docs/adr_consultation_paper_18012011_en.pdf

⁴⁴ See Study on the Use of Alternative Dispute Resolution in the European Union of 16 October 2009 (ADR Study). For an overall overview of the existing ADR schemes in the Member States, see Annex 1, p.164 to 324

⁴⁵ For example, Denmark, Estonia, France, Ireland, Lithuania, Luxemburg, Latvia, the Netherlands, Poland, Slovakia, Slovenia, Czech Republic, Malta, the United Kingdom.

⁴⁶ For example, Germany, Spain, Italy and Portugal.

⁴⁷ See ADR Study p. 33.

⁴⁸ The ADR Study and the ECC Report Cross-border Dispute Resolution Mechanisms in Europe – Practical reflections on the need and availability
<http://dokumenter.forbrug.dk/forbrugereuropa/crossborder-dispute-resolution/>

⁴⁹ See The European Consumer Centres' Network Fifth Anniversary Report 2005-2009, p.26.

⁵⁰ Eurobarometer No 282, p.20.

⁵¹ Flash Eurobarometer 300, "Retailers' attitudes towards cross-border trade and consumer protection" (not published yet).



EUROPEAN Justice Forum

Question 9: Are there specific features of any possible EU initiative that in your opinion, are necessary to ensure effective access to justice while taking due account of the EU legal tradition and the legal orders of the 27 Member States?

- 9.1 There Should be No Assumption that the EU must Introduce new Measures of Collective Redress, the need for which has yet to be demonstrated. Also a general answer cannot take into account the particular nature of any EU initiative that might be proposed and the particular field in which that initiative might be taken.
- 9.2 The best approach to this question is again to emphasise the ways in which Member States have generally framed their national policies, the extensive use of ADR mechanisms and the distinct limitation of collective litigation in delivering benefits coupled with the underlying risks of that approach (see question 20 below). The lesson of the experience in the Member States is the success of a combination of voluntary dispute regulation, the role of the public authorities in encouraging redress⁵² and the power of the court to oversee ADR processes and at the request of the parties to endorse the agreement reached. The EU should also note that in different ways, the principle of restorative justice is developing in Member States whereby regulatory enforcement policies focus on remediation as the priority with punishment and deterrence as secondary objectives.
- 9.3 If there were any EU initiative, it would be critical that it could in reality be applied to all the Member States in a manner that would take into account and respect the particular aspects of their national civil justice systems, and that it would ensure that any necessary procedures and safeguards were actually implemented to equivalent levels in all the Member States.
- 9.4 It should also be borne in mind that the great majority of claims for collective redress will arise at national level and their redress will be a matter for that particular country. Where cross border issues arise, they are best dealt with not by litigation but by ADR systems – see our answer to Question 14 below.
- 9.5 Rather than introduce new mandatory EU mechanisms for redress, the EU's greatest contribution would be to develop measures to strengthen ADR systems in the EU (which we understand to be the aim of DG SANCO following their ADR consultation) and strongly to recommend Member States that they base their national collective redress policies on the combination of those voluntary dispute resolution systems coupled with the role of public authorities in facilitating remediation of damage and oversight by the court. Wherever collective procedures are established (be they judicial or non-judicial) the principles and safeguards outlined in this paper need also to be established (see in particular our answers to Questions 4, 7 and 20). We urge that the Commission issue a strong guidelines and

⁵² EJF advocates a responsive approach, in which the public authorities take into account an infringer's voluntary compensation of any damage caused and mitigate any penalties imposed in light of such remediation. Such an approach both encourages improved behaviour in the future and facilitates the immediate remediation of any genuine loss caused by the infringement. Public authorities should not act as judge and jury or force settlements on unwilling parties nor should they dictate damages, and their actions must always be subject to the review of the courts. But, if properly used, the public authorities have an important role to play in identifying genuine claims and complementing ADR in their resolution. See section 3 of our general response page 5 above.



EUROPEAN Justice Forum

recommendations that such principles and guidelines be applied to any collective process by the Member States⁵³.

Question 10: Are you aware of specific good practices in the area of collective redress in one or more Member States that could serve as an inspiration from which the EU/other Member States could learn? Please explain why you consider these practices as particularly valuable. Are there on the other hand national practices that have posed problems and how have/could these be overcome?

10.1 We give below examples of best practice in addition to those cited elsewhere in this response.

- (a) The Nordic countries have taken medical negligence and pharmaceutical claims out of the arena of private claims for redress. Instead, any justified compensation is delivered through an insurance system established by the State and financed in part by the State and in part by industry. Litigation in connection with such matters hardly ever arises.
- (b) Consumer ombudsmen are adept at settling disputes brought to them by either or both parties and filtering out unmeritorious claims. Although statistics are not kept, the Danish consumer ombudsman has reported that a high proportion of complaints (probably in excess of 30%) is rejected as not having a basis in law. The remainder of complaints are resolved. The Nordic consumer ombudsmen now have the power to refer the matter to litigation if the parties do not reach a voluntary agreement, but they hardly ever need to do so.
- (c) The Financial Services Ombudsman in London reports a similar experience. Around 40% of claims are rejected and the remainder are resolved⁵⁴.
- (d) Independent accreditation and certification bodies enhance the quality and credibility of ADR mechanisms. Such approval should be given against objective criteria by properly qualified accreditation bodies, and the performance of such certified systems should be kept under on-going review. This not only gives additional credibility to ADR, but it also provides precedents for certification from which others can learn. The more such schemes develop, the more likely it is that a harmonised set of criteria will emerge and that mutual recognition of different voluntary schemes will increase. The UK Office of Fair Trading runs a voluntary approval scheme for Codes of Practice. The Geschillen Commissie (Dispute Resolution Committee) in the Netherlands oversees the Dutch system of Business Sector Boards (see below)
- (e) The use of Business Sector Boards in the Netherlands and Nordic countries. Almost all Dutch industry and commerce is covered by 49 sectoral Boards and by one Financial Services Board (KiFiD). Traders who value their reputation have little choice but to

⁵³ See also our argument in section 5 of our Executive Summary above and our answers to question 6 at 6.3 and 6.4 above.

⁵⁴ Aspects of the way in which the UK Financial Services Ombudsman operates are subject to criticism. In particular, there needs to be stricter adherence to clear and fair procedural rules (for which the Nordic consumer ombudsmen are rightly applauded) and there should be greater opportunity to appeal decisions to the court. However, what remains clear is that an ombudsman is able both to eliminate unmeritorious claims and to deal with a workload that would be unrealistic for a court-based system.



EUROPEAN Justice Forum

join the relevant Board and to abide by the decision of that Board when claims against them are made. The Geschillen Commissie stands above and oversees the Sector Boards, ensuring that they meet appropriate standards. The whole system is financed as to 20% by government and as to the rest by industry.

- (f) The Netherlands introduced its ‘Act on the Collective Settlement of Mass Damages’ 2005. This provides that, upon an application by both parties to the Appeal Court of Amsterdam, the court can give assistance to those engaged in negotiating voluntary settlements. When an agreement has been reached, the parties may request endorsement from the Court. If so, the court will confirm that all (or the great majority) of potential claimants have been represented in the negotiations⁵⁵, that the process has been fair, and that the agreement is on the face of it reasonable. Subject to those conditions the court will endorse the agreement making it legally impossible for either party to walk away from it. Once endorsed, the parties to the agreement cannot raise the same matter again, giving finality to the process. The negotiation and endorsement process is done on the basis that all claimants are identified on an opt-in basis. It is possible for individuals to decline to take part in the collective agreement, and they may then pursue their individual remedies. This is a rare occurrence. Intervention by the court has been given in this way in major cases involving side effects from a medicine (DES), financial miss-selling (Dexia), and shareholder claims (Shell Oil). The procedure is speedy, taking between 4 and 9 months from the point of requesting the court to act.

Question 11: In your view, what are the defining features of an efficient and effective system of collective redress? Are there specific features that need to be present if the collective redress mechanism would be open for SME?

- 11.1 Collective redress mechanisms must be low cost, low risk and speedy and wherever possible voluntary. Mechanisms based on ADR provide such solutions; court-based mechanisms do not.
- 11.2 Collective redress mechanisms must avoid the abusive claims and blackmail settlements that have become associated with certain countries outside the EU. Safeguards are needed in both court-based and non-court-based systems, but because of their voluntary nature it is considerably easier to guard against abuse in ADR mechanisms compared to judicial collective redress systems. (Please see Question 20 below). We urge the Commission to issue strong guidelines and recommendations to the effect that in any collective redress mechanism the necessary principles and safeguards are applied.
- 11.3 Private collective redress must not be used to enforce public law. On the contrary, consumers and business should be protected by the activity of the public authorities in protecting their rights and encouraging (but not dictating) remediation of damage caused by breach of regulations.

⁵⁵ If the Court believes that potential claimants may not have heard of the negotiations, it may require a short period of advertisement to alert them to the opportunity to identify themselves and take part in the settlement.



EUROPEAN Justice Forum

- 11.4 Certain claims need individual adjudication and should not be submitted to a collective process (see also our answer to Question 4.4). This will, for example, exclude product liability and personal injury cases from collective procedures.
- 11.5 Claimants must be encouraged to use ADR before commencing any litigation.
- 11.6 The courts should be used to support ADR mechanisms, for example if the certainty of a court decision is needed on a particular point of law that is keeping the parties from reaching an overall resolution of their dispute. It might also be necessary to establish the overall legal rights and obligations in particular cases, and access must be open to the parties for this purpose.
- 11.7 ADR systems are open both to consumers and industry and there are no particular features that distinguish ADR systems used by consumers from those used by industry. We are not aware of any ADR mechanism that is only open to one or the other. There is no bar on SME's participating in ADR mechanisms, and in any event the great majority of dispute resolution procedures are applied to cases involving companies large and small.
- 11.8 In cases where an SME does take part in litigation, the defining features of an effective and efficient system of collective redress must include those safeguards discussed above, and as stated in paragraph 11.3 above, the Commission should issue strong recommendations regarding safeguards.

Question 12: How can effective redress be obtained, while avoiding lengthy and costly litigation?

- 12.1 Throughout this response, we seek to explain that the most effective approach to collective redress is not lengthy and costly litigation, but instead is the non-litigious combination of voluntary dispute resolution with the role of the public authorities in encouraging remediation of damage caused by infringement of regulations, coupled with the oversight of the court to ensure due process and lack of abuse⁵⁶. We have also described how many Member States have evolved policies along these lines, and how, even where they have introduced collective litigation they have done so within the particular legal traditions and rules of their countries to address particular situations that are specific to each of the countries where such laws have been introduced (see para. 5.4 above).
- 12.2 Collective litigation is in fact little used in Europe and we emphasise again that all collective litigation is very slow and costly. There are simply better ways of doing things.
- 12.3 There are those who argue that – without the threat of collective litigation – traders would refuse to come to terms with consumers. There is obviously some attraction to this argument when it comes to recalcitrant organisations. However, in our view this argument is overstated. The fact of the matter is that any sound business model requires companies

⁵⁶ With regard to the role of the public authorities, EJF advocates a responsive approach, in which the public authorities take into account an infringer's voluntary compensation of any damage caused and mitigate any penalties imposed in light of such remediation. Such an approach both encourages improved behaviour in the future and facilitates the immediate remediation of any genuine loss caused by the infringement. Public authorities should not act as judge and jury or force settlements on unwilling parties nor should they dictate damages, and their actions must always be subject to the review of the courts. But, if properly used, the public authorities have an important role to play in identifying genuine claims and complementing ADR in their resolution. See also section 3 of our general response page 5 above.



EUROPEAN Justice Forum

to act in a way that increases customer support and strengthens their reputation. Reputable companies want to resolve disputes not because they fear being hit over the head if they do not do so, but because dispute resolution achieves their goal of protecting customer relations and enhancing their reputation. That is why DG SANCO's study showed such high levels of compliance of companies with decisions reached in ADR processes. The evidence from DG SANCO's study is that traders recognise the benefit of ADR in enabling them to resolve disputes without litigation and thereby protect their reputation. Moreover, the same evidence shows that in well over 90% of cases, traders comply with the outcome of ADR processes⁵⁷. To a large extent, the cost of establishing ADR mechanisms is being borne by industry because it sees the mutual benefit of these mechanisms to their customers and themselves.

- 12.4 We have also sought to show that any collective litigation measures should evolve within each of the Member States and answer the particular needs of those Member States. If they see the need for collective litigation measures, it will be due to their recognition of the need for their courts to be able to manage mass complaints. The policy need is identified and answered at national level by national governments legislating specifically within the context of their legal systems to meet particular problems. That is the reason why compensatory collective litigation in different forms has been developed in fourteen Member States, and that is why other Member States may, depending on their needs, in due course also introduce such national laws. The experience of the countries that already have compensatory collective litigation mechanisms is that they are very far from the principal means of redress. On the contrary they are used in a tiny minority of cases, because those countries have far better means of resolving collective disputes. Collective litigation is not and should not be the prime means of securing consumer redress.

Question 13. How, when and by whom should victims of EU law infringement be informed about the possibilities to bring a collective (injunctive and/or compensatory) claim or to join an existing lawsuit? What would be the most efficient means to make sure that a maximum of victims are informed, in particular when victims are domiciled in several member States?

- 13.1 A number of the assumptions behind this question need to be challenged:
- (a) The use of the word "victims" is prejudicial. There should be no assumption that people are "victims" unless they have proved their case. This question and the Consultation Paper in general, should therefore refer to 'claimants' in order to avoid the use of emotive language.
 - (b) The concern should be to inform all potential parties to a collective redress dispute and not just claimants.
 - (c) Private litigation should not be used to enforce EU law. As stated above, we reject this approach. Enforcement is for the public authorities, and the concept of private enforcement of public law belongs in America, not in Europe. As argued above, it should be for the public authorities to protect private rights and to encourage remediation

⁵⁷ See our answer to question 18 at 18.2 below.



EUROPEAN Justice Forum

- of any loss or damage that have been caused by a breach of the regulations for which they are responsible.
- 13.2 Objective information campaigns may be needed both in respect of court-based and non court-based mechanisms. In our view, since they are the means by which the great majority of justified claims are resolved, it is more important to disseminate information about voluntary rather than court-based mechanisms. In particular, publicity should be given to the success of ADR mechanisms since this is the way the great majority of claims are resolved.
- 13.3 Member States should establish data bases listing the ADR mechanisms available for particular sectors of industry and commerce, with easily accessible national information points. To disseminate information at national level, publication in the press or in official media (such as national gazettes) may be appropriate. It is essential that information is given in an impartial and objective manner and to avoid any misrepresentation. In this respect, government information campaigns may be appropriate. By the same token, private initiatives to recruit claimants to a particular case must be avoided or at least carefully regulated. Europe must avoid the kind of recruitment campaigns in which some US plaintiff law firms indulge as well as the kind of unsolicited communications encouraging all and sundry to make general and unspecified claims that are becoming increasingly common in Europe.
- 13.4 Information about collective redress should emphasise the need for complaints to have a clear legal basis and avoid language that could simply encourage unmeritorious claims. The key features of any procedure should be made clear, including the need for claimants individually to identify themselves and expressly agree to join in the process. The likely time and cost of any process should be identified together with any risks involved for the claimants. For example, in the case of court based procedures, the cost of legal representation and the exposure to reimbursing a successful defendant's costs should be explained.
- 13.5 Controls should be placed on the way in which information is given, particularly if it is given by interested parties such as law firms or organisations proposing to represent claimants.
- 13.6 With regard to claims that may involve people in different Member States, the parties may themselves take the initiative. For example, the Dutch Act on Collective Settlement of Mass Damage (2005) has been used to settle matters in which claimants were located in different European countries.
- 13.7 The problem of providing information to those who should be aware of a dispute resolution process has been successfully tackled by a number of established networks in Europe, and their practices can provide answers in this respect. We draw attention in particular to the following organisations that are also relevant to Question 14 below (cross border situations):
- (a) ECC-NET: The Extra-Judicial Network (EEJ-NET) was launched in 2001⁵⁸. In 2007 it was re-launched as The European Consumer Centre Network (ECC-NET). The network has branches in every Member State plus Iceland and Norway, and

⁵⁸ Council Resolution of 25 May 2000 on a Community-wide network of national bodies for the extra-judicial settlement of consumer disputes, OJ C 155/1, 6.6.2000.



EUROPEAN Justice Forum

assists consumers in resolving their cross border disputes within the EU.⁵⁹ The total volume of cases in 2008 and 2009 has been around 60,000 per year.

- (b) The Consumer Law Enforcement Forum⁶⁰ was created in 2006 to enhance the role consumer organisations can play in making the EU consumer protection rules fully and equally effective throughout the Community, in particular in the new Member States. .

- (c) The FIN-NET network was established by the European Commission in February 2001. It links 50 out-of-court Alternative Dispute Resolution (ADR) schemes that deal with complaints in the area of financial services and covers the European Union, Norway, Iceland and Liechtenstein (European Economic Area – EEA). The rationale for the creation of FIN-NET is to provide customers with easier access to out-of-court complaint procedures in cross-border cases, thus facilitating the market in cross-border financial services⁶¹.

In 2009, FIN-NET handled 1542 cross-border cases, out of which 884 in the banking sector, 244 in the insurance sector, 410 in the investment services sector, and 4 that cannot be attributed to one sector⁶².

- (d) SOLVIT⁶³ is an on-line problem solving network in which Member States work together to solve legal proceedings problems caused by the misapplication of Internal Market law by public authorities. There is a SOLVIT centre in every European Union Member State (as well as in Norway, Iceland and Liechtenstein). SOLVIT Centres can help with handling complaints from both citizens and businesses. They are part of the national administration and are committed to providing real solutions to problems within ten weeks. Using SOLVIT is free of charge.

The network was created in July 2002 and has since then resolved more than 1300 problems encountered by citizens and businesses due to incorrect application of EU rules by national authorities. SOLVIT now accepts around 60 new cases per month. Around 80% of these problems are resolved, most of them within the deadline of ten weeks.

13.8 Many dispute resolution systems operate principally or entirely on-line and have used this medium to resolve communication problems. We draw attention to the WIPO online dispute resolution (ODR) service for the resolution of disputes regarding domain names.

Question 14: How the efficient representation of victims could be best achieved, in cross border situations? How could cooperation between different representative entities be facilitated, in particular in cross-border cases?

⁵⁹ http://ec.europa.eu/consumers/redress_cons/index_en.htm

⁶⁰ <http://www.clef-project.eu>

⁶¹ See more at http://ec.europa.eu/internal_market/fin-net/docs/evaluation_en.pdf.

⁶² Examples of disputes handled through FIN-NET can be found at

http://ec.europa.eu/internal_market/consultations/docs/adr/adr_consultation_en.pdf and in annual reports, such as http://ec.europa.eu/internal_market/fin-net/docs/activity/2008_2009_en.pdf.

⁶³ http://ec.europa.eu/solvit/site/index_en.htm



EUROPEAN Justice Forum

- 14.1 Emotive language should not be used. The word “claimant” is much more appropriate than “victim” since it does not assume guilt of one party in advance.
- 14.2 The question suggests that claimants will necessarily be legally represented. While this is inevitably the case in court-based mechanisms, it is not generally true of voluntary dispute resolution. Legal representation may be used in arbitration procedures and in some more complex mediation procedures. But in the great majority of ADR mechanisms, the parties represent themselves and avoid the cost of legal representation. This is one of the advantages of ADR procedures, and it stands in contrast to collective litigation, where professional legal representation is essential.
- 14.3 The question also assumes that there will necessarily be “representative entities” in collective claims. In the sense that multiple claimants will need some form of organisation or spokesperson(s), this is obviously true. But in the sense that representation can only be through particular representative organisations such as consumer bodies, this is not true. Representative organisations should, as stated above, only be involved in collective claims if they have been formally accredited by their governments for this purpose against objective criteria which would include the need to demonstrate appropriate expertise and resources, independence and impartiality, as well as operating as a not-for-profit organisation.
- 14.4 The question is concerned particularly with “cross-border situations”. It should be noted that the evidence to date is that cross-border issues are hardly dealt with at all in collective litigation, but that the experience in this field lies with ADR mechanisms (see question 13 above). The management of cross-border complaints should be left to existing bodies such as those mentioned in our answer to Question 13 above.
- 14.5 The important issues in both cross border and single country claims are that:
- (a) the procedure is appropriate to the dispute and that claimants make an informed choice of that procedure;
 - (b) claimants have been informed about the availability of ADR processes and the relative benefits and disadvantages of ADR versus court-based procedures;
 - (c) so far as the parties are willing to do so, disputes concerning a particular subject matter are resolved in a single procedure and not by multiple procedures;
 - (d) multiple claims by the same individual about the same matter are prevented;
 - (e) any representation or representative entity is objective and impartial;
 - (f) in so far as different languages or legal systems are involved in the dispute, the mechanism chosen has the ability to deal with these factors; and
 - (g) the procedure and its outcome are proportionate to the dispute in question.
- 14.6 The voluntary nature of ADR mechanisms facilitates the management of these issues. In an ADR process, the parties agree upon the rules and procedure to be applied, and they avoid potentially complex and costly arguments about different legal systems. They can agree upon the language to be used and are not necessarily burdened by the costs of translation. They agree on the venue for dispute resolution. They can chose a venue and an ADR process that is not even in any of the countries where the dispute has arisen, and this can result in a more objective and impartial forum.
- 14.7 Whatever process is chosen and whether or not the case has cross border elements, it is essential to avoid multiple claims by the same individuals. In order to do this, claimants



EUROPEAN Justice Forum

must be individually identified and procedural steps must be introduced to make sure that they are not involved in other claims concerning the same subject matter.

- 14.8 It may be desirable in principle to avoid duplicate proceedings about the same subject matter. However, provided a particular individual claimant is involved in only one proceeding, it should be left to the parties to decide how they wish to proceed. For example, parties that have chosen to pursue their claim in a more rapid and cost effective ADR procedure should not be obliged to submit to longer and more expensive processes of another parallel judicial procedure.

Question 15: Apart from a judicial mechanism, which other incentives would be necessary to promote recourse to ADR in situations of multiple claims?

- 15.1 As stated above (12.2), we object to the assumption that without the existence of a court-based collective procedure, voluntary dispute resolution will not be used. The reality is that ADR is already extensively used in countries that have no compensatory collective litigation process, the most obvious example being the Netherlands where court-based compensatory collective claims are forbidden but where ADR mechanisms are better developed and more widely used than elsewhere. Reputable companies want to resolve disputes not because they fear being hit over the head if they do not do so, but because dispute resolution achieves their goal of protecting customer relations and enhancing their reputation. In any case, even in countries that do have collective litigation processes, they are little used and disputes are far more likely to be resolved by ADR. See also our response to Questions 8 and 13 above.
- 15.2 The main reason for choosing ADR is not that the matter might otherwise end up in collective litigation, but that ADR has considerable advantages of speed, cost-effectiveness and relative lack of risk. Consequently, voluntary dispute resolution is the means by which the great majority of disputes are resolved, and even where it exists collective litigation is little used. The main incentives to use ADR lie within the system itself. The key is to encourage development of effective ADR mechanisms; to publicise them widely and in a positive light; and to provide mechanisms for certifying ADR schemes against objective criteria, thus increasing their standing and reputation.
- 15.3 As argued above, the role of the public authorities is important on an overall policy on collective redress. Public authorities are there to enforce the laws that protect consumers, and the effect of that enforcement can be to facilitate the remediation of damage that may have been caused to third parties by infringement of those laws. Governments need to decide what should be the ‘enforcement policy’ for their authorities. A policy that consists purely of the deterrent effect of imposing fines and sanctions on infringers will take no notice of whether the infringers themselves take steps to improve their own behaviour and will do nothing directly to facilitate compensation for those who have suffered loss as a result of the infringement. However, there are alternative approaches in which governments are not just concerned with minimising the risk of infringement being repeated but are also concerned to remedy damage done (‘restorative justice’). In such a policy, the public authorities will be responsive to the actions of an infringer to make amends and may mitigate any sanctions accordingly. For example, if an electricity



EUROPEAN Justice Forum

company infringes the regulations covering its business and as a result overcharges its customers, a regulator will naturally expect (but should not be able to dictate to) the infringer to reimburse its customers. Any fines imposed by the regulator should take this reimbursement into account. Indeed, unless the regulator first knows the cost of that reimbursement, how can it ensure that the aggregate effect of the fine and the compensation paid to customers is proportional to the offence committed?

- 15 A comparison between two different approaches to collective investor claims is telling. In Holland, shareholders in Shell Oil⁶⁴ grouped together to agree a voluntary settlement with the company. The parties then jointly asked the Appeal Court of Amsterdam to endorse their settlement, making it legally enforceable and final. The court process took less than 9 months. In Germany, shareholder litigation began over the sale of Deutsche Telekom. The case has been handled under the German Capital Markets Model Claims Act (KapMuG). The case has so far run for several years and is far from resolved.

Question 16: Should an attempt to resolve a dispute via collective consensual dispute resolution be a mandatory step in connection with a collective court case for compensation?

- 16.1 The concepts of ‘consensual dispute resolutions’ and ‘mandatory’ in this question are contradictory. ADR must be voluntary and therefore cannot be mandatory. However, in our model, claimants would be encouraged to resolve claims out of court. Legal and other advisers (e.g. citizens’ advice bureaus and consumer organisations) should advise claimants objectively about ADR processes and their advantages over litigation. Responding to the preliminary steps in responding to a lawsuit can be very burdensome. A great deal of time and money will be wasted by both parties, and an unnecessary burden will have been placed on the court, if it then turns out that the matter is resolved by agreement. Such costs should not be incurred until the claimant has made good faith efforts to resolve the matter out of court. Moreover, if a defendant has been forced in any event to incur these preliminary costs, his willingness to resolve the matter by ADR or by another non-judicial means may be understandably reduced.
- 16.2 *There will be cases in which legal rights and obligations need to be established with certainty and where to do so a court action is required.* The right to refer such questions to the court must be respected and parties should not be stigmatized let alone penalised for turning to the courts in such situations. We do not anticipate that this will apply in the majority of cases, but the right to go to court must be preserved.
- 16.3 It goes without saying that in referring to the need for court actions we are not in any way saying that there is a need for the introduction of compensatory collective redress legislation at EU level. Please see also our answers to questions 1 and 13.

Question 17: How can the fairness of the outcome of collective consensual dispute resolution best be guaranteed? Should the courts exercise such fairness control?

⁶⁴ Litigation arose over the loss to shareholders caused by a fall in the share price of Shell Oil which arose because of previously misleading information about its oil reserves issued by the company.



EUROPEAN Justice Forum

- 17.1 ADR systems are by their nature voluntary, and the parties should make informed decisions as to the procedure they chose and whether or not the outcome should be binding. Parties will choose the extent to which they want a more or less exhaustive process, and provided they are properly advised, the parties should be free to choose the process that best suits them. It should be remembered that a relatively rough and ready procedure may be preferable to more lengthy and expensive processes (and certainly preferable to the length, cost and risk of court proceedings).
- 17.2 Although, because of their voluntary nature, the risk of abuse is considerably less in collective ADR procedures than in collective litigation, safeguards are still required. In this respect we refer to our answer to question 20.
- 17.3 It is essential that *ADR procedures should not only observe due process and give fair results but should be perceived as doing so* by any reasonable objective observer.
- 17.4 *Certification of ADR systems against objective criteria by properly accredited bodies should be encouraged.* Not every system will have the resource to go through such certification, and simple negotiation procedures may still be useful notwithstanding lack of certification. But more sophisticated procedures will benefit from certification and on-going oversight – see for example the UK Office of Fair Trading voluntary scheme (paragraph 8.4 above) and the Geschillen Commissie (dispute resolution committee) in the Netherlands (paragraph 10.1 above). See also the definition and strict observance of proper procedures by the Nordic consumer ombudsmen.
- 17.5 As stated above, at the request of both parties the court should also be used to oversee dispute resolution procedures to ensure they are fair and that no party abuses its position – see the operation of the Act on Collective Settlement of Mass Damage (2005) referred to in paragraph 10.1 above.
- 17.6 Court oversight is also essential with regard to the activities of the public authorities. The more active the authorities become in facilitating remediation of damage caused by breach of regulation, the more important it is that the court can review their activities and ensure that they neither exceed their remit nor abuse their authority.

Question 18: Should it be possible to make the outcome of a collective consensual dispute resolution binding on the participating parties also in cases which are currently not covered by Directive 2008/52/EEC on certain aspects of mediation in civil and commercial matters?

- 18.1 Binding outcomes should certainly be possible but not mandatory. Dispute resolution systems are voluntary. It is up to the parties to agree on the mechanism they wish to use and the extent to which the outcome is binding.
- 18.2 The parties to an ADR procedure may agree in advance to make the proceeding binding, or it may be determined by the nature of the proceeding chosen. (For example, arbitration proceedings are binding in their nature.) It is a matter of contract between the parties as to how they wish to proceed, although in our view the more parties agree to binding outcomes the more ADR is likely to be used.
- In any event, it is important to recognise that under existing voluntary procedures the parties usually accept the result of the procedure. DG SANCO's study into ADR schemes showed that in schemes that have data recording the outcome, compliance rates by



EUROPEAN Justice Forum

businesses averaged 99%. The range of compliance was from 100% for schemes with binding decisions to 90% where decisions were non-binding. *That is an impressive statistic, and consumer compliance ought to be in the same range.*

- 18.3 The opportunity for the parties jointly to go one step further and to ask the court to endorse their decision is highly desirable. The decision is thus made legally binding. Under the Dutch precedent⁶⁵, endorsement will also make the decision final and prevent the same matter being disputed again by any party. Such finality is important for both parties.

Question 19: Are there any other issues with regard to collective consensual dispute resolution that need to be ensured for effective access to justice?

- 19.1 The most important issue is to *increase awareness and understanding* of the availability and benefits of ADR procedures. As an additional step, the EU and Member State governments should establish and announce the policy that ADR procedures should be encouraged in order to avoid claimants unnecessarily starting a lawsuit.
- 19.2 Governments should *establish and maintain registers listing the ADR mechanisms available* in their countries and summarising the scope and benefits of those mechanisms. Publicity should be given to these systems and legal and other advisers should be required to advise potential claimants about ADR mechanisms and the requirement to use them before litigation.
- 19.3 Governments should encourage the development of ADR and should provide financial support for the establishment of relevant new mechanisms. Government will not be the only source of finance, but in view of the savings that can be made by taking disputes out of the court system, it is in their interest to provide such support for ADR. Moreover, *by contributing to the cost of establishing ADR structures, government is in a better position to ensure they meet appropriate criteria and contribute to thus improve their credibility.*
- 19.4 The techniques of ADR are similar everywhere, ranging from simple negotiation to conciliation to mediation. However, the structure of ADR differs from country to country. Governments should encourage rationalisation of that structure (which in itself will facilitate understanding and awareness) and should provide examples of best practice.
- 19.5 The facility with which ADR mechanisms can handle cross border and collective disputes should be publicised (see our response to Question 13 above).

Question 20: How could the legitimate interests of all parties adequately be safeguarded in (injunctive or compensatory) collective redress actions? Which safeguards existing in Member States or in third countries do you consider as particularly successful in limiting abusive litigation?

- 20.1 As noted above, although 14 Member States have established compensatory collective litigation procedures, they are little used. As a result, policy makers may be insufficiently sensitive to the risks of abuse. They should have in the front of their minds that in countries where such compensatory collective litigation mechanisms are frequently used,

⁶⁵ Act on Collective Settlement of Mass Damage (2005)



EUROPEAN Justice Forum

it has not been possible in practice to prevent abuse – see for example Australia and the USA. These countries never intended to have abusive litigation, but for the reasons given below, if there is sufficient funding to encourage collective lawsuits, the risk of abuse will follow.

- 20.2 The *most effective safeguard against abusive collective litigation is to provide better and more attractive alternative methods of redress*, i.e. dispute resolution systems, and thus marginalise the need for litigation. There is strong evidence that precisely because Europe has established such alternative systems, the need for collective litigation is hugely reduced. Policy makers should draw comfort from that experience and should recognise that the emphasis that has been placed by some on the need for collective litigation (which has been such a prominent feature of EU debate in the past years) is misplaced. It distorts the picture and removes attention from the success of ADR mechanisms and the role of the public authorities in protecting consumers and business.
- 20.3 In our answer to question 4 and 7 above, we outline the basic principles that should apply to collective redress. These should be borne in mind when addressing the more specific question of safeguards.
- 20.4 *All collective redress systems must take into account the limitations of a collective approach and the safeguards needed.* As argued above, there are cases that cannot be properly adjudicated and resolved on a collective basis. A collective process is not applicable when, for example, it is necessary to consider a claimant's individual characteristics and any actions taken by that individual that contributed to the loss or damage allegedly suffered. ADR systems have shown themselves adept at processing collective claims on an individual basis. Litigation systems have not.
- 20.5 Except as stated otherwise, the safeguards listed below apply to any collective redress procedure in the Member States as well as any measure introduced by the EU. Above all, there should be prioritisation of ADR over litigation.
- 20.6 Although the voluntary nature of ADR mechanisms substantially reduces the risk of abuse, safeguards are still necessary, and unless specifically stated otherwise, the following measures must apply to both judicial and non-judicial collective redress procedures:
- (a) Opt-in procedures only. All individual claimants participating in a collective process must be specifically identified. They must have expressly agreed to join the collective procedure either at its commencement or within a short but reasonable time limit. "Opt-out" collective procedures are not acceptable.
 - (b) Common issues must be the main focus and not all claims can properly be submitted to a collective procedure. Claims that require consideration of the individual circumstances and characteristics of individual claimants (see for example para 20.4 above) must not be submitted to a collective process.
 - (c) In court proceedings, there must be a preliminary certification hearing, prior to the commencement of any collective process, to certify that the proceeding can go ahead. This certification hearing should include a number of criteria among which must be proportionality and a determination of the merit of the claims (both on an individual and collective basis). The hearing must also verify that the claims and claimants are sufficiently homogeneous for to be handled in a single collective



EUROPEAN Justice Forum

- mechanism. Any decision from this preliminary hearing must be subject to immediate appellate review.
- (d) Unmeritorious claims must be filtered out at the outset by reviewing so far as possible the merits of the case and by verifying that every claimant that is party to, or represented in the collective action has a “prima facie” legitimate individual claim. We refer to the success of Ombudsmen in doing this (paragraph 10.1 above).
 - (e) The loser-pays rule must apply to any judicial process including all collective litigation.
 - (f) In order to discourage unreasonable expenditure, there should be no obligation under the loser pays rule for the losing party to reimburse: (i) legal fees that exceed in any way the normal fee scale; or (ii) the costs of any after the event (ATE) or other insurance policy taken out by the winning party⁶⁶.
 - (g) In collective litigation, the court must approve which costs are borne by which parties. In a successful case, the court must also determine which claimants get what amounts of money. There must be transparency and accountability to ensure that payments end up where they should.
 - (h) Again in collective litigation, any settlement must be closely verified by the court to ensure that it is fair and reasonable.
 - (i) Organisations representing claimants and/or lawyers acting either for claimants or for such representative bodies must not have a financial or any other beneficial interest in the outcome of the action beyond recovery of their direct legal costs or their normal legal fees as the case may be.
 - (j) Contingency fees must not be allowed nor may any other fees dependent on the outcome of the action be allowed.
 - (k) Third party funding must not be allowed in collective actions. Alternatively, if third party funding is permitted, it must be strictly controlled by means of statutory regulation to ensure in particular that undertakings providing third party funding: (i) are registered with, and subject to the supervision of, the appropriate national authority that has the experience and qualifications needed to supervise such activities; (ii) have no means to control or influence the conduct or settlement of proceedings; and (iii) only receive fees or profits that have been reviewed by the court and found to be reasonable and not liable to give rise to abusive claims. Any costs associated with third party funding must be borne by the party entering into that arrangement and must not be recoverable from the other side.
 - (l) The sale and purchase of individual claims in order to create collective litigation should be prohibited.
 - (m) If claimants are represented by any representative organisation, that organisation must: (i) be officially designated in advance by the government of the Member

⁶⁶ The recent report on the costs and funding of civil litigation in England and Wales by Lord Justice Jackson showed how expensive such costs could be and how their reimbursement under a costs order discouraged restraint on the part of plaintiff lawyers. Under the conditional fee system, lawyers were recovering twice or more than the normal legal fee. After the event insurance (to protect against the risk of reimbursing a successful defendant) could reach several million pounds in major cases. In future, such costs will be borne by the party incurring them.



EUROPEAN Justice Forum

State in which it is established to bring representative actions after (ii) certification by an independent body against strict objective criteria set by the law in order to ensure that they are independent, impartial, competent and have the resources and expertise to represent consumers in such litigation processes; (iii) be a not-for-profit body; (iv) be financially solvent, have sufficient resources to provide a quality service to those they represent and to pay the defendant's cost in the event of losing the case; (v) follow a strict deontological/ethical code that guarantees that abusive litigation is avoided; and (vi) as stated in paragraph 20.6 (i) above, such organisations must have no financial or other beneficial interest in the case. Such entities must not be directly or indirectly owned or controlled by any other entity or individual that has any interest in the outcome of the litigation.

- (n) The defendant must be able to invoke the "passing-on" defence.
- (o) Any compensation awarded must cover only actual loss or damage proven to have been suffered (including loss of profit and interests). Any type of punitive or multiple damages (including any type of uplift in damages for whatever reason) must be forbidden.
- (p) A judgment must not be enforceable until all appeals have been exhausted.
- (q) No changes should be introduced to the rules of discovery applying in each of the Member States. With few exceptions, current national justice systems do not allow for extensive discovery, and the EU should take no steps to change this position.

20.7 Certain of these safeguards in particular merit further comment:

- (i) Opt-in Rule: Proceedings in which all Claimants are not individually identified create considerable constitutional concerns. No litigation should be brought for or on behalf of a person who has not given express informed consent. Indeed, Art 6 ECHR and the constitutions of a number of Member States forbid a person being involved as a claimant in civil litigation without his/her express consent, let alone without his/her actual knowledge.

Such proceedings also open the way to fraud and to non-recovery of any compensation awarded. A series of group litigation actions was brought in London in the 1980s and 1990s was brought on an opt-in basis. It was therefore possible to interrogate individual records and to identify that in some those cases a high proportion of claims were brought by individuals who had not even been exposed to the alleged cause of damage⁶⁷. Those claims were, of course, dismissed, but under an opt-out procedure (where the claimants were not identified) this would not have been possible. Similar levels of fraud became subsequently known in America in connection with asbestos claims. After the relevant class actions had been settled, research found that a high proportion of the medical records (used as evidence that claimants had suffered damage as a result of exposure to asbestos) were fraudulent.

The opt-out mechanism has also been used – particularly but not only in America - hugely to enlarge the scale of the litigation on an entirely artificial basis by including hypothetical claimants who not only give no express consent to take part

⁶⁷ Reference to Hodges group actions book



EUROPEAN Justice Forum

but who in the great majority of cases do not even know of the litigation. This enlargement is done primarily to increase the hypothetical value of the action and thus the potential earnings of a law firm benefitting from an arrangement whereby it will be entitled to a percentage of any damages awarded.

The experience of opt-out actions in America also shows that they are ineffective in delivering compensation because claimants that have not opted in to the case are generally not aware of it therefore do not come forward to claim their share of any damages awarded.

- (ii) The 'Loser-pays' rule must apply. The loser-pays rule applies to the litigation systems of every developed jurisdiction in the world outside the USA⁶⁸. The rule is an important reality check to potential litigants. It helps avoid unmeritorious litigation, and it encourages the parties to seek to resolve their differences by agreement or by pursuit of an ADR mechanism. There has been debate in certain countries about modifying the application of this rule to consumers in party to party disputes. We strongly urge that no such deviations be allowed in collective litigation. As we demonstrate below, funding for collective litigation is likely to be provided increasingly from market based sources. The assessment of what cases are worth supporting will change markedly if the person providing the financial support does not have to factor in the risk of reimbursing the other party in the event of losing the case. The result will be to promote weak or unmeritorious claims. Deviations from this rule should not be allowed.

- (iii) Controls on Funding: The US system has been described in the Commission as a "toxic cocktail of ingredients" none of which are to be found in European legal systems⁶⁹. While it is true that certain aspects of the US system including jury trials, punitive damages, and contingency fees do not apply (or hardly apply) in Europe, it is simply mistaken to assume that these are the only causes of abusive class actions in America. The main cause of abuse lies in the opportunity for those supporting class actions to make very considerable profits. It is imperative that there should be no equivalent incentive in Europe. Consequently, in any collective litigation there should be:

- an absolute ban on contingency fees;
- no person or organisation should be allowed to bring or support collective litigation if that person or organisation stands to gain more than the recovery of normal legal fees or the direct legal costs incurred in the action or to profit in such a way that it is able to subsidise or expand parts of its operation;
- prohibition of third party funding in collective litigation or at the very least strict regulation of any third party funding of collective litigation⁷⁰. We attach in the Annex to this paper a preliminary list of controls;

⁶⁸ C. Hodges, S. Vogenauer and M Tulibacka 'The Costs and Funding of Litigation: A Comparative Perspective' Hart Publishing 2010

⁶⁹ See the Commission's MEMO/07/741, p.3

⁷⁰ Third party process finance broadly means the provision of litigation funding by third parties who contract with the litigant to fund their case in return for a share of any damages awarded. It is the principal means of financing collective



EUROPEAN Justice Forum

- similarly, the sale or transfer of claims by a claimant to a third party must be forbidden or at the very least be strictly regulated; and
 - there should be transparency as to the source of finance for collective litigation claims to enable the court to determine whether the provider of such finance does so in order to gain an excessive financial or otherwise unacceptable benefit or whether the nature of the finance is liable to distort the court process.
- 20.8 As argued above, we urge the Commission to issue strong guidelines and recommendations to the effect that in any collective redress mechanism the necessary principles and safeguards are applied.

Question 21: Should the “loser pays” principle apply to (injunctive and/or compensatory) collective actions in the EU? Are there circumstances which in your view would justify exceptions to this principle? If so, should those exceptions rigorously be circumscribed by law or should they be left to case-by-case assessment by the courts, possibly within the framework of a general legal provision?

- 21.1 The loser pays principle is one of the most important safeguards against abusive litigation and its absence is – as the Commission identifies – one of the drivers of unjustified claims in the USA⁷¹. Accordingly, the loser pays rule should be applied to all collective litigation without exception.
- 21.2 In some jurisdictions, the courts have the power to amend cost orders and may do so depending on the conduct and circumstances of the parties. Even in these systems, the loser pays rule is the (strong) default position in collective litigation.
- 21.3 The EU should do all it can to ensure that in all Member States the loser pays rule is applied in any court based system of collective redress.

Question 22: Who should be allowed to bring a collective redress action? Should the right to bring a collective action be reserved for certain entities? If so, what are the criteria to be fulfilled by such entities? Please mention if your reply varies depending on the kind of collective redress mechanism and on the kind of victims (e.g. consumers of SMEs).

- 22.1 Clearly the parties themselves must be allowed to bring an action. To do so they will need to appoint an individual or a group of individuals to speak on their behalf and to agree the conduct of the case with their lawyers. In some countries, the claimants have to create an “entity” of which they are all members and which takes the case on their behalf. This does not have to be a legal corporation, and a simple arrangement suffices. The purpose is simply to give coherence to the claimant’s group.
- 22.2 The ability for “representative organisations” to bring collective litigation on behalf of others needs to be treated with considerable care. On the one hand there are

litigation in Australia and has led to abuse and intense debate. The Australian Federal Government is considering strict regulation of this source of finance

⁷¹ The USA is the only developed civil justice system that does not apply the loser pays rule. See C Hodges, S Vogenauer and M Tulibacka (eds), *The Costs and Funding of Civil Litigation: A Comparative Perspective* (Hart Publishing, 2010)



EUROPEAN Justice Forum

- organisations that provide valuable representation: on other hand, it is possible for representative organisations to be controlled by interested parties that they intend to bring litigation for their own purposes. For example, organisations might be set up or controlled by law firms precisely in order to bring collective litigation. Similarly, ‘foundations’ may be established in order to operate as a captive vehicle of a law firm or some other organisation intent on using it as a means of pursuing litigation or claims under ADR mechanisms for the benefit not least of those who have established the entity. This risk has already been seen in the Netherlands where US law firms have used such entities to ‘export’ US Class actions to Europe for ‘settlement’ under the Dutch law.
- 22.3 It is therefore essential that organisations that are entitled to bring representative litigation are authorised to do so by their governments and are independently certified against objective criteria by appropriate accreditation bodies as having the resource, expertise, impartiality and objectivity to be entitled to bring such cases.
- 22.4 Representative organisations must demonstrate that they are not controlled or directed by third parties that have a particular interest in bringing collective litigation. In DG COMP’s 2009 draft proposal for a Directive on Competition Damages, there was nothing to prevent law firms or other financially interested parties from controlling or directing representative existing organisations or even setting up new organisations to bring class actions to court. Such an approach would be wholly unacceptable.
- 22.5 Examples have been given above of organisations that are effective in bringing collective cases on behalf of consumers. The German and Austrian consumer organisations, which are almost extensions of government departments, play an effective role in this regard. They are both independent and objective, and they have the resources and expertise needed for their role.
- 22.6 Representative organisations must have no financial or other similar incentive to bring representative litigation. There is every reason for them to recover the direct legal costs incurred in a case, but they should not be able to profit by taking a share of any damages awarded: to do so would put them in the same position as litigation funders and analogous to contingency fee lawyers. Nor should they be able to use any proceeds from representative litigation to subsidise or expand their other activities.
- 22.7 The principles stated in answer to Question 4 above and the safeguards outlined in our answer to Questions 20 and 21 above apply also to representative collective actions. In particular, *there must be no “opt-out” representative procedures: all the claimants represented must be individually identified.*
- 22.8 The above principles apply to organisations regardless of whether they represent consumers or businesses, although the issue may be more likely to arise with consumers. Whatever their size, companies generally are more able to fund their own representation.

Question 23: What role should be given to a judge in collective redress proceedings? Where representative entities are entitled to bring a claim, should these entities be recognised as representative entities by a competent government body or should this issue be left to a case-by-case assessment by the courts?



EUROPEAN Justice Forum

- 23.1 In collective judicial proceedings, the points made in answer to question 20 above (particularly under paragraph 20.5 above) must be borne in mind. The following should be added to normal court procedures:
- Ensuring that the *claimants have been advised as to the opportunities for and benefits of voluntary dispute resolution*. The court should enquire as to why the case could not be resolved by ADR;
 - Subject to the above, *a preliminary hearing must be held* to certify the class and filter out unmeritorious claims;
 - The *court should review the source of funding* for the case to be sure that it does not provide an incentive for unnecessary or unmeritorious litigation
 - The court should ensure that *any representative body bringing the case has been properly accredited by government* as being suited to do so;
 - It must be confirmed that *all claimants are individually identified and have consented* to take part;
 - Measures must be taken to ensure that the *parties have the resource to reimburse the other side's costs* if the other party is successful.
- 23.2 We also emphasise our view expressed above that the court should not simply be used a forum for litigation but should have a role in supporting and facilitating voluntary dispute resolution procedures, in ensuring that due process is used and that no party or public authority has abused its position; and, if the parties so request, endorsing the decision reached by the parties to make it enforceable and final

Question 24: Which other safeguards should be incorporated in any possible initiative on collective redress?

- 24.1 Please see above (particularly in our answer to Question 20) for the safeguards to be applied.
- 24.2 If, contrary to our recommendation, collective litigation were to be introduced by EU legislation, it is essential that the *outcome is carefully monitored* to make sure there was no abuse, and that corrective measures were promptly taken if necessary. Civil justice systems in Europe are evolving rapidly and assumptions that are taken for granted today may not prove to be valid in the future. Consequently, the Commission would need to set up an effective monitoring system to track experience, identify any abuse or unintended practices and to take effective measures to correct the position. In particular, the Commission must be alert as to whether settlements of collective litigation are in fact consensual agreement or whether they are blackmail settlements. An example of such monitoring is found in the Product Liability Directive.
- 24.3 Such ongoing review would in our view be essential if abuse is to be avoided and effective corrective measures taken. If need be, those measure should include limiting the ambit of collective litigation or even withdrawing the mechanism altogether.

Question 25: How could funding for collective redress (injunctive and/or compensatory) be arranged in an appropriate manner, in particular in view of the need to avoid abusive litigation?



EUROPEAN Justice Forum

- 25.1 The *risks of inappropriate funding and the measures needed to avoid funding leading to abusive litigation* are stated in our response to questions 20 above. We began with some general remarks and elaborated in more detail in our answers to questions 26 and 27.
- 25.2 In some countries, Government finance for impecunious litigants is available in some form of legal aid. In the current financial climate, such assistance is likely to become increasingly limited. In any event, legal aid must be carefully controlled and only allocated if the merits of the case are reasonable. The group action cases brought in London in the 1980s and 1990s were all financed on the plaintiffs' side by government finance, but the cases proved to be weak or have no valid legal basis. The experience illustrates the difficulty of regulating finance for class actions⁷².
- 25.3 Certain countries control funding by removing certain types of cases from the field of litigation altogether – for example the Swedish compulsory insurance system that deals with complaints arising in connection with medicines or medical practices⁷³.
- 25.4 Another way to remove certain cases out of the arena of dispute, and therefore out of the need for separate funding, is through greater involvement of public authorities. In certain countries – notably in the Nordic regions – collective litigation may only be taken after an ombudsman procedure has failed. The case is then taken by and at the (cost-effective) expense of the ombudsman's office.
- 25.5 One of the major advantages of voluntary dispute resolution mechanisms is the low cost to the applicant. There is no significant financial barrier against consumers engaging in the great majority of ADR processes. While sophisticated mediation or arbitration may carry a substantial cost, such procedures are also often built into ADR mechanisms operated by industry and other organisations at a low cost to consumers.

Question 26: Are non-public solutions of financing (such as third party funding or legal costs insurance) conceivable which would ensure the right balance between guaranteeing access to justice and avoiding any abuse of procedure?

- 26.1 We refer to our comments above (Question 20) regarding third party funding. Such financing has been available for many years in Europe in party to party commercial litigation, and in that field it has caused no real concerns. To date it has hardly been used in Europe in collective litigation⁷⁴. But there is no guarantee that it will not be so used in the future, and policy makers should be aware that third party process funding is the prime source of finance for class actions in Australia. Accordingly, we oppose the extension of third party process funding to collective litigation, and if such were to be applied to collective litigation in Europe, it would be essential that the measures set out in paragraph 20 above were applied.
- 26.2 *There may be more attractive before-the-event insurance based solutions to funding.* For example, in Germany, the usual contracts on before the event legal insurance generally

⁷² See our answer at 20.7 above

⁷³ See our answers at question 8.4(g) and 10.1 above.

⁷⁴ Third party funding has apparently been used to support representative claims brought by the Austrian consumer association, but we are not aware of any other use in European collective litigation.



EUROPEAN Justice Forum

- include collective actions and cover the policy holder's share in the cost of the action, where applicable, according to the terms and conditions of the policy.
- 26.3 In other Member States, before-the-event legal insurance is common as an adjunct to motor policies and house insurance. Many holders of such 'adjunct policies' are not even aware that they have such cover, and it adds little to the cost of their premiums. This kind of insurance is designed to cover the policy holder against any costs incurred in defending litigation brought against him or indeed the costs of bringing litigation to assert his rights. We are unaware of any use of such cover specifically in the field of collective litigation, and we are doubtful that it could be made available in this form. However, an extension of personal before-the-event legal event insurance may be a very helpful way of protecting individual consumers and companies and providing cover against future unexpected (and unwanted) litigation costs. If so, it may be a relatively benign solution since its potential for abuse would appear to be very limited. This may be an area for government to investigate with the insurance industry in countries where separate before the event insurance contracts are not common.
- 26.4 In relation to collective litigation, the development of any policy must take into account the ways in which civil justice systems are changing. Government finance for litigants is increasingly limited, and consequently market based funding solutions are emerging. These may have implications which governments and society would not approve. For example, if third party litigation funding were to develop (either in party to party or in collective litigation), there might be the potential to securitise the future income streams emerging from a portfolio of such cases. We have made clear that in our view such a development could be highly undesirable and should either be banned or at the least heavily regulated.
- 26.5 A further example of the way in which the rules surrounding litigation may be changing concerns contingency fees. They are allowed in principle in certain litigation in Poland (though hardly used) and in Italy (although again, so far as we are aware, they are little used). The UK recently announced government reforms would allow a limited expansion of contingency fees in party to party litigation subject to strict regulation and subject also to a 25% cap⁷⁵. If contingency fees were allowed in collective litigation, one of the key drivers of US class actions would also be present. We urge the Commission to take note of such changes in civil justice systems. Contingency fees have been rightly understood by the Commission to be the fuel that drives US litigation and the incentive that has caused the huge expansion of class actions, often regardless of the underlying merits of the claims. Simply to assume that such an incentive could never apply in Europe is unsafe. It is important that policy makers realise that such changes that are taking place and consider the consequences of introducing an EU measure that in certain countries could allow EU-wide collective litigation that could be brought on the basis of contingency fee funding.

⁷⁵ See the UK Ministry of Justice Consultation Paper CP 13/10 of November 2010 and their announcement of a major overhaul of civil justice systems issued on 29 March 2011.



EUROPEAN Justice Forum

Question 27: Should representative entities bringing collective redress actions be able to recover the costs of proceedings including their administrative costs, from the losing party? Alternatively, are there other means to cover the costs of representative entities?

- 27.1 The loser-pays rule should always apply. If representative entities (including consumer associations or trade unions) bring litigation on behalf of others, they should also be subject to the loser-pays rule. If they win their case they should recover their direct legal costs. However, they should not be allowed to recover any part of their overhead or any other costs incurred. They must establish themselves in a way that provides other sources of income to cover their operation costs, whether by membership fees or otherwise. However, they must not be allowed to build up funds that allow them to turn themselves into a vehicle for financing litigation. That would risk their becoming analogous to the US plaintiff law firms.
- 27.2 If such representative organisations bring representative litigation, this should be incidental to the task of such organisations in representing the interests of their members, not a principal function. Government certification of such organisations as recommended above would guard against this outcome.
- 27.3 As stated above, such representative organisations should not have pecuniary or similar incentives to bring litigation. They must also be prohibited from accepting funding that could turn them into vehicles for mounting litigation desired by other organisations such as law firms. Nor may they be able to use any proceeds from litigation to subsidise or develop their other activities.
- 27.4 In a comprehensive survey of the costs and funding of litigation in England and Wales published in January 2010, Lord Justice Jackson looked at the practice of trade unions seeking to recover under the loser pays rule their overhead costs from unsuccessful defendants in cases brought by the union on behalf of its members. He found that such costs were an unreasonable burden on the defendant and strongly recommended that the practice should no longer be allowed. We recommend that the same approach be taken by the EU.

Question 28: Are there further issues regarding funding of collective redress that should be considered to ensure effective access to justice?

- 28.1 See above particularly: paragraph 20.7 and particularly sub-paragraph (iii); our response to question 21; paragraphs 22.6 and 22.8. See also our response to question 25 and our suggestion regarding before the event legal insurance in paragraphs 26.2 and 26.3. In particular, please see also the preliminary list of controls in the Annex to this paper.
- 28.2 Plaintiffs who withdraw from a case before its conclusion should be exposed to pro-rata costs orders under the loser pays rule.
- 28.3 The main concern should be to provide alternative effective, low cost voluntary dispute resolution procedures that are free or low cost to the user and thus avoid such funding issues. Similarly, the role of public authorities in encouraging (but not dictating) the remediation of damage is free to consumers⁷⁶.

⁷⁶ With regard to the role of the public authorities, EJF advocates a responsive approach, in which the public authorities take into account an infringer's voluntary compensation of any damage caused and mitigate any penalties imposed in



EUROPEAN Justice Forum

Question 29: Are there to your knowledge examples of specific cross-border problems in the practical application of the jurisdiction, recognition or enforcement of judgments? What consequences of these problems have and what counter-strategies were ultimately found?

- 29.1 The fundamental problem with cross-border disputes is the disparity in practice between the standards of courts and tribunals in different Member States. The Brussels regulation is aimed at cross border enforcement of judgments reached in a Member State. We note that in the case of collective litigation, such cross border enforcement still requires completion of an administrative step of exequatur. We urge that collective judgments are only enforced outside the country of litigation if they are reasonable in terms of procedure and outcome.
- 29.2 We draw attention to the New York Convention which regulates the recognition and enforcement of arbitral awards.
- 29.3 We would point out that under the New York Convention, for the sake of clarity and as a means of avoiding forum shopping, *jurisdiction is exclusively that of the place of residence of the defendant*. This principle should be applied to collective litigation. If there is more than one defendant, the place of jurisdiction could either be agreed by the defendants or could be the place of residence of the main defendant.
- 29.4 The problem of cross border enforcement is much easier in ADR procedures. The parties voluntarily agree to participate in and to apply the rules of the procedure in question. If they are content for that procedure to decide a cross-border case, that is a matter for their own discretion. Claimants in different countries will have agreed to do so because they regard the procedures as satisfactory. In effect, mutual recognition is achieved by the claimants in the different countries. We also refer to the evidence in DG SANCO's survey of ADR procedures (above) that once parties have agreed to participate, compliance with the outcome is extremely high.

Question 30: Are special rules on jurisdiction, recognition, enforcement or judgments and/or applicable law required with regard to collective redress to ensure effective enforcement of EU law across the EU?

- 30.1 As argued throughout this paper, the purpose of collective redress is to compensate legitimate claims for damages suffered by a group of persons whose claims arise from a common cause and can properly be heard together. Collective redress is not about enforcement of EU law, which is the domain of public authorities.
- 30.2 We have also argued for a policy based on the use of consensual ADR, complemented by the role of public authorities in encouraging (but not dictating) an infringer to compensate

light of such remediation. Such an approach both encourages improved behaviour in the future and facilitates the immediate remediation of any genuine loss caused by the infringement. Public authorities should not act as judge and jury or force settlements on unwilling parties nor should they dictate damages, and their actions must always be subject to the review of the courts. But, if properly used, the public authorities have an important role to play in identifying genuine claims and complementing ADR in their resolution. See also section 3 of our general response page 5 above.



EUROPEAN Justice Forum

legitimate claims arising from damage caused by his infringement and taking such compensation into account in assessing any sanctions to be applied. The court should oversee the process of ADR to ensure that due process is followed and – at the request of the parties – to endorse an agreement voluntarily reached in order to make it both enforceable and final. The court should also oversee the activities of public authorities to ensure they do not exceed their remit and to hear appeals against their decisions.

- 30.3 In this model, the voluntary nature of ADR resolves by agreement between the parties many of the problems of jurisdiction, enforcement and/or applicable law that cause difficulty in court-based procedures. We have pointed to the New York Convention governing arbitral awards as a precedent for adopting the law of the claimant’s country as the governing law in any collective dispute – see our response to question 29 above.
- 30.4 We have also explained why collective redress legislation should be a matter for the Member States and not the EU. The national civil justice systems of the EU are simply varied and are evolving rapidly so that we see no realistic opportunity to design a single EU measure that would harmonise collective redress laws in the EU in such a way that considerable disruption to the existing national laws could be avoided and that any new EU system could be implemented with equivalent effect together with all the necessary safeguards throughout the EU without causing serious unintended consequences – see in particular our responses at

Question 31: Do you see the need for any other special rules with regard to collective redress in cross-border situations, for example for collective consensual dispute resolution or infringements of EU legislation by online providers for goods and services?

- 31.1 See above and in particular our answers to questions 13.7 and 29.
- 31.2 As argued above, the problem of cross-border disputes is relatively easily addressed by consensual procedures, since the parties enter into them on a willing basis and therefore accept any cross-border impact.
- 31.3 With regard to on-line trading, we support investigation of a central ODR (online dispute resolution) scheme carefully designed to deal with disputes whether they are limited to claimants in one or in several countries. (See our response to the ADR Consultation). In addition, such matters would be assisted by the agreement on a harmonised set of terms and conditions covering on-line trading. The International Chamber of Commerce may be the organisation best able to provide such terms.
- 31.4 Careful consideration should be given to whether or not (and if so under what conditions) European dispute resolution systems may be used by non EU bodies, firms or organisations as a means of resolving disputes which have little if any connection with the EU. In our view it would be regrettable if Non-EU class actions and collective disputes could be introduced in this way to EU dispute resolution systems if the result was to an extent to “capture those mechanisms for the purposes of foreign collective procedures”.

Question 32: Are there any other common principles which should be added by the EU?



EUROPEAN Justice Forum

32.1 We have referred above and in our response to the ADR Consultation to the principles of restorative justice. We recommend that the Commission work with the Member States to develop this concept in the EU and to issue guidance on it. We believe that in due course this should become one of the pillars on which collective (and indeed individual) redress is built.

Question 33: Should the Commission's work on compensatory collective redress be extended to other areas of EU law besides competition and consumer protection? If so to which ones? Are there specificities of these areas that would need to be taken into account?

33.1 There should be no presumption as to whether or not the EU should be adopting any collective redress measures on competition damages or consumer protection or in any other field. The purpose of this consultation is to determine that question, and until it has been determined, we do not think that there should be discussion of collective measures in other fields.

33.2 We would again point out that however many fields of action the Commission may eventually identify as appropriate for initiatives on collective redress, in so far as those initiatives concern judicial procedures, the courts of the Member States can only cope with a single set of rules on collective procedures. It is simply not practical to develop different systems and procedures for different sectors, since the same national courts and ADR bodies will need to deal with all of them. Consequently, if the EU introduces judicial measures of collective redress in any or in different fields, it must use the same rules in each case.

33.3 One of the advantages of voluntary dispute resolution is its inherent flexibility. Since the parties agree to take part and agree on the rules to be applied to the procedure, there is little need for outside intervention in determining what mechanisms apply. We show above how fairness and due process can be guaranteed and the role the court has to play in oversight and endorsement of ADR.

33.4 Similarly, provided public authorities take into account any voluntary remediation of damage by the infringer, and providing the court ensures they do not exceed their remit or abuse their position, national authorities are in a position to encourage (but not dictate) redress without the EU needing to determine the rules⁷⁷.

33.5 We would make particular comment concerning the field of "financial services". The substantive rules governing the rights and responsibilities of actors in the financial services sector (e.g. banks, brokers, and issuers of share capital) are largely a matter of national corporate and securities (capital markets) law, and where appropriate those national laws

⁷⁷ With regard to the role of the public authorities, EJF advocates a responsive approach, in which the public authorities take into account an infringer's voluntary compensation of any damage caused and mitigate any penalties imposed in light of such remediation. Such an approach both encourages improved behaviour in the future and facilitates the immediate remediation of any genuine loss caused by the infringement. Public authorities should not act as judge and jury or force settlements on unwilling parties nor should they dictate damages, and their actions must always be subject to the review of the courts. But, if properly used, the public authorities have an important role to play in identifying genuine claims and complementing ADR in their resolution. See also section 3 of our general response page 5 above.



EUROPEAN Justice Forum

implement any relevant EU measures. Within this framework, collective redress has already been considered at national level in procedures that fit the particular issues and the particular legal systems of the countries concerned. The Dutch collective redress procedures and the Financial Services Ombudsman's office in London are examples.

Question 34: Should any possible EU initiative on collective redress be of general scope, or would it be more appropriate to consider initiatives in specific policy fields?

- 34.1 There is a general need to encourage the development and improvement of Member States' voluntary dispute resolution systems. DG SANCO has taken an initiative in this respect, and in our view this initiative should be supported. There is every advantage in developing such mechanisms and ensuring they are available in any area in which disputes may arise.
- 34.2 Industry is already closely involved in developing ADR, and as stated above government should support this. Government should also contribute to the cost of establishing and maintaining ADR structures.
- 34.3 In terms of judicial remedies, we are clear that legislation should only be introduced if and to the extent that a clear need can be demonstrated, and we are sceptical that there is a demonstrated need for EU action in this respect. There must be an impact study that objectively defines the problem and identifies collective litigation as the required solution. The introduction of EU collective litigation is controversial and risky. It should only be done on the basis of very clear evidence of need and acceptance by all relevant stakeholders.
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ANNEX

Preliminary Summary of Safeguards for Third Party Funding

The following is not a final statement of safeguards required. Indeed, in EJF's opinion, third party funding should not be allowed in collective litigation because we doubt that it would be possible to regulate it so as wholly to exclude the risk of abuse. However, if such funding were to be allowed in collective litigation, the following safeguards should at the least be given statutory force:

- Third party funding must be regulated and provided exclusively by undertakings that are registered with and subject to the supervision of an appropriate Member State with the experience and qualifications needed to supervise such activities.
- A register should be maintained of those who provide third party process funding. Appropriate regulations should be applied with penalties for breach of those regulations.
- The main guiding principle of any such regulations should be to ensure that control of the conduct of the litigation (and of any settlement of the litigation) lies solely with the litigants and not with third party process funders. The third party process funder must not control the litigation or act in a manner that amounts to effective control.
- The terms of any funding arrangements (and in particular any potential profit element) must be disclosed to the Court and subject to the Court's power to forbid any arrangements that could distort the proper and sound administration of justice. The Court must ensure that there is no distortive effect resulting from any profit-motive on the part of providers of funding, and must have power to take appropriate measures to prevent this. Court rules and guidelines should be issued to the Courts indicating how funding arrangements can lead to abuse and the need to ensure that appropriate safeguards are applied.
- The Court should examine the extent of the financial reward which a third party funder may make in the event of his client winning the case. Binding guidelines should be developed in this area and introduced by way of legislation. These guidelines should include reasonable limits to the rewards that can be earned by the funder, in order that Europe may not experience the development of a litigation industry such as has developed in Australia and the USA. In particular, the guidelines should set reasonable limits to the extent to which a third party process funder may share in any damages awarded, so that any such arrangement does not adversely affect the proper and sound administration of justice.
- If plaintiffs who are dependent on a third party process funder win their case, they shall not be entitled to recover costs from the defendant in excess of a normal reasonable attorney fee and necessary outgoings. In particular, they shall not be entitled to recover any contingency or success element of the fees charged by the third party process funder, nor will they be entitled to recover from the losing party any amount of the damages awarded to them that is paid to the third party funder in consideration of his services.



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- In assessing whether it is prepared to invest in a piece of litigation, a third party funder will consider the experience and ability of the lawyers chosen by the party in question. While this makes sense, a third party funding organisation must not be allowed actually to select the law firm that handles the case. That is a decision for the plaintiffs alone, and the plaintiffs and their attorneys alone should be responsible for the management, conduct and any eventual settlement of the case.
- While a third party process funder should be entitled to receive information on the progress of a case and any significant changes to the prospects of success, such funders should not be able to exercise directly or indirectly any control or influence over the conduct or settlement of litigation.
- If a litigant wishes to settle a case, the terms of the funding agreement must not allow the third party funder to prevent the litigant from doing so, but must oblige the funder to continue financing the case until such settlement is reached.
- It is important that the Court satisfy itself that the TPF funder has the resources to meet the cost of reimbursing the defendant's costs if the funded case is unsuccessful and arrangement must be in place that allow successful defendants to recover costs from the TPF funder if the claimants prove unwilling or unable to do so. The Court should be able to require a TPF funder to make an appropriate payment into court in order to cover sufficiently this eventual liability.
- Any third party funding contract must be between the funding company and the litigants. The agreement with the lawyers must be between the lawyers and the litigants and not with the provider of the finance. The reason for this is to minimise the risk of abusive behaviour in relation to the litigation and in particular of the funder being able to exercise any control or influence over the conduct or settlement of the case.
- For similar reasons, while careful analysis of the merits of a case by third party funders is to be encouraged – including analysis from in-house or external lawyers, the litigation itself must not be handled or controlled by lawyers engaged by the third party funder nor may the third party funder be owned or controlled by law firms or lawyers.
- In recent years, the sale of asset backed securities has become common. It is foreseeable that projected income streams from litigation backed by third party funding organisations could provide the “asset backing” for such financial instruments. This would be distasteful and highly undesirable. It would also provide the biggest imaginable incentive to bring litigation. Accordingly, such securitisation of or other instruments based on the income streams from third party process funding must be prohibited.
- The lawyers involved must have no financial interest in the damages awarded. Their financial interest should be limited to charging normal reasonable fees.
- Certain costs should not be recoverable by a winning party who is using TPF funding. These include the cost of insurance premiums; the costs of taking out third party process funding



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and any amount payable to the funder upon conclusion of the case, including any share in the damages.
