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**GREEN PAPER**

**On Consumer Collective Redress**

(presented by the Commission)

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## On Consumer Collective Redress

### 1. INTRODUCTION

1. In an increasingly consumer-oriented, globalised and digital economy, a single market that responds efficiently to consumer demands also helps to deliver an innovative and competitive economy. Encouraging active participation of citizens in the good functioning of markets helps protect healthy competitive conditions. In particular, access to redress by consumers when consumer rights are violated by traders promotes consumer confidence in the markets and improves their performance.
2. The Commission Consumer Policy Strategy<sup>1</sup> fixes the objective of promoting the retail internal market by making consumers and retailers as confident shopping cross-border as in their home countries by 2013. This objective, however, can only be achieved if consumers know that if they have a problem, their rights will be enforced and they will receive adequate redress. 76% of the consumers who have low confidence in cross-border purchasing feel that it is very or fairly important for their confidence to be able to bring a cross-border case to their national courts under their national law<sup>2</sup>. This points to a lack of trust in other legal systems, both regarding substantive rights and the means of satisfactory redress. The proposal for a Directive on Consumer Rights<sup>3</sup> will address the issue of legal certainty on substantive rights. However, the efficacy of cross-border redress needs to be addressed independently.
3. In its Strategy, the Commission underlined the importance of effective redress mechanisms for consumers and announced its intention to consider action on consumer collective redress. The European Parliament, the Council and the European Economic and Social Committee welcomed the Commission's intention to improve consumer redress and in particular to consider action on collective redress<sup>4</sup>. The OECD in its recommendation on consumer dispute resolution and redress<sup>5</sup> encouraged its member countries to provide consumers with access to different means of redress, including collective redress mechanisms.

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<sup>1</sup> COM (2007) 99 final

<sup>2</sup> Flash Eurobarometer (EB) 57.2 – Spring 2002

<sup>3</sup> COM (2008) 614 final

<sup>4</sup> In their resolutions on the Consumer Policy Strategy, the EP asked the Commission, after careful assessment of the issue of consumer redress in the Member States "...to present, as appropriate, a coherent solution at European level, providing all consumers with access to collective redress mechanisms for the settlement of cross-border complaints" (A6-0155/2008); the Council invited the Commission "...to carefully consider collective redress mechanisms and come forward with the results of on going relevant studies, in view of any possible proposal or action", OJ C 166, 20.7.2007, p.1-3. The EP request was re-iterated in the resolution on the Green Paper on retail financial services (A6-0187/2008). The EP committee of inquiry on Equitable Life also had requested the Commission "... to investigate further the possibility of setting up a legal framework with uniform civil procedural requirements for European cross border collective actions..." (A6-0203/2007). The EESC in its own-initiative opinion of 14 February 2008 INT-348 – CESE 258/2008 put forward proposals in respect of the legal arrangements for CR mechanisms

<sup>5</sup> <http://www.oecd.org/dataoecd/43/50/38960101.pdf>

4. The purpose of this Green Paper is to assess the current state of redress mechanisms, in particular in cases where many consumers are likely to be affected by the same legal infringement, and to provide options to close any gaps to effective redress identified in such cases. As economic market integration at retail level increasingly leads to consumers participating in retail markets beyond their borders and therefore being affected by the same practices as national shoppers, it is not found useful to make a distinction between cross-border mechanisms for mass claims and purely national mechanisms. Another issue arising is whether instruments possibly to be chosen would apply only to cross-border or also to national cases.
5. The present Green Paper does not address collective redress for victims of EC antitrust law infringements because of the specific nature of antitrust law and the wider scope of victims which includes also SMEs. In this regard, the Commission has suggested, in its White Paper<sup>6</sup>, a set of specific measures to ensure that consumers as well as businesses across the EU Member States can obtain effective compensation for the harm they suffered as a result of infringements of EC antitrust law. These measures include two collective redress mechanisms that are tailored to overcome the particular difficulties encountered by victims of antitrust infringements, i.e. an opt-in collective action for several victims who expressly decide to combine their individual claims in a single action and a representative action, which can be brought by qualified entities such as consumer organisations or state bodies on behalf of a group of victims.

## 2. OUTLINE OF THE PROBLEM

6. As mass consumer markets expand in size and even become cross-border, very large numbers of consumers can be harmed by the same or a similar practice of a trader. The effect of a malpractice may be so widespread as to distort markets. For example, UK banks are under investigation for having systematically imposed excessive charges on several hundred thousand consumers whose accounts became overdrawn<sup>7</sup>. An EC led enforcement action across the European Union revealed widespread abuse in the market for ring tones<sup>8</sup>: around 60% of websites checked had the obligatory pre-contractual information, but hid it or presented it in small print. Advertisements claimed to offer "free" ringtones but acceptance of the offer resulted in payment and sometimes even a subscription.
7. Because infringements of consumer rights that affect a very large number of individuals may create distortions in markets, the Green Paper focuses on the resolution of mass claim cases and aims at providing effective means of collective redress for citizens across the EU. This means mechanisms by which a large group of consumers affected by a single trader's practice can effectively obtain redress wherever the trader is located within the EU.

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<sup>6</sup> White Paper on damages actions for breach of the EC antitrust rules, COM (2008) 165 final, <http://ec.europa.eu/comm/competition/antitrust/actionsdamages/documents.html>

<sup>7</sup> [http://www.offt.gov.uk/advice\\_and\\_resources/resource\\_base/market-studies/current/personal/personal-test-case](http://www.offt.gov.uk/advice_and_resources/resource_base/market-studies/current/personal/personal-test-case)

<sup>8</sup> <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1169&format=HTML&aged=0&language=EN>

8. Currently, when consumers affected by a malpractice want to pursue a case, they face barriers<sup>9</sup> in terms of access, effectiveness and affordability. This is particularly true for claims that involve small amounts. The sectors in which consumers find it most difficult to obtain redress for mass claims are financial services (39% of documented cases), telecommunication (12%), transport (8%) as well as package travel and tourism (7%)<sup>10</sup>. These are sectors where consumers are increasingly likely to engage in cross-border activities.
9. Consumers can always go to court to obtain individual redress. Mass claims could then in principle be resolved with a large number of individual claims. But there are barriers which *de facto* impede European consumers from obtaining effective redress. These are in particular high litigation costs and complex and lengthy procedures. One out of five European consumers will not go to court for less than EUR 1000. Half say they will not go to court for less than EUR 200.<sup>11</sup> **High costs and the risk of litigation** make it uneconomic for a consumer to pay court, lawyer and experts fees that may exceed the compensation. **Procedures are so complex and lengthy** that consumers may find themselves entangled without any clear perception of when (or if) their case will be satisfactorily resolved. Only 30% of consumers think that it is easy to solve disputes through courts<sup>12</sup>.
10. In some instances, but not all, consumers can have access to individual alternative dispute resolution mechanisms. The state of these mechanisms across the EU is fragmented. Access to it varies across Member States and even within Member States it may vary by sector, being for instance available only for specific sectors. Only 39% of European consumers believe that resolving disputes with traders through alternative dispute resolution mechanisms is easy<sup>13</sup>.
11. Consumers also lack awareness of the different types of enforcement and redress tools that are available, particularly if they go cross-border, either physically or via e-commerce. There also seems to be a lack of faith in current systems that discourages complaints and therefore prevents consumers from obtaining redress. 51% of consumers who complained to a trader and were not satisfied with the way their complaint was dealt with, did not take further action.<sup>14</sup> A study by the UK Office of Fair Trading on consumer detriment shows that only 62% of consumers harmed complain on average in the UK and this percentage drops to 54% for purchases less than GBP 10<sup>15</sup>. When asked what problems they might encounter when shopping cross-border, consumers rated highest the difficulties of resolving problems (33%)<sup>16</sup>.
12. Thirteen Member States currently have judicial collective redress mechanisms. These mechanisms are very different across countries and have diverse results. The study

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<sup>9</sup> Cf. Study regarding the problems faced by consumers in obtaining redress for infringements of consumer protection legislation, and the economic consequences of such problems (Problem Study), p.42, [http://ec.europa.eu/consumers/redress\\_cons/collective\\_redress\\_en.htm](http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm)

<sup>10</sup> Problem Study, p.21

<sup>11</sup> Special EB on Access to Justice, October 2004, p.29; these figures concern only EU-15

<sup>12</sup> EB survey on Consumer Protection in the Internal Market, September 2008

<sup>13</sup> However, the situation is different from one country to another. The Netherlands is the country with the highest percentage of consumers confident in ADR (57%), followed by Nordic countries (Denmark and Finland 47%, and Sweden 45%). On the other hand, Bulgaria has the lowest figure (12%), together with Slovakia (17%) and Portugal (19%). See footnote 12

<sup>14</sup> See footnote 12

<sup>15</sup> See [http://www.offt.gov.uk/advice\\_and\\_resources/publications/reports/consumer-protection/](http://www.offt.gov.uk/advice_and_resources/publications/reports/consumer-protection/)

<sup>16</sup> See footnote 12

launched by the Commission<sup>17</sup> and the consultations conducted<sup>18</sup> show that the vast majority of the existing collective redress mechanisms tend to have some elements that work, and some that do not. Almost all existing collective redress mechanisms have some added value compared to individual judicial redress and alternative dispute resolution schemes<sup>19</sup>. But their efficiency and effectiveness could be improved. The mechanisms have been applied in relatively few cases.<sup>20</sup> The lowest number of consumers using a collective redress mechanism is in Germany where on average only four in ten million people every year have participated in a collective redress action.<sup>21</sup> The collective redress mechanism that reached the most people in a single case is that of Portugal where a case against a telecommunication company gave redress to some 3 million consumers affected by the same overcharging. The compensation to these consumers was largely in kind and non-monetary. The average benefit to consumers in collective redress mechanisms have ranged from EUR 32 in Portugal to EUR 332 in Spain.<sup>22</sup>

13. Elements which contribute to the effectiveness and efficiency of a collective redress mechanism include political and financial support from governments, high media coverage (which can act as an incentive for traders to settle and can also help in finding financing companies; in general it can have a deterrent effect on wrongdoers), no or low litigation fees for consumers, no or reduced litigation fees for representatives, flexible solutions regarding lawyers' fees and bypassing the formalities of normal civil procedures.
14. On the other hand, elements which hinder the effectiveness and efficiency of a collective redress mechanism include insufficient funding, lack of expertise and resources of consumer organisations, the fact that the risk of paying high litigation fees often falls on consumer organisations, the complexity of collective redress mechanisms, very strict prerequisites regarding admissibility and standing (which deter from access to the mechanisms), the length of proceedings and the ability of defendants to delay proceedings, lack of media coverage, the inability to distribute the proceeds of the actions effectively, the dependence of alternative dispute resolution mechanisms on the trader's willingness to cooperate and the use of one collective redress mechanism for all claims, without tailoring the mechanism to the value, needs and specificities of each particular claim.
15. As a consequence of the weaknesses of the current redress and enforcement framework in the EU, a significant proportion of consumers who have suffered damage do not obtain redress. In mass claim cases that affect a very large number of

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<sup>17</sup> Study on the Evaluation of the effectiveness and efficiency of CR mechanisms in the European Union (Evaluation Study), p.47 and part II (country reports); [http://ec.europa.eu/consumers/redress\\_cons/collective\\_redress\\_en.htm](http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm)

<sup>18</sup> The Commission organised a workshop in Leuven in June 2007 and it held three more workshops with consumers, business stakeholders and legal practitioners in May-June 2008. At the Portuguese Presidency Conference on CR in Lisbon in November 2007, a consultation on draft benchmarks for an effective and efficient CR system was launched, [http://ec.europa.eu/consumers/redress\\_cons/collective\\_redress\\_en.htm](http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm)

<sup>19</sup> Evaluation Study, p.93

<sup>20</sup> 326 cases were documented. A number of mechanisms (the Bulgarian, Danish and Finnish group actions and the Greek test case procedure) were introduced too recently to be properly evaluated. The Italian mechanism is under revision

<sup>21</sup> Evaluation Study, p.116

<sup>22</sup> Evaluation Study, p.116. These figures exclude the results for the Netherlands which are distorted by a few cases which involve large companies and significant amounts

consumers, although sometimes the harm may be low for the individual consumer, it can be high for the size of the market. As these markets become more cross-border in nature, effective cross-border access to the mechanisms of redress become necessary. Today, close to 10% of collective redress claims have a cross-border element<sup>23</sup>. For example, a UK company recently distributed scratch cards in Irish newspapers offering "free" holidays, whereas in reality this offer cost each consumer a minimum of EUR 130<sup>24</sup>. With further integration of the markets this percentage is likely to rise.

### 3. EXISTING EUROPEAN INSTRUMENTS

16. Some instruments specifically designed for consumer redress already exist at European level. There are two Commission Recommendations<sup>25</sup> to facilitate alternative dispute resolution through simple and inexpensive procedures. Both recommendations set out principles for the good functioning of out of court settlements. The Injunctions Directive<sup>26</sup> provides a procedure enabling consumer associations and public authorities to stop infringements abroad. Public enforcement was recently strengthened through the Regulation on Consumer Protection Cooperation<sup>27</sup> which allows named national authorities to request another Member State authority to act on an infringement. Neither the Injunction Directive nor the Consumer Protection Cooperation Regulation provide for consumer compensation.
17. The overall performance of the existing consumer redress and enforcement tools designed at EU level is not satisfactory. The Consumer Protection Cooperation Regulation is relatively new but indicates that public cross-border enforcement is not yet satisfactory. Alternative dispute resolution mechanisms are not available to consumers in all Member States or in all sectors. For example, in nearly no Member State there is an alternative dispute resolution schemes in the airline transport sector. Only two cross-border cases have been brought since the Injunctions Directive entered into force in 1998<sup>28</sup>, the main reasons being the financial risk for the entity bringing the case as well as the complexity and diversity of national injunctive proceedings.
18. Since there is evidence that commercial malpractice affecting multiple consumers often goes unsolved and since, where it exists, collective redress can potentially provide a useful complementary means of reducing consumer detriment, the present Green Paper focuses on collective redress as a tool that could help solve the problems that consumers face in obtaining redress for mass claims both in national and cross-border contexts. 76% of consumers would be more willing to defend their

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<sup>23</sup> Evaluation Study, p.44

<sup>24</sup> Problem Study, Annex 3

<sup>25</sup> Commission Recommendation 98/257/EC on the principles applicable to the bodies responsible for the out-of-court settlement of consumer disputes, OJ L 115, 17.04.1998, p. 31 and Commission Recommendation 2001/310/EC on the principles for out-of-court bodies involved in the consensual resolution of consumer ADR, OJ L 109, 19.04.2001, p.56

<sup>26</sup> Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on injunctions for the protection of consumers' interests, OJ L 166, 11.6.1998, p. 51

<sup>27</sup> Regulation (EC) No 2006/2004 of the European Parliament and of the Council of 27 October 2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws, OJ L 364, 9.12.2004, p.1

<sup>28</sup> Report from the Commission concerning the application of the Injunctions Directive, [http://ec.europa.eu/consumers/enforcement/injunctions\\_en.htm](http://ec.europa.eu/consumers/enforcement/injunctions_en.htm)

rights in court if they could join together with other consumers<sup>29</sup>. Businesses would avoid losses through unfair competition, gain more legal certainty and reduce some of their litigation costs by being able to bundle the claims against them<sup>30</sup>. At the same time, the necessary safeguards have to be taken not to burden business with unmeritorious claims, punitive damages, or excessive costs.

#### 4. OPTIONS

19. The current consumer redress situation in the EU is unsatisfactory and is not allowing large numbers of consumers affected by a single breach of the law to obtain redress and compensation. The Commission has identified a number of options which could be used to address this issue, which is important for the protection of healthy and integrated retail markets within the EU. The goal is to have effective mechanisms that work for both consumers and traders. The options below are presented according to an increasing degree of EU involvement. These options as well as different elements within the options could also be combined.

##### Option 1 – No EC action

20. This option involves no new EC action and relies on the existing national and EC measures to achieve adequate redress for consumers. National judicial redress schemes, either individual or collective, coupled with alternative dispute resolution mechanisms and complaint-handling systems set up by traders/services providers, provide redress for consumers with mass claims. The extent to which this redress is effective varies, depending on the different systems in place.
21. At EU level, legal instruments capable of helping to resolve cross-border mass claims will either have to be implemented in the near future or come into effect shortly. The Mediation Directive<sup>31</sup> must be implemented by 2011, and the Commission will report on its application in 2016. The European Small Claims Regulation<sup>32</sup> will apply from 1 January 2009, and the Commission will report on its application in 2014. However, both instruments have limited application to mass claims. The Mediation Directive can only help in cases where the parties are willing to mediate. The Small Claims Regulation concerns cross-border disputes not exceeding EUR 2.000 and whether it applies to collective redress will depend on national procedural rules. These rules may allow, for example, the possibility of grouping together several individual claims against the same trader, each not exceeding the threshold envisaged by the Regulation. It may be desirable to await the assessment of the impact of these EU measures on mass claims.
22. Option 1 would mean waiting until more information<sup>33</sup> is available on the effect of the national and EU measures in place or about to be implemented. It has the

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<sup>29</sup> This figure even presents a slight increase compared with the previous EB in 2006 (74%). See footnote 12

<sup>30</sup> Problem Study, p.96

<sup>31</sup> Directive 2008/52/CE of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, OJ L 136, 24.5.2008, p.3

<sup>32</sup> Regulation (EC) No 861/2007 of the European Parliament and of the Council of 11 July 2007 establishing a European Small Claims Procedure, OJ L 199, 31.7.2007, p.1

<sup>33</sup> In order to gather evidence about the functioning of the different redress systems, the Consumer Markets Scoreboard will be used to present data collected on redress issues



advantage of not imposing any additional implementation costs for Member States or businesses. It has the disadvantage of leaving different means of redress available to consumers, depending on their place of residence or on the Member State where the transaction took place or the damage occurred. This fragmented situation could lead to distortions of competition and give consumers across the EU a different level of redress. This option would possibly not provide satisfactory redress to a number of consumers concerned or remedy obstacles to the Single Market.

## **Option 2 – Cooperation between Member States**

23. This option involves developing cooperation between the Member States in order to ensure that consumers throughout the EU are able to use the collective redress mechanisms that are available in different Member States. This option would ensure that Member States having a collective redress mechanism open up their respective mechanisms to consumers from other Member States and that Member States who do not have a collective redress mechanism establish one. This could be achieved through either a Recommendation or a Directive. In parallel, a Recommendation could lay down a set of benchmarks which all Member States systems should satisfy.
24. Thirteen Member States currently have some form of collective redress (representative action, group action, test case mechanism). These actions can be brought by consumer organisations, individuals or public bodies. For example, if a trader in a Member State having a representative action committed an infringement of consumer protection legislation, the Member State concerned should ensure that the competent national entity also represents consumers from other Member States, or should allow entities from other Member States to bring a representative action before its courts. In the case of a group action, the relevant Member State should allow consumers from other Member States to join actions brought by its own consumers or should allow consumers from other Member States to initiate actions before its courts. Finally, a Member State with a test case should allow consumers from other Member States to bring a test case before its courts, and ensure that the effect of any test case is extended to all consumers affected, regardless of their nationality or residence.
25. The opening up of national collective redress mechanisms could be facilitated by establishing a cooperation network bringing together the entities that have the power to bring a collective redress action in those Member States having such mechanisms, including public bodies and consumer organisations.
26. For representative actions, the cooperation could involve the competent entities in the trader's Member State either bringing a representative action on behalf of consumers located in other Member States upon request of their counterpart entities in these Member States, or assisting these counterpart entities to take direct action. For group actions and test cases, members of the network in the Member State concerned could co-operate in assisting harmed consumers to bring or join group actions or test cases before the courts in the Member State of the trader.
27. Assistance provided could include launching information campaigns about pending collective redress actions, gathering claims, assisting with the translation of documents, explaining national judicial proceedings and helping to find national legal practitioners and experts.

28. Member States with collective redress mechanisms might be hesitant to grant resources to their entities for bringing collective redress actions on behalf of or assisting consumers from other Member States before their courts when entities in Member States without collective redress mechanisms do not have such an obligation. Informal consultations with consumer organisations in such Member States seem to indicate that they would not be willing to develop such activities due to a lack of resources. An equitable mechanism for bearing the costs of proceedings would need to be introduced. Member States could also be encouraged to provide sufficient resources to their entities for this purpose.
29. The work of the cooperation network could be facilitated by the European Consumer Centres Network (ECC-Net). The advantage of using the ECC-Net is that it is an EU-wide network which is already in place. However, since it currently works mainly on individual cross-border out-of-court actions, different expertise and more resources would be needed<sup>34</sup>.
30. Alternatively, a new specific collective redress network could be created. The funding necessary for such a network would depend on its workload which would in turn depend on the number of entities belonging to the network, their competence and expertise, the exact tasks assigned to them and the number of cross-border cases that would arise.
31. Issues relating to jurisdiction and the law applicable to contractual and non-contractual obligations (see paragraphs 58-60), would also arise under this option.

### **Option 3: Mix of policy instruments**

32. Option 3 envisages a mix of policy tools, non-binding or binding, that can together enhance consumer redress by addressing the main barriers identified earlier, namely high litigation costs, complexity and length of proceedings, consumers' lack of information on the available means of redress. It involves: improving alternative dispute resolution mechanisms, extension of the scope of national small claims procedures to mass claims, extending the scope of the Consumer Protection Cooperation Regulation, encouraging businesses to improve their complaint handling schemes and taking actions to raise consumers' awareness of existing means of redress.
33. When consumers decide whether to take action or not, the value of a claim is an important parameter. Consumers are not likely to act when their claim is below a certain threshold. Alternative dispute resolution schemes, small claims procedures and cooperation between national public enforcement authorities may be more efficient for different levels of claim value.
34. When both parties have sufficient incentives<sup>35</sup> to go to alternative dispute resolution schemes, this tool has proved an efficient alternative to court proceedings in low and medium value cases, as it may be quicker, less expensive and more flexible. Alternative dispute resolution schemes may be less suitable for high value claims, which often involve complex facts and evidence gathering. For very low value

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<sup>34</sup> This may lead to possible additional costs to be decided in agreement with the Member States

<sup>35</sup> For instance media attention or the availability of effective judicial redress

claims consumers are unlikely to seek redress since the individual loss is lower than the cost of litigation.

35. Small claims procedures are simplified court procedures with low litigation costs and relatively quick handling. For these reasons they are a good tool for individual low and medium value claims, when the parties refuse to negotiate.
36. Action by national public enforcement authorities such as those of the Consumer Protection Cooperation network could provide efficient redress in cases where alternative dispute resolution schemes and small claims procedures are less likely to work, particularly in very low value cases where consumers have little incentive to take action.
37. Existing consumer **alternative dispute resolution schemes** vary considerably within and between Member States. They can be publicly or privately funded, be hosted by public or private organisations, by collegiate or individual bodies, have a nationwide, regional or local coverage, be responsible for all consumer claims or only for claims in a specific-sector, take binding or non-binding decisions or lead to agreements between the parties. There are also significant gaps in alternative dispute resolution coverage, both sector-specific and geographical. Not all consumer claims can therefore be dealt with through alternative dispute resolution schemes. Most alternative dispute resolution schemes within the EU deal principally with individual claims. Some Member States have amended<sup>36</sup> or may adapt<sup>37</sup> their legislation to expressly recognise collective alternative dispute resolution mechanisms.
38. The existing EU framework does not exclude collective alternative dispute resolution schemes. Although the two Recommendations on alternative dispute resolution were not drafted with the resolution of collective consumer claims in mind, their principles can also be applied to collective alternative dispute resolution schemes. The Recommendations could be supplemented to respond to specific issues linked to the management of collective claims.
39. The EU could encourage Member States to establish collective consumer alternative dispute resolution schemes making sure that such schemes are available on their entire territory for all consumer claims and accessible to consumers from other Member States. Member States could have the choice on how to establish collective alternative dispute resolution schemes. They could either adjust their existing schemes or establish one or more new alternative dispute resolution schemes to deal with consumer collective claims. The existing European networks such as the ECC-Net or FIN-Net which already help individual consumers to access an alternative dispute resolution in another country could also help consumers with similar claims to access the appropriate collective alternative dispute resolution schemes in another Member State. This may lead to possible extra operational costs for these networks. Any additional costs would need to be decided in agreement with Member States which co-finance the ECC-Net.
40. This could be achieved by a Recommendation or Directive. A Recommendation with a result-oriented monitoring process would offer flexibility in its implementation and could be designed as a first step. An EU Directive could also require Member States to set up collective consumer alternative dispute resolution schemes. Either of such

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<sup>36</sup> Sweden, Finland  
<sup>37</sup> Slovenia

instruments could be more detailed and present the main components of a collective alternative dispute resolution scheme (e.g. the composition of the scheme and the procedure).

41. In parallel, the Commission could bring stakeholders together to develop a standard model for collective alternative dispute resolution scheme which is easy to use, in particular in a cross-border situation. This standard model could present the main components of a collective alternative dispute resolution scheme. Such a model could be used by stakeholders who want to set up a collective alternative dispute resolution scheme. It would be a voluntary step towards achieving convergence of collective alternative dispute resolution schemes.
42. Another measure that could help improve existing redress mechanisms is for Member States to extend the scope of their **small claims procedures**, so as to deal efficiently also with mass claims in a national and cross-border context. For example, when several individuals have the same claim against the same trader for the same damage, all these claims could be grouped together, ideally by the court, and dealt with by the simplified procedures envisaged for individual small claims. A Recommendation with a monitoring process could be the appropriate instrument.
43. The **Consumer Protection Cooperation Regulation** sets up an EU-wide network of national public enforcement authorities. These authorities can call on other members of the network for assistance in investigating possible breaches of consumer laws and in taking action against traders who have committed such breaches. The Consumer Protection Cooperation Regulation sets out a non-exhaustive set of investigation and enforcement powers necessary for its application which can be exercised only where there is a reasonable suspicion of an intra-Community infringement, and include a power to require the cessation or prohibition of any intra-Community infringement.
44. The Consumer Protection Cooperation Regulation could be amended to include a power whereby a competent authority, after the finding of an intra-Community infringement, could require the trader to compensate consumers that have been harmed<sup>38</sup>. The detailed working of such a mechanism would be left to Member States. They would deal with issues such as funding, how and by which entity affected consumers would be found and informed, what type of evidence the consumers would need to provide, measures to be taken if the trader does not comply with the order to compensate, and possibilities for appeal. Alternatively, such issues could also be dealt with at EU level via a Recommendation or a Directive. On funding, Article 4(7) of the Consumer Protection Cooperation Regulation stipulates that "Member States shall ensure that competent authorities have adequate resources necessary for the application of this Regulation."
45. The scope of the Consumer Protection Cooperation Regulation would need to include under "intra-Community infringements" acts that harm the individual interests of multiple consumers in addition to acts that harm the collective interest of consumers. A threshold of the number of consumers involved would need to be set. The compensation resulting from the decision of a court or public authority would have to be properly distributed to consumers from other Member States. Especially

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<sup>38</sup> The Commission has informally consulted the CPC network, and it seems that in the vast majority of Member States, public enforcement authorities do not have the power to order traders who have committed an intra-Community infringement to compensate consumers, while only in a few Member States do they have the right to sue wrongdoers for damages on behalf of consumers

regarding very low value claims, the Consumer Protection Cooperation Regulation could provide for a power to skim-off the profit from traders who have committed an intra-Community infringement. This would imply that Member States would have to grant their public authorities this power<sup>39</sup>. Details would be left up to the Member States. For instance, Member States would decide if the amount skimmed-off would go to the State treasury or to consumer-related purposes. The scope of the Consumer Protection Cooperation Regulation would remain unchanged. Under such a system individual consumers would not be able to obtain a share of the skimmed-off profit. Consumers would benefit indirectly from the deterrent effect that such a system would have on traders.

46. Businesses have an interest in ensuring that their customers are content. Self-regulatory measures, could be encouraged where they do not yet exist. Existing measures could be further improved. This involves for example ensuring that all businesses have an internal **complaint-handling system** which is credible, works efficiently and is subject to independent monitoring or auditing standards. The Commission could encourage all businesses, particularly in those sectors where more mass problems are reported, to develop self-regulatory measures in the form of a code and to make this widely known to consumers.
47. In order to increase consumers' knowledge of their means of redress, **awareness-raising actions** could be envisaged. These could be in the form of EU or national information activities, either in general or tailored to specific sectors. Possible actions could range from information events carried out by consumer organisations to actions promoted by Member States or the EU.

#### **Option 4 – Judicial collective redress procedure**

48. This option proposes a non-binding or binding EU measure to ensure that a collective redress judicial mechanism exists in all Member States. Such a procedure would ensure that every consumer throughout the EU would be able to obtain adequate redress in mass cases through representative actions, group actions or test cases. The issues to be decided include the financing of the procedure, how to prevent unmeritorious claims, standing in court, the question of an opt-in or opt-out procedure and the distribution of compensation. The purpose of this option is to provide a judicial collective redress procedure that is effective and efficient in providing redress for consumers. In any case, this option should avoid elements which are said to encourage a litigation culture such as is said to exist in some non-European countries, such as punitive damages, contingency fees and other elements.
49. On the issue of **financing**, the costs may prevent consumers from engaging in a collective action and make it very hard for consumer organisations to handle mass cases in representative actions.
50. One - partial - solution could focus on cutting down the costs e.g. by exempting collective actions from court fees or capping legal fees.
51. With regard to representative actions, the financing of entities representing consumers is crucial. One could consider allocating a share of the compensation to

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<sup>39</sup> The Commission has informally consulted the CPC network, and it seems that such a power does not exist in the majority of Member States

the organisation to cover its costs. A third party (e.g. banks) or a public body could grant a loan to cover possibly needed pre-financing of court proceedings. Litigation funding by private third parties (e.g. companies specialising in financing litigation) is practised successfully in some Member States. Another solution could be public funding by the Member States. Different funding solutions could also be combined.

52. A EU mechanism should facilitate meritorious claims and benefit consumers. At the same time, it needs to discourage a litigation industry as mentioned before, as this would benefit lawyers rather than consumers and create high costs for defendants. In order to avoid the possibility of abuse of a collective redress mechanism, various elements qualify as safeguards and help to **prevent unmeritorious claims**. The judge can play an important role by deciding whether a collective claim is unmeritorious or admissible. Certification of the representative entity acts as a gatekeeper, as does the loser-pays-principle in the Member States where it exists. Public authorities could be potential gatekeepers when funding collective redress, refusing to allocate resources to unmeritorious claims.
53. The consumers' position in collective redress court procedures could be reinforced by giving **legal standing** to pursue a representative action to qualified entities such as consumer organisations or ombudsmen.
54. An important element of collective redress procedures is the decision of whether an **opt-in or opt-out procedure** should be introduced.
55. Opt-in systems could be burdensome and cost-intensive for consumer organisations which have to do preparatory work such as identifying consumers, establishing the facts of each case, as well as running the case and communicating with each plaintiff. They also may face difficulties in obtaining a sufficiently high number of consumers opting-in in the case of very low value damage, where consumers are less likely to act. However, they do not involve the risk of promoting excessive or unmeritorious claims.
56. Opt-out solutions might mitigate some of the difficulties of the opt-in systems. However, they are often viewed negatively in Europe due to the perceived risk of encouraging the excessive litigation experienced in some non-European jurisdictions. Any collective redress system should be designed to avoid such a risk. In any case, the issue of information dissemination across borders remains relevant. Lack of information could lead to a situation where consumers would be bound by a judgement without their knowledge or without having been able to contest the management of the case. In addition, in opt-out scenarios consumer organisations may face a burden when they have to identify the victims and distribute the compensation.
57. In an opt-in procedure the said problems could be solved by the court **distributing the compensation** and by allowing consumers to join a mass action after the judgement in a test case has been delivered and giving the judgement effect for all victims. Each consumer would, however, have to follow a specific judicial procedure in order to benefit from the judgement.
58. In **cross-border cases** the Regulation on jurisdiction<sup>40</sup> would be applicable to any action including an action brought to court by a public authority, if it is exercising

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<sup>40</sup> Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgements in civil and commercial matters, OJ L12, 16.1.2001, p.1

private rights (e.g. an ombudsman suing for consumers). Representative actions would have to be brought to the trader's court or the court of the place of performance of the contract (Art. 5 (1)).

59. In mass cases where consumers come from different Member States, the court would have to apply to contractual obligations the different national laws of the various consumers (Art. 6 Rome I Regulation<sup>41</sup>). This would cause practical problems in cases with consumers from many different Member States. A solution would be to introduce an amendment to the rules imposing the law of the trader in collective redress cases. Other options are the application of the law of the market most affected or of the Member State where the representative entity is established.
60. In similar situations in the area of product liability (Art. 5 Rome II Regulation<sup>42</sup>) a choice of law agreement after the damaging event occurred (Art. 14 (1a) Rome II Regulation) would help.

**Q1: What are your views on the role of the EU in relation to consumer collective redress?**

**Q2: Which of the four options set out above do you prefer? Is there an option which you would reject?**

**Q3: Are there specific elements of the options with which you agree/disagree?**

**Q4: Are there other elements which should form part of your preferred option?**

**Q5: In case you prefer a combination of options, which options would you want to combine and what would be its features?**

**Q6: In the case of options 2, 3 or 4, would you see a need for binding instruments or would you prefer non-binding instruments?**

**Q7: Do you consider that there could be other means of addressing the problem?**

With this Green Paper the European Commission calls on the interested persons to express their views by sending in their replies (marked "Response to the Green Paper on Consumer Collective Redress") no later than 1<sup>st</sup> March 2009 to:

European Commission  
Directorate-General Health and Consumers

<sup>41</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ L177, 4.7.2008, p.6

<sup>42</sup> Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31.7.2007, p.40

Rue de la Loi 200  
1049 Brussels  
Belgium

Or by e-mail to [Sanco-consumer-collective-redress@ec.europa.eu](mailto:Sanco-consumer-collective-redress@ec.europa.eu)

Contributions will be published on the website of the Health and Consumers Directorate-General of the European Commission. It is possible to request that submissions remain confidential. In this case, contributors should expressly state on the first page of their submission that they oppose publication. The Commission will examine the contributions and publish a summary thereof in the first half of 2009.

On the basis of the outcome of the consultation, the Commission will present another policy paper in 2009.

### **Privacy statement**

#### Purpose and scope of personal data processing:

Health and Consumers Directorate-General will record and further process your personal details to the extent that they are necessary for the follow-up of your contribution to the public consultation on the Green Paper on Consumer Collective Redress.

Your data will be handled in conformity with Regulation (EC) N° 45/2001 on the protection of individuals with regard to the processing of personal data by Community institutions and bodies and on the free movement of such data.

Your data are recorded and stored as long as follow-up actions are needed in the context of your contribution.

For transparency purposes, the contributions, including your name and position in your organisation will be communicated to the public, in particular through the Health and Consumers web pages on Europa at:

[http://ec.europa.eu/consumers/redress\\_cons/collective\\_redress\\_en.htm](http://ec.europa.eu/consumers/redress_cons/collective_redress_en.htm)

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